ENFORCEMENT OF "HUMAN RIGHTS" STANDARDS AGAINST MULTINATIONAL CORPORATIONS

by

MAROPENG N MPYA

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SUPERVISOR: PROFESSOR NOMTHANDAZO NTLAMA

DECLARATION

Student Number: 215081992

I declare that this thesis, entitled **'ENFORCEMENT OF "HUMAN RIGHTS" STANDARDS AGAINST MULTINATIONAL CORPORATIONS'** is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Signature: **Maropeng N MPYA**
Date**: November 2019**

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LIST OF ABBREVATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
ATCA	Alien Tort Claims Act
BIT	Bilateral Investments Treaties
BSAC	British South Africa Company
CSO	Civil Society Organisations
COHOM	Council Working Group on Human Rights
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
EEAS	European External Action Service
EIB	European Investment Bank
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreement Tariffs and Trade
GDP	Gross Domestic Product
GM	General Motors
GNP	Gross National Product
HR	Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investments Dispute
IGWG	Inter-Governmental Working Group
ICTY	International Criminal Tribunal for the former Yugoslavia
IMF	International Monetary Fund
IHRL	International Human Rights Law
ILA	International Law Association

ILO	International Labour Organisation
ISO	International Organisation for Standardisation
ITO	International Trade Organisation
JSE	Johannesburg Stock Exchange
LDC	Less Developed Countries
LDC	Less Developed Countries
MDG	Millennium Development Goals
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational Corporations
MNE	Multinational Enterprises
NAP	National Action Plans
NATO	North Atlantic Treaty Organization
NCP	National Contact Points
NGO	Non-Governmental Organisation
NEPAD	New Partnership for African Development
NIEO	New International Economic Order
OAS	Organisation of American States
OAU	Organisation of African Union
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPEC	Organisation of Petroleum Exporting Countries
REC	Regional Economic Communities
SME	Small and Medium-sized Enterprises
SRSG	Special Representative of the Secretary-General
TNC	Transnational Corporations
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN Draft Norms	Draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
UN	United Nations

UNHRC	United Nations Human Rights Council
UNGC	United Nations Global Compact
UNGP	United Nations Guiding Principles on Business and Human Rights
VOC	Vereenigde Oost-Indische Compagnie
YEN	Youth Employment Network
WTO	World Trade Organisation

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CHAPTER ONE

BACKGROUND

1.1 Introduction

Human rights have come to represent the moral dimension of globalisation - the affirmation of universal standards to which the world can aspire for guidance for the humanisation of capitalism but also the renewal of democratic control and protection of the values that give meaning and importance of human life.[1] The single story narrative is that all human beings are born free and equal in dignity and rights.[2] Furthermore, the evolution of human rights has been postured as a progressive teleology that contextualises the expansion of rights within a larger grand narrative of liberalisation, emancipation and social justice.[3] However, Mutua states that the 'human rights movement is marked by damning metaphor.[4] The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviours (SVS), on the other'.[5]

In explaining the above metaphor, Mutua, states that the human rights corpus, though well-meaning, is fundamentally eurocentric, and suffers from several basic and interdependent flaws captured in the SVS metaphor.[6] First, the corpus falls within the historical continuum of the eurocentric colonial project, in which peoples, political governance, economic structures and legal framework are cast into superior and subordinate positions.[7] Instead, a historical understanding of the struggle for human

[1] Campell T & Miller S (2005) *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Springer) 11; see also Voicelescu A "Human Rights and the Normative Ordering of Global Capitalism" 10 in Voiculescu A & Yanacopulos H (2011) *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (Zed Books, London/New York) 10.
[2] Article 1 of the Universal Declaration of Human Rights, 1948.
[3] Linde R & Arthur MML (2015) "Teaching Progress: A Critique of the Grand Narrative of Human Rights as Pedagogy for Marginalized Students" No 103, 27.
[4] Mutua M (2001) "Savages, Victims, and Saviors: The Metaphor of Human Rights" *Harvard International Law Journal* Vol. 42, No. 1, 201.
[5] *Ibid.*
[6] *Id* 204.
[7] *Ibid.*

dignity should locate the impetus of a universal conception of human rights in those societies subjected to European tyranny and imperialism.[8]

Secondly, the SVS metaphor and narrative rejects the cross-contamination of cultures and instead promotes a Global North ideal.[9] Global North refers to developed countries with high standard of living, high literacy level, high production capacities, and availability of industries.[10] The metaphor is premised on the transformation by Western cultures of non-Western cultures into a Eurocentric prototype and not the fashioning of a multicultural mosaic.[11]

The Global North/South terminology came into use in the 1960s as shorthand for a complex of inequalities and dependencies which entails: industrialised versus raw material producing countries, rich versus poor, those with military power versus those without, high technology versus low technology, and so on.[12] 'Southern' countries are, broadly, those historically conquered or controlled by modern imperial powers, leaving a continuing legacy of poverty, economic exploitation and dependence.[13] Not all populations in the South are poor: the global periphery includes countries with rich classes (e.g. Brazil and Mexico) and relatively rich countries (e.g. Australia).[14] Even Australia, however, is regarded by global capital as a source of raw materials (timber, coal, uranium, iron ore) and holds a peripheral position in global society, culture and economics.[15] Yet this group of countries is the centre of economic and political

[8] *Id* 205.
[9] *Ibid.*
[10] Agbanyi A N and Oddih M C (2012) "North-South Dialogue and Global Inequality: Meaning, Challenges and Prospects" *Nnamdi Aziliwe Journal of Political Science* Vol. 3, No 1, 120; The Global North is characterized by high standard of living, high literacy level, better security of lives and property (all things being equal), presence of infrastructural facilities/development, there is provision of better social welfare, ability to influence the trend of international socio-economic and political orders, strong immunity against vulnerability to external forces and powers, political stability, high science and technological prowess among others, high production capacities and availability of industries. It also refers to all the members of the G8 and four of the five permanent members of the United Nations Security Council
[11] Mutua (note 4 above) 205.
[12] Meekosha H (2011) "Decolonising Disability: Thinking and Acting Globally" *Disability & Society* Vol. 26, No 6. 667-682; see also The 'North', the global metropole, refers to the centres of the global economy in Western Europe and North America. Many of the countries of the North were the imperial powers that colonised other parts of the globe and have remained major centres of global capitalism since the formal end of European empires. Not all populations in the North are rich – the US 'underclass' and immigrant communities of Europe are familiar exceptions.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*

decision-making, is the home of almost all major transnational corporations, is the world centre of technology and disposes of massive military power.[16]

Thirdly and finally, the language and rhetoric of the human rights corpus present significant theoretical problems.[17] For example, human rights can be seen as primarily ethical demands or as moral demands.[18] They are not principally "legal," "proto-legal" or "ideal-legal" commands. Even though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights.[19] Despite the gains that human rights language has made in the world, rather, the worries relate to what is taken to be the "softness" of the conceptual grounding of human rights.[20]

The biased rhetoric of human rights movement prevents the latter from gaining cross-cultural legitimacy.[21] It is this colonial paradigm that Multinational Corporations (MNCs) protect themselves from accountability of human rights abuses which they have perpetrated in Global South[22] because of their inherent and interdepend relationship with colonialism. The Global South is characterised by common colonial and neo-colonial experiences like external control and exploitation, dependence on western capitalist economy, external forces influence their socio-economic and political lives, lack of control over the trend and issues in international system, fundamental socio-economic and political policies of the South are shaped by

[16] *Ibid.*
[17] *Id* 206.
[18] Sen A (2004) "Elements of a Theory of Human Rights" *Pholosophy &Public Affairs* Vol. 32, No. 4, 319. 315-356; see also Wolfsteller R and Gregg B (2017) "A Realistic Utopia? Critical Analyses of the Human Rights State in Theory and Deployment: Guest Editor's Introduction" *The International Journal of Human Rights* Vol. 21, No. 3, 220. 219-229.
[19] Mahler A G (2017) "Global South" *Oxford Bibliography in Literary and Critical Theory*, University of Virginia available at https://globalsouthstudies.as.virginia.edu/what-is-global-south (accessed 15 May 2019).
[20] Sen A (2004) "Elements of a Theory of Human Rights" *Pholosophy &Public Affairs* Vol. 32, No. 4, 319.
[21] Mutua (note 4 above) 206.
[22] Agbanyi (note 10 above) 120. The Global South is characterized by common colonial and neo-colonial experiences like external control and exploitation, dependence on western capitalist economy, external forces influence their socio-economic and political lives, lack of control over the trend and issues in international system, fundamental socio-economic and political policies of the South are shaped by international organizations, multinational corporations and foreign government interfere and influence their governments, majority of their population live in abject poverty, they have poor economic bases that produce only few primary agricultural products, low technological skill, low standard of living, political instability among others; poor leadership, corruption and mismanagement of resources, as well as absence of strong socio-economic and political institutions.

international organizations, multinational corporations and foreign government interfere and influence their governments.[23]

Philosophical ideas of the European Enlightenment, such as natural law, reason, equality and liberty, laid the ground for modern human rights reasoning – and, consequently, for the rise of human rights discourse as a global language giving voice to struggles for social justice.[24] These notions demonstrably informed the drafters of the 1948 Universal Declaration of Human Rights.[25] The language of human rights is a fairly post-modern discourse which emerged after World War II for the consolidation of power by the victorious States.[26] The language of human rights has made an impact on the discourse of human consciousness as far as the appreciation of violence through colonial-capitalist-imperialist expansionism is concerned. However, it has had a moderate impact on the disruption of structural and systems of colonialism especially in Africa. This has prompted scholars such as Chimni to suggest that the international community needs to make effective use of the language of human rights to defend interests of the poor and marginal groups.[27] In addition, although the human rights language[28] has been utilised formally for the last 73 years, the United Nations is still failing in promoting, protecting, and encouraging respect for business and human for all especially in Africa.[29] This is because Africa is losing US$40bn through tax

[23] *Ibid*; see also Mahler A G (2017) "Global South" *Oxford Bibliography in Literary and Critical Theory*, University of Virginia available at https://globalsouthstudies.as.virginia.edu/what-is-global-south (accessed on 15 May 2019); Global South notion captures a deterritorialised geography of capitalism's externalities and means to account for subjugated peoples within the borders of wealthier Global North countries. For the Marxist scholars, North-South inequality is an outcome of the structural imbalance of the contemporary international economic order and the prevailing exploitation of one class by the other. For this group no other method can correct the abnormality than the fundamental transformation of the existing capitalist order. For the liberal school, North-South developmental differences lie within the inability of the disadvantaged South to raise its status to an appreciable level and this according to them, can only be achieved if the South imitates the North.

[24] Wolfsteller R and Gregg B (2017) "A Realistic Utopia? Critical Analyses of the Human Rights State in Theory and Deployment: Guest Editor's Introduction" *The International Journal of Human Rights* Vol. 21, No. 3, 220.

[25] *Ibid.*

[26] Dolin K (2007) *A Critical Introduction to Law and Literature* (Cambridge: Cambridge UP) 2.

[27] Chimni B S (2006) "Third World Approaches to International Law: A Manifesto" *International Community Law Review* Vol. 8, 24.

[28] Mazower M (2004) "The Strange Triumph of Human Rights, 1933-1958" *The Historical Journal,* 47, 2 (Cambridge University Press) 379; see also Dolin K (2007) *A Critical Introduction to Law and Literature* (Cambridge: Cambridge UP), 2: see also Ward I (2017) *Literature and Human Rights: the Law, the Language and the Limitations of Human Rights Discourse* (De Gruyter Germany) 1.

[29] Article 1(3) of United Nations, *Charter of the United Nations*, 24 October 1945, and 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html (accessed 18 November 2017); see also Oxfam International Report (2015) "Africa: Rising for the Few" available https://www.oxfam.org/sites/www.oxfam.org/files/world_economic_forum_wef.africa_rising_for_the_fe

avoidance tricks allowing MNCs to move considerable amounts of money out of Africa.[30] Furthermore, Ward has argued that all "law is inevitably a matter of language".[31]

This language of human rights was contested from the beginning by the Global South because it legitimised the intrusion of international law in the internal affairs of a state – it could be used to justify further intervention by the Global North in the Global South.[32] Given the history of conquest of Africa by Europeans and Arab states and their merchants, it is important to define who is "human" in the human rights language. A human ordinarily refers to the individual person of the human race or human kind.[33] This definition has not always been attributed to all humanity - Africans, particularly have for over 360 centuries not been clothed with this character of being human. Thus, it is in this formulation of the other (Africans) that MNCs also operated with slaves in their plantations, mines, factories, and unfortunately even today with modern slavery.[34] However, the history of the world in recognition of humanness begun to surface firmly in the Global North starkly after the Germans genocidal actions against the Jewish people.[35] It is thus, established that the notion of human rights is fairly new in the world

w.pdf (accessed 16 May 2019); The common assumption that Africa loses money primarily because of bribery and corruption needs to be re-assessed. Tax avoidance tricks are allowing multinational companies to move considerable amounts of money out of Africa. A recent report by the High Level Panel on Illicit Financial Flows, led by former South African President Thabo Mbeki, found that in 2010 alone, multinational companies were responsible for around US$40bn leaving the continent as a result of trade mispricing (where companies deliberately over-price imports or under-price exports between subsidiaries of the same company to evade taxes, avoid customs duties, or launder money). This amounts to around US$11bn in revenue lost to national treasuries through multinational companies cheating the system. This is just one of the many tricks multinational companies use to manipulate the accounts to escape paying their fair share of taxes and avoid making a long- term productive investment into the African continent.

[30] *Ibid.*

[31] Ward I (2017) *Literature and Human Rights: the Law, the Language and the Limitations of Human Rights Discourse* (De Gruyter Germany) 1.

[32] Anghie A (2006) "The Evolution of International Law: Colonial and Postcolonial Realities" *Third World Quarterly* Vol. 27, No. 5, 749.

[33] Human Being, available at https://en.oxforddictionaries.com/definition/human_being, (accessed 15 March 2018).

[34] Stringer C & Michailova S (2018) "Why Modern Slavery Thrives in Multinational Corporations' Global Value Chains" Multinational Busisness Review available on https://doi.org/10.1108/MBR-04-2018-0032 (accessed 10 March 2019).

[35] Mazower (note 28 above) 381.

as advocated by the Global North through the Atlantic Charter,[36] the Scramble for Africa,[37] Nuremberg Trials,[38] the League of Nations[39] and the United Nations.[40]

The traction for human rights was largely based on the recognition by the Global North of atrocities of the World War I and the World War II.[41] Thereafter, the decolonisation of Africa in the 1960's took place, and allowed for subsequent dissemination of human rights notions throughout the other regions (Regional Human Systems, e.g. African Union, Organisation of American States and the European Union) of the world. Unfortunately colonial-imperial-capitalism categorised Africans even after decolonisation as property and not humans which justified colonial conquest by European states and their respective MNCs.

Thus, it is in this vein that MNCs have always been the other side of the colonial coin. MNCs' original crimes begun with slavery during the colonialisation of Africa as a form of European and Arab businesses. That was the beginning of the relationship between European companies and Africa and the beginning of MNCs' human rights violations in Africa.[42] Furthermore, since colonialism and business went hand in hand, the MNCs facilitated the contact of Africa with colonial empire and the emergence of imperialism as its harbinger.[43] Therefore, it is necessary to interrogate the past-present-future of MNCs which will enable a proper context to analyse the advantages and disadvantages of the utilisation of human rights language in Africa.

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[36] Atlantic Charter issued: 14 August 1941.
[37] Griffits I (1986) "The Scramble for Africa: Inherited Political Boundaries" *the Geographical Journal,* Vol. 152, No. 2, 204.
[38] Skinner G (2008) "Nuremberg's Legacy Continues: The Nuremberg Trial' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute" 71 Alb. L. Rev. 321. 322, see also Henkin L (1994) Human Rights and State "Sovereignty" *GA.J. INT'L and COMP. L. 31-45.* 31.
[39] League of Nations, 1920, The League of Nations was an international organization, headquartered in Geneva, Switzerland, created after the First World War to provide a forum for resolving international disputes. Though first proposed by President Woodrow Wilsonas part of his Fourteen Points plan for an equitable peace in Europe, the United States never became a member.
[40] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html (accessed 25 April 2018).
[41] Mnyongani F D (2016) *Accountability of Multinational Corporations for Human Rights Violations Under International Law* (LLD Thesis, University of South Africa) 1.
[42] Osuntogun A J (2015) *Global Commerce and Human Rights: Towards an African Legal Framework for Corporate Human Rights Responsibility and Accountability* (PhD Thesis at the School of Law at the University of the Witwatersrand) 34.
[43] *Ibid.*

Muchlinski affirms the above point and states that the history of MNCs began with the European colonial trading MNCs established in the sixteen and seventeenth centuries.[44] Indeed, the view has been put forth that the chartered trading MNCs of the sixteenth to the eighteenth centuries differ only in the degree but not in the kind of production integration across borders (transnational) to be found in the modern MNCs.[45] The first MNCs were the East India Company also called the English East India Company, formally (1600-1708) Governor and Company of Merchants of London Trading into the East Indies or (1708-1873) United Company of Merchants of England Trading to the East Indies.[46] However, during these earlier years, these companies were not referred to as MNCs - the coining of the name Multinational Corporation (The MNCs were called companies) happened much later in the 1960 as it will be demonstrated below.

However, the epitome of MNCs is the Vereenigde Geotroyeerder Oost Indische Compagnie (Dutch East India Company) which defined the Trans-Atlantic slavery and its victims being the Black African male, women and children.[47] MNCs were the main

[44] Muchlinski T P (2007) *Multinational Enterprises & The Law* 2nd ed (Oxford University Press, New York, 2007) 18-19.

[45] *Ibid*; David E Lilienthal defines Multinational Corporations as corporations which have their home in one country but which operate and live under the laws and customs of other countries as well; Multinational Enterprise is defined as a firm that engages in direct investment outside its home country that is in foreign direct investment; Transnational Corporation is a term that is used to cover all types of cross-border business associations that engage in direct investment as opposed to portfolio investment or cross-border trade.

[46] Lotha G (2017) "East India Company English Trading Company" *The Editor of Encyclopaedia Britannica* available at https://www.britannica.com/topic/East-India-Company (accessed 12 March 2019); see also Major A (2017) "The East India Company: How a trading corporation became an imperial" *History Extra* January 21, 2017 at 2:56 pm.

[47] Transatlantic Slave Trade, available at http://www.unesco.org/new/en/social-and-human-sciences/themes/slave-route/transatlantic-slave-trade/ (accessed 12 March 2019), The transatlantic slave trade is often regarded as the first system of globalization. According to French historian Jean-Michel Deveau the slave trade and consequently slavery, which lasted from the 16th to the 19th century, constitute one of "the greatest tragedies in the history of humanity in terms of scale and duration" see the contemporary example such as the Marikana Massacre 16 August 2012: available at www.sahistory .org.za/article/marikana-massacre-16-august-2012 (accessed 12 February 2018); see also Herero Revolt 1904-1907: A rebellion by Herero people in Namibia broke out in January 1904 and continued until 31 March 1907. On 11 August the Herero resistance was crushed. The Herero people were scattered and many of them died of starvation and thirst as they fled through the Omaheke desert. About 12 000 of the remaining Herero were forced to surrender and were placed in concentration camps where medical experiments as well as daily executions took place. 80% of the Herero population of Namibia was wiped out during the 1904 revolt. Available on http://www.sahistory.org.za/article/herero-revolt-1904-1907 (accessed 04 February 2018); see also Apartheid in South Africa Laws, History Documentary Film-Raw Footage (1957)mp4, available on http://filmania.info/download/apartheid-in-south-africa-laws-history-documentary-film-raw-footage-1957/v/MOA66AOG52M.html (accessed 20 March 2018).

players during the trans-Atlantic trade and have maintained their hold on a global knowledge-based economy.[48] Moreover, the Dutch East India Company was amongst the first MNCs in the world and the first company to issue shares.[49] It was also arguably the world's first if not only MNCs, possessing quasi-governmental powers, including the ability to wage war, negotiate treaties, coin money and establish colonies.[50] The MNCs' operations and conduct in the Global South, are characterised by their origins in policies of imperialism and colonialism.[51] At the peak of colonisation, there was a very thin line between economic and political power of MNCs and this is because the European states and their MNCs acted in unison as they looted the resources of the colonised territories.[52]

The term "Multinational Corporations" was coined in 1960 when David E. Lilienthal, once head of the Tennessee Valley Authority, then of the Atomic Energy Authority and, chief executive of the Development and Resources Corporation of New York, set up with Lazards to provide loans to Less Developed Countries (LDCs).[53] In April 1960 Lilienthal delivered a paper to the Carnegie Institute of Technology on 'Management and corporations, which was published later that year as *The Multinational Corporation.*[54]

Thus, David E. Lilienthal coined the definition by stating that 'such corporations – which have their home in one country but which operate and live under the laws and customs of other countries as well – I would like to define them here as multinational corporations'.[55] Lilienthal suggested that the MNCs had three definitive features: first, it has a manufacturing base or some other form of direct investment that gives its roots in at least one foreign country.[56] Secondly, it has a genuine global perspective - its management makes fundamental decisions on marketing, production, and research

[48] Eluka J, Uzoamaka N P & Ifeoma A R (2016) "Multinational Corporations and Their Effects on Nigerian Economy" *European Journal of Business Ethics and Management* Vol. 8, No. 9. 59.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] Mnyongani (note 41 above) 87.
[53] Fieldhouse D K "The multinational: a critique of a concept" in Teichova A, Levy-Leboyer M & Nussbaum H (1986) *Multinational Enterprises in Historical Perspective* (University Press, Cambridge, Great Britain) 9.
[54] *Ibid.*
[55] Fieldhouse (note 53 above) 11.
[56] *Ibid.*

in terms of the alternatives that are available to it anywhere in the world.[57] Thirdly, the objective of the MNCs is the greatest good of the whole unit even if the interests of a single part of the unity must suffer.[58]

Put differently, an MNC is an economic enterprise conducting business "in more than one country or in a group of economic entities operating in two or more countries in whatever legal form, whether in their home country or country of activity, and whether taken individually or collectively".[59] Moreover, Tricker describes MNCs as firms which have large commercial organisations which operate, produce, extract or provide services in several countries, although their ownership, management and control are usually centralised in the one country which confers upon the holding company or headquarters its nationality.[60]

Gilpin states that "the principal objective of MNCs is to secure the least costly production of goods for world markets, largely to the Global North's benefit".[61] Osuagwu and Obumneke also provides that the above goal:

> May be achieved through acquiring the most efficient locations for production facilities or obtaining taxation concession from host governments. Furthermore, this objective confirms the views of the Marxist who contend that MNCs as agents of capitalism and as a result of this capitalist motif, the MNCs try in every way possible to cut down expenses and maximize profit. The MNCs usually have their head office in one country with a cluster of subsidiaries in other countries and maintain a very

[57] *Ibid*; Top management takes full responsibility for all overseas operations, so that 'the old "international division", as a separate and self-contained unit into which all off-shore operations are bundled, tends to wither away'. Above all, the MNCs had to be seen as a whole, an integrated operation.
[58] From David E. Lilienthal's definition, other descriptions of MNCs emerged, such as; an enterprise that controls and manages production and establishes plants (enterprises) that are located in at least two countries or more. It is simply one subspecies of multi-plant firm. The term "enterprise" rather than "company" is utilised to direct attention to the top level of coordination in the hierarchy of business decisions whilst a company or multinational itself, may be controlled by subsidiary of another firm.
[59] Article 20 United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). See also Weissbrodt D (2005-2006) 'Business and Human Rights' Vol 74 No 55*, U. Cin. L. Rev.* 13.
[60] Tricker R I (1984) *Corporate Governance* (Gower Publishing, England) 2.
[61] Osuagwu G O & Obumneke E (2013) "Multinational Corporations and the Nigerian Economy" *International Journal of Academic Research in Business and Social Sciences* Vol. 3, No. 4. 361.

> high standard management outfit. This managerial expertise gives rise to maximum efficiency, that is, maximum result at minimum cost.[62]

The definition of MNCs sheds light into the complexity that is inherent within the undertaking of business at a transnational level. The operations of MNCs and their impact on human lives and subsequent consequences when the MNCs are found to be in breach of rights, form the basis of this study. This is so because whether it is Nazi industrialists using slave labour from concentration camps, or central African rebels exploiting local farmers and natural resources to supply international business - unlawfulness, undignified and immoral (infringements of rights) atrocities are all too often committed in the name of the MNCs' profitability.[63] To compound the issue, the international community's tendency to plead ignorance to the real problem which is regrettably frequent.[64] The above gives rise to the need and value of the enforcement of rights standards against the MNC.[65]

The above demonstrate that MNCs do not exist in a vacuum - they are creations of human hands, emotions, and intellect which facilitates both domestic and international trade. Furthermore, MNCs are creations of colonial-capitalist-expansionist necessity for economic development, thus, it is against this background that MNCs cannot be seen from a regulatory basis, as purely commercial creatures (juristic person) that cannot take human value (human rights accountability) into consideration.

These development has unearthed grave rights violations in which, owing to history, have been considered as part of human evolution for the Global North and its necessities for economic development. The issue of business and human rights permanently implanted on the global (United Nations) agenda in the 1990s and this corresponded with the rise in transnational economic activity.[66] These developments intensified social awareness of the businesses' impact on rights and also attracted the

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[62] *Ibid.*
[63] Weissbrodt D (2006) "Business and Human Rights" *U. Cin. L. Rev,* Vol. 74, No. 55, 1.
[64] *Ibid.*
[65] *Ibid*
[66] Ruggie J (2011), 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy' Framework Report of the Special Representatives of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 3.

attention of the United Nations and subsequently championed by the same institution with little success to date save for as drafting non-binding instruments.[67] In addition, Ntlama asserts that 'this evolution of rights is owed to the struggles within African states in the colonial and post-independence eras'.[68]

The United Nations was then faced with a mammoth task of finding appropriate methods of holding MNCs accountable for rights violations either directly or indirectly. The first task was an attempt to overcome trite laws, such as the fact that traditionally, international law applied only to rights violations committed by states. This allowed private individuals and MNCs to escape liability.[69] In recent times, it is evident that "international law" (European Conglomerate of Interests Agreements) reaches not only states, but also non-state entities.[70] MNCs possess rights and duties under international law which implies that MNCs are legally responsible and accountable for complying with international rights law standards.[71]

Furthermore, recognising the principle of limited liability, a holding MNCs is generally not legally liable for infringements of rights committed by a subsidiary even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent MNCs that it can be seen as the holding company's agent.[72] Each subsidiary is legally distinct and subject to the laws of the countries in which it operates, although the MNCs group as a whole is not governed directly by international human rights law.[73] What remains after the limited liability of the MNCs is the *lacuna* in law as far as holding MNCs responsible and accountable for their continual exploitation of the Global South. Mutua aptly states that amongst other things the economic results of the United Nations for the Global South is vised by the Bretton Woods institutions (the World Bank, International Monetary Fund (IMF), General

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[67] *Ibid.*
[68] Ntlama N (2017) 'The foundations of 'peace' as a value for the promotion of human rights in Africa' Vol. 17 *African Human Rights Law Journal*, 57.
[69] Bridgeford T A (2003) "Imputing Human Rights Obligations on Multinational Corporations: The NINTH Circuit Strikes Again in Judicial Activism" Vol 1010 *AM. U. Int'L. Rev.* 1014.
[70] *Ibid.*
[71] *Id* at 1015.
[72] Ruggie J G (2007) "Business and Human Rights: The Evolving International Agenda" *The American Journal of International Law,* Vol. 101, No. 4, 819-840.
[73] *Ibid.*

Agreements on Tariffs and Trade (GATT), MNCs and the Western States.[74] Nyerere explains the above economic paradox as neo-colonialism which is described as the inability of the Global South to change their dependency upon and exploitation by the former imperial powers.[75]

This has allowed the *status quo* to remain because "MNCs have long outgrown the legal structures that govern them, thus, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms."[76] Moreover, MNCs still remain clearly outside the mainstream of international law because traditional international law does not have much to say about them.[77] If it has shown any interest at all, it has been more concerned with protecting the rights of MNCs than with enforcing their duties.[78]

The nature and scale of MNCs' power are demonstrated by the case of one of the world's biggest MNCs (measured by sales) in the retail sector namely, Walmart.[79] "Wal-Mart's 2011 sales of $419 billion made it larger than the economies of all but the world's 24 richest nations. Its sales on a single day alone are greater than the annual Gross Domestic Product (GDP) of many countries in the world. In Mexico, for example, although it is the largest private employer and accounts for 2 percent of the country's GDP, but it also stands accused of covering up a major bribery scandal, and has consistently battled allegations of labour rights violations'.[80]

[74] Mutua M & Anghie A (2000) "What is TWAIL?" *Proceedings of the Annual Meeting (American Society of International Law* (Cambridge University Press), Vol. 94 (April 5-8) 31-40.
[75] *Ibid.*
[76] Stephens B (2002) "The amorality of profit: Transnational corporations and human rights" Vol. 46 *Berkeley Journal of International Law* 54; see also Mnyongani (note 41 above) iii.
[77] Duruigbo E (2008) "Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges" Vol (6) *Northwestern Journal of International Human Rights* 228; see also Mnyongani (note 41 above) iii.
[78] Kamminga M T (1999) "Holding Multinational Corporations Accountable for Human Rights Abuses: A challenge for the EC" in Alston P, Bustelo M and Heenan J (eds) *The EU and Human Rights* (Oxford University Press Oxford) 556; see also Mnyongani (note 41 above) iii.
[79] Alston P and Goodman R (2013) *International Human Rights. The Successor to International Human Rights in Context: Law, Politics and Morals.* (Oxford University Press, Great Clarendon Street, Oxford, OX26DP, United Kingdom) 1464.
[80] *Ibid.*

Like Wal-Mart, the revenues of General Motors (GM) is larger than that of Thailand and Norway.[81] Ford and Mitui are each larger than Saudi Arabia's GDP.[82] Mitsubishi is larger than Poland, and Royal Dutch Shell larger than Greece.[83] Moreover, even some wealthy individuals in the world now outstrip entire national economies – for example, Bill Gates and the world's other two richest individuals now have more assets than the combined Gross National Product (GNP) of the world's 48 least developed nations.[84]

Gumede assets that in this post-independence era, African leaders have surreptitiously, and possibly also inadvertently, formed alliances with global capital in a scheme called the "transnational capitalist class."[85] This complicity of African leaders has given rise to the internationalisation of production networks as an inevitable outcome of global capitalism in which MNCs seek outlets for cheap labour, higher returns on investments, and freer trade, investment and capital regimes.[86] Furthermore, Adedeji has aptly describe this phenomenon as:

> A deliberate design by the global capitalist order to perpetuate a socio-economic and political system that advances the interests of the Global North (usually former colonists) and thus, maintain the peripheralisation of the African continent.' It is not by chance that Africa finds itself in the shackles it is in, and that there is always an external agenda that interferes with whatever Africa pursues in the interest of the further renewal of the African continent.[87]

The issue of corporate accountability has been aptly ventilated by Mnyongani when he asserts that since the violations of rights perpetrated by MNCs straddle the divide

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[81] Cassel D (2001) "Human Rights and Business Responsibilities in the Global Market Place" *Business Ethics Quarterly,* Vol. 11, No. 2, 8.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] Gumede V (2015) "Exploring the role of thought leadership, thought liberation and critical consciousness for Africa's Development" Africa Development, Vol. XL, No. 4, 95; see also Robinson W I (2004) *A Theory on Global Capitalism: Production, Class, and State in a Transnational World* (John Hopkins University Press) 35.
[86] *Ibid.*
[87] *Ibid;* see also Adedeji A (2002) "You must first set your house in order" *Africa Recovery,* Vol.16 (September) 16. The name of the paragraph is coined by Adedeji as "Development Merchant System".

between private international law, international investment law, international trade law and even international criminal law – the notion of the primacy of human rights provides a point of convergence around which a conceptual model of accountability can be constructed.[88] The notion of accountability yields moderate results for the protection of human rights because the Global South, immediately following the period of decolonisation, placed a special faith in international law, believing that it could assist them.[89] However, this faith proved unfounded, and many international initiatives that were explicitly humanitarian and anti-colonial such as the Mandate System became a vehicle for imperialism.[90] It is from this point of primacy of human rights that the enforcements of human rights standards against MNCs is assessed holistically to interrogate the major spectrum of the languages of human rights such as the legal framework from the international to the domestic and more importantly the historical and socio-economic factors that have a direct impact of the enforcements of human rights standard against the MNCs.

The stronghold of imperialism still continued as demonstrated by the reaction to the Bandung Conference.[91] Neither politically, nor economically, was the Global North going to accept the spirit of Bandung light-heartedly. Is it just accidental that, a year later, France, Britain, and Israel attempted to overthrow Nasser through the 1956 aggression. The disdain that the West had for the radical third world leaders of the 1960s (Nasser in Egypt, Sukarno in Indonesia, Nkrumah in Ghana, Modibo Keita in Mali, almost all overthrown at about the same time (1965-68), a period which also saw the Israeli aggression of June 1967, shows that the political vision of Bandung was not accepted by the imperialist capitalist. It was thus a political weakened non-aligned camp that had to face global economic crisis after 1970-71. The Global North's absolute refusal to accept the proposal for a New International Economic Order shows

[88] Mnyongani (note 41above) 271.
[89] Anghie A (2006) "The Evolution of International Law: Colonial and Postcolonial Realities" *Third World Quarterly* Vol. 27, No. 5, 752.
[90] *Ibid.*
[91] The Bandung Conference was the First large scale Asian-African or Afro-Asian Conference at the City of Bandung in Indonesia on the 18-24 April 1955. The stated aims were to promote Afro-Asian economic and cultural cooperation and to oppose colonialism and neocolonialism by any nation.

that there was a real logic linking the political dimension and economic dimension of the Afro-Asian attempt crystallised after Bandung.[92]

Following the above display of repression by the Global North on the economic independence of the Global South, it is therefore important to analyse the enforcement of human rights standard against MNCs on three developing States that have faced incredible problems of the abuse of human rights at the hands of MNCs, namely, South Africa, Nigeria and the Democratic Republic of Congo (DRC). The said countries have been selected firstly because they were all colonised by the Global North with South Africa and Nigeria colonised by Britain. The DRC however, was colonised by Belgium. Secondly, the track record of human rights violation by MNCs which demonstrate the extent to which these three countries have been affected and how they have dealt with MNCs problems. Thirdly, because of their economic performance in their region, influence and economic growth rate in the African continent.

For example, South Africa is dubbed the gateway to Africa with immense economic leverage although it mostly occupies second spot with Nigeria which is the largest economy and most populous nation in Africa with serious issues pertaining to oil MNCs that have troubled many indigent Nigerians ever since the discovery of oil in Nigeria.[93] The DRC has, however, remained amongst the bottom poorest countries in the world despite it being the richest in mineral resources that fuel 80 per cent of the world's technology and other industries.[94]

In Nigeria the *Okpabi and Others v Royal Dutch Shell and Another* case involved people living in the Niger Delta sought damages arising as a result of alleged pollution

[92] Amin S, Arrghi G Frank AD, & Wallenstein I (1990) *Transforming the Revolution Social Movements and the World* (Monthly Review Press, New York) 112.
[93] Business Report (2019) "SA's Role as an Economic Gateway to Africa" ECONOMY / 4 FEBRUARY 2019, 8:30PM available at https://www.iol.co.za/business-report/economy/sas-role-as-an-economic-gateway-to-africa-19125167 (accessed 17 May 2019; see also IT NEWS AFRICA (2018) "Top Ten Wealthiest African According to GDP" available at https://www.itnewsafrica.com/2018/07/top-10-wealthiest-african-countries-according-to-gdp/ (accessed 17 May 2019).
[94] Focus Economics: The Poorest Countries in the World available at https://www.focus-economics.com/blog/the-poorest-countries-in-the-world (accessed 17 May 2019); see also Ventura L (2019) "Poorest Countries in the World: All these extremely fragile and underdeveloped economies have either recently been through a civil war or are suffering from ongoing sectarian or ethnic conflicts" available at https://www.gfmag.com/global-data/economic-data/the-poorest-countries-in-the-world (accessed 17 May 2019).

and environmental damage caused by the oil leaks from the pipelines and associated infrastructure.[95] On 21 November 2017, the Court of Appeal heard the parties' arguments. On 14 February 2018, it upheld the High Court's ruling, with a majority of judges holding that the parent company did not hold a duty of care towards affected communities. Following the dismissal, the claimants announced their intention to bring the case to the UK Supreme Court. On 27 April 2018, over 40 UK and international human rights, development and environmental NGOs submitted a letter to the Supreme Court supporting the claimants' application to appeal.[96]

Another case demonstrating the ruthlessness of MNCs is the *Zango v Pfizer International* taking place in Nigeria and *Abdullahi v Pfizer* and *Adamu v Pfizer* taking place in USA Federal Court under the Alien Tort Act (ATCA).[97] The issue involved the usage of an experimental drug (Trovan) in the district Kano during an outbreak of bacterial meningitis without the consent of the parents. This led to the death of 11 children and serious injuries to many other children. The applicant alleged that this was contrary to customary international law. All these matters ended up with the settlement after a long and protracted legal battle.[98]

The Democratic Republic of Congo, display a pattern of non-prosecution on the basis of lack of jurisdiction especially in the Global North regarding human rights violations that took place in the Global South as demonstrated by *Danzer Group & SIFORCO* lawsuits (re Dem. Rep. Congo).[99] This matter involved two separate lawsuits emanating from the same facts, one taking place in the DRC and the other in Germany.[100] On 2 May 2011, the village of Bongulu in northern Democratic Republic of Congo (DRC) was allegedly attacked by Congolese police and military.[101] During

[95] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191; available at https://www.dentons.com/en/pdf-pages/generateinsightpdf?isPdf=true&ItemId=h19w7CbxTuyzK3TCDvPIa4ddZw1AOvnPPjO4zdHFSFDV9gxq4UGe1w (accessed 24 March 2019).
[96] *Ibid.*
[97] *Abdullahi v Pfizer* 2001, *Adamu v Pfizer* 2002 and *Zango v Pfizer International* 2001, available on https://www.business-humanrights.org/en/pfizer-lawsuit-re-nigeria (accessed 15 April 2019).
[98] *Ibid.*
[99] Danzer Group & SIFORCO lawsuits (re Dem. Rep. Congo) available at https://www.business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo (accessed 15 April 2019).
[100] *Ibid.*
[101] *Ibid.*

the attack several human rights abuses took place, such as rape and arbitrary arrests of villagers. Senior staff of Danzer Group, a Swiss and German timber manufacturer, allegedly aided and abetted these abuses by failing to prevent these crimes from being committed.[102]

Further, Congolese security forces reportedly received financial and logistical help from Danzer's former subsidiary, SIFORCO (now part of Blattner). Danzer and SIFORCO deny the accusations. They insist that they did not facilitate violence against local communities in DRC and that the events of 2 May happened outside their control and responsibility. The proceedings in the DRC went to trial on the 5th of June 2015. However, in March 2015, the public prosecutor's office in Tubingen discontinued the investigations.[103]

In addition, the case is that involving Anvil Mining which opened an office in Quebec in 2005, with an allegation that the MNCs provided logistical support to the Congolese military as it crushed a rebel uprising in 2004, killing as many as 100 people in the port city of Kilwa.[104] The Supreme Court of Canada has refused to hear the appeal filed by The Canadian Association against Impunity, an organization representing survivors and families of victims of the 2004 Kilwa massacre. As usual, the justices gave no reasons for their ruling.[105]

In South Africa, the Alien Torts Claims Act was used *in Re South African Apartheid Litigation United States District Court*, which was a case meant to deal with apartheid crimes alleged to have been committed by Ford and International Business Machines Corporations (IBM) from the United States which were accused of aiding and abetting

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[102] *Ibid.*
[103] *Ibid.*
[104] "Supreme Court won't hear appeal in Congo massacre case" *The Canadian Press* Posted: Nov 01, 2012 12:26 PM ET | Last Updated: November 2, 2012, available at https://www.cbc.ca/news/canada/montreal/supreme-court-won-t-hear-appeal-in-congo-massacre-case-1.1297191 (accessed 20 August 2019); Anvil Mining, which had offices in Montreal but has since been acquired by another mining company (Anvil Mining Limited was acquired by Minmetals Resources in March 2012), has denied any culpability in the Kilwa incidents.
[105] *Ibid.*

violations of the ATCA by manufacturing and providing military vehicles and computers to the South African Security Forces.[106]

Finally, one of the latest attempts by a MNCs to mine without the concerns of human rights for the people is that of the *Baleni and Others v Minister of Mineral Resources and Others*.[107] An Australian MNCs, Transworld Energy and Mineral Recourses (SA) Pty Ltd (TEM), wanted to mine the titanium-rich sands under the Xolobeni area Mineral Sands Project.[108] The disputed area (the proposed mining area) comprises of some 2 859 hectares and comprises a strip of land over a coastal land of some 22 kilometres long and 1,5 kilometres inland from the high water mark.[109] The vast majority of the applicants, together with their families live within or in close proximity of the proposed mining area.[110]

The applicants (the community of Umgungudlovu) do not want TEM to mine on their ancestral land.[111] Apart from the fact that several hundred people live within or near to the proposed mining area, the land that comprises the proposed mining area is an important resource and central to the livelihoods and substance of the applicants. Many of the applicants utilise the land for grazing for their livestock and for the cultivation of crops and depend on the water supply.[112] The Minerals and Petroleum Resources Development Act (MPRDA) and Interim Protection of Informal Land Rights Act IPILRA must be read together.[113] In keeping with the purpose of IPILRA to protect the informal rights of customary communities that were previously not protected by the law, the applicants in this matter therefore has the right to decide what happens with their land.[114] As such they may not be deprived by their land without their consent.[115]

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[106] *In Re South African Apartheid Litigation United States District Court S.D New York 56 F. Supp. 3d 3311.*
[107] *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018).
[108] *Baleni* case, para 4.
[109] *Ibid.*
[110] *Ibid.*
[111] Para 11.
[112] Para 11.
[113] Para 79.
[114] Para 79.
[115] Para 79.

The above cases also demonstrate lack of judicial enforcement due to the traditional adjudication of business disputes within the confines of trade, investment and competition, therefore, the infusion of human rights is ordinarily not considered and come second to profits. The overall impression of the enforcement of human rights standards in courts can be summed up with the following passage:[116]

> "Thirty years after the Bhopal tragedy, in which toxic gases leaked from a pesticide plant owned by the Union Carbide Corporation, thousands of surviving victims are still waiting for fair compensation, adequate medical treatment and rehabilitation and the plant site has still not been cleaned up. In Ecuador, despite the favourable decision on the historic class-action lawsuit against the oil company Chevron due to the refusal of US jurisdictions to execute the Ecuadorian decision, victims are still awaiting compensation for the damages suffered from water contamination, while the Ecuadorian state is now being sued before an arbitral tribunal. The list goes on. In all parts of the world, human rights and environmental abuses are taking place as a result of the direct or indirect action of corporations."

1.2 Theoretical Framework

This study adopts five theories, namely, a Third World Approach to International Law (TWAIL) as its theoretical framework which is the broad framework supplemented by the Critical Race Theory, Dialectal Utility Theory, Post-colonial Theory and Political Economy (these theories will be explained in full below). These theories are linked to one another in that they provide at a different level, the analysis of human rights language within a geopolitical power between the Global North and South, race as a determinant of power relations between Europeans and non-Europeans, finally, the global economy that is unequal and favours the Global North. First, TWAIL is a response to decolonization and the end of direct European colonial rule over non-

[116] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 15, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).

Europeans.[117] It basically describes a response to a condition, and is both reactive and proactive - it is reactive in the sense that it responds to international law as an imperial project - but it is proactive because it seeks the internal transformation of conditions in the Global South.[118] This is because despite the evolution of human rights law to account for changes in society it remains confined for the most part to the individual-State paradigm from a Global North-centric perspective.[119] This element does not respond to the growing adverse human rights impacts of non-state actors, and the demands for recognition of other kinds of rights from the Global South.[120]

TWAIL is driven by three basic, interrelated and purposeful objectives:[121]

(a) The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that sub-ordinate non-Europeans to Europeans.
(b) Second, it seeks to construct and present an alternative normative legal edifice for international governance.
(c) Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Global South.

Thus, since the beginning of its discussions, TWAIL have always paid attention to the human rights discourse, which has been analyzed by both generations of TWAILers.[122] The traditional understanding of international law and of its sub-discipline, International Human Rights Law regards colonialism and, indeed, non-European societies and their practices more generally-as peripheral to the discipline

[117] Mutua M (2000) "What is TWAIL?" Proceedings of the Annual Meeting (*American Society of International Law*), Vol. 94, 31.
[118] *Ibid.*
[119] Khoury S (2010) "Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to accountability" Sortuz. Oñati Journal of Emergent Socio-legal Studies, Vol. 4, No. 1, 74.
[120] *Ibid.*
[121] Mutua (note 117 above) 31.
[122] Ramina L (2018) "TWAIL-Third World Approaches to International Law and Human Rights: Some Considerations" *Revista de Investigatcoes Constitucionais* (*Journal of Constitutional Research*) Vol. 05, No. 1, 263; While the first academic conference of TWAIL was held at Harvard Law School in March 1997, Third World perspectives of international law are much older. As a political movement, TWAIL dates back to the Bandung Afro-Asian Solidarity Conference of 1955, which fostered the "Non-Aligned Movement" at the Belgrade Conference in 1961. Though, TWAIL is not new as a phenomenon, as TWAIL scholars have challenged the existing international legal system for decades. Nevertheless, it is new as an intellectual movement which grew around the 1990s.

proper because international law was a creation of Europe.[123] Anghie goes further to state that imperialism is experienced in the Global South in a much more everyday way through, for example, international economic regimes, supported and promoted by international law and institutions that systematically disempower and subordinate the people of the Global South.[124]

The enforcement of human rights against MNCs operate within the past-present-future structures and systems of colonialism. Therefore, the end of formal colonialism, while extremely significant, did not result in the end of colonial relations.[125] Rather, in the view of Global South societies, colonialism was replaced by neo-colonialism; the Global South continues to play a subordinate role in the international system because they were economically dependent on the Global North, and the rules of international economic law continued to ensure that this would be the case.[126] Critical scholarship that falls under the rubric of Global South studies is invested in the analysis of the formation of a Global South subjectivity, the study of power and racialisation within global capitalism in ways that transcend the nation-state as the unit of comparative analysis, and in tracing both contemporary South-South relations.[127]

Fanon aptly diagnosis the problem of the world, especially the Global North and South relations by stating that:

> Looking at the immediacies of the colonial context, it is clear that what divides this world is first and foremost what species, what race one belongs to. In the colonies the economic infrastructure is also a superstructure. The cause is effect: You are rich because you are white, you are white because you are rich.[128]

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[123] Anghie A (2006) "The Evolution of International Law: colonial and postcolonial realities" *Third World Quarterly* Vol. 27, No. 05, 739.
[124] *Id* 750.
[125] *Id* 748.
[126] *Id* 749.
[127] Mahler A G (2017) "Global South" *Oxford Bibliography in Literary and Critical Theory*, University of Virginia available at https://globalsouthstudies.as.virginia.edu/what-is-global-south (accessed 15 May 2019);
[128] Fanon F (1963) *Wretched of the Earth* (Translated by Richard Philcox, New York, Grove Press) 5.

Therefore, following the above logic of Fanon, the question of economic inequality can be separated neither from history in general, and the history of colonialism in particular, nor from the question of race.[129] In other words, race, history and economics are intertwined.[130] It is in recognition of the aforementioned dialectics that the issue of enforcement of human rights standards against MNCs will be fruitless if not analysed within the context of the legacy of colonialism and its global structures.

In addition, TWAIL offers both theories of, and methodologies for, analysing international human rights law and its institutions.[131] TWAIL is an approach that is intimately connected to the kinds of theoretical propositions that are generated from its application.[132] Badaru observes the following points where a TWAIL perspective of international human rights law would assist in the critical analysis of the enforcement of human rights against MNCs:[133] First; TWAIL highlights the historical root causes of the current dismal state of socio-economic rights in the Global South, and thus not to approach human rights issues from a mainly formal textual and institutional angle";

Secondly, to recognise how international human rights law promotes and legitimise neo-liberal aspirations which hampers realization of human rights and thus undermines the very idea of human rights ethos itself.[134] Thirdly, "to understand the internationalization of human rights violations in the sense of how the activities in one part of the world can have detrimental effects in other parts of the world (the Global South especially), and hence, could equip scholars with more justifications for demanding extraterritorial obligations from richer states";

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[129] Pahuja S (2019) "Corporations, Universalism, and the Domestication of Race in International Law" in Bell D (2019) *Empire, Race and Global Justice* (Cambridge University Press, United Kingdom) 75.
[130] *Ibid.*
[131] Okafor O C (2008) "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both" *International Community Law Review* Vol, 10, 371-378, 378.
[132] *Ibid.*
[133] Badaru O A (2008) "Examining the Utility of Third World Approaches to International Law for International Human Rights Law" *International Community Law Review*, Vol. 10, No 4, 379-387, 382, as summarized by Ramina L (2018) "TWAIL-Third World Approaches to International Law and Human Rights: Some Considerations" *Revista de Investigatcoes Constitucionais* (*Journal of Constitutional Research*) Vol 05, No 1, 263.
[134] *Ibid.*

Fourthly, to demystify the assumption that human rights have been conceived in the West and hence should be promoted universally disregarding Third World particularities; and Lastly, in the same vein, it helps "to deconstruct the ideology of "savage-victim-savior" that has permeated international human rights law, and to criticize the human rights initiative as a preservation of the essential structure of the "civilizing mission" of the Global South by the Global North".[135]

Second, the study also employs Critical Race Theory (CRT) to demonstrate how the language of human rights against MNCs though postured in objective terms still exhibit bias on the basis of race, power and legal doctrine. The vivid example is that of *Hudgins v Wright*:[136]

> "the case emphasize the role of law in reifying racial identities. By embalming in the form of legal presumptions and evidentiary burdens the prejudices society attached to vestiges of African ancestry – *Hudgins* demonstrates that the law a prime instrument in the construction and reinforcement of racial subordination. Judges and legislators, in their role as arbiters and violent creators of the social order, continue to concentrate and magnify the power of race. Race suffuses all bodies of law, not only obvious ones like civil rights, immigration law, and feral Indian law, but also property law, contracts law, criminal law, federal courts, family law and even the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm. I assert that no body of law exists untainted by the powerful astringent of race in our society."

Delgado and Stefanic puts into perspective the tools upon which the language of human rights can be analysed by stating that CRT movement is a collection of activists and scholars interested in studying and transforming the relationship among race,

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[135] Badaru O A (2008) "Examining the Utility of Third World Approaches to International Law for International Human Rights Law" *International Community Law Review*, Vol. 10, No 4, 379-387, 382, as summarized by Ramina L (2018) "TWAIL-Third World Approaches to International Law and Human Rights: Some Considerations" *Revista de Investigatcoes Constitucionais* (*Journal of Constitutional Research*) Vol. 05, No. 1, 263.

[136] Haney-Lopez I F (1994) "Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice" Harvard Civil Rights-Civil Liberties Law Review Vol. 29, No. 1, 3-4.

racism, and power.[137] The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group- and self-interest, and even feelings and the unconscious. Unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, enlightenment rationalism, and neutral principles of constitutional law.[138]

The fact that there is a major challenge to adopt a treaty to hold MNCs accountable may with one perspective demonstrate that it is very difficult for the UN members to agree on a binding treaty which still does not aid peoples of the world, especially in the Global South from the negative impacts of MNCs. The other view is that the Global North which has a monopoly at the UN and global economy stands to lessen their power over the Global South by having a binding treaty as a start and a commitment to enforce human rights standards against MNCs. Therefore, the thesis will moderately touch on some aspects of how race and power contributes to the illegitimacy of human rights in the Global North especially under the all-encompassing colonial history.

Human rights, like principles of law, are always embedded in a political context and a political culture.[139] The understanding of what human rights are find expression in public life, and the uses of the language of human rights in politics in turn to help constitute the understanding of what is due in justice.[140] Law describes the language of human rights in this particular manner:

> Human rights discourse has been likened to a global *lingua franca*, and in more ways than one, the analogy seems apt. A lingua franca is a bridge language used by speakers of other languages to communicate. Its defining characteristic is that is used in many places but is not native to any particular place. The original lingua franca – literally, the "Frankish

[137] Delgado R & Stefanic J (2000) *Critical Race Theory: An Introduction* (New York University Press, New York and London) 3.
[138] *Ibid.*
[139] Carozza P G "The Protean Vocabulary of Human Rights" University of Norte Dame *Caritas in Veritate Foundation* 3.
[140] *Ibid.*

> language" was used in the Mediterranean Basin as the language of commerce and diplomacy. Human rights discourse, a species of rights talk with explicitly international aspirations, is a form of legal and ideological expression widely used around the world. It is a language employed by public lawyers everywhere. Like the original Frankish language, it is widely used and shaped by many influences; it is used by all yet belongs uniquely to no one. The same language is found in national constitutions and international agreements alike. In other words, this language crosses not only the borders between nation-states, but also the divide between national law and international law. its use has spread both horizontally (across national borders) and vertically (across national, and international legal orders)."[141]

Third, from the above definition this thesis also employs Dialectal Utility Theory which refers to the usage of language as a tool of analysis of power, race, politics, economy and the law in their interrelatedness. Thus, the human rights language in this study is assessed from its inception, ideology, geography, and effectiveness particularly in the Global South as juxtaposed to the Global North.

Fourth, a Post-colonial theory much like TWAIL is applicable in the study if human rights language especially MNCs whom have always been inherent with untold horrors of colonial-imperial-capitalist history of the world. Post-colonial perspectives emerged from the colonial testimony of the Global South and the discourses of "minorities" within the geopolitical divisions of East and West, North and South.[142] They intervene in those ideological discourses of modernity that attempt to give a hegemonic "normality" to the uneven development and the differential, often disadvantaged, histories of nations, race, communities, peoples.[143] Postcolonial theory formulates its critique around the social histories, cultural differences and political discrimination that are practised and normalised by colonial and imperial machineries.[144] Therefore, this

[141] Law D S (2017) "The Global Language of Human Rights: A Computational Linguistic Analysis" *Law & Ethics of Human Rights* Vol. 12, No. 1, 112-113.
[142] Rukundwa L S & van Aarde A G (2007) "The formation of postcolonial theory" HTS Vol. 63, No. 3, 1174; see also Bhabha, H K 1994. *The location of culture*. (London: Routledge) 171.
[143] *Ibid*.
[144] *Id* 1174.

tools of perspective have put into an appropriate analysis of why MNCs continual aviation of human rights language may be a deliberate structure of the global imbalance of power informed by history.

Five, closely linked to the above theoretical framework is also the application of the Political Economy Theory which concerned with the interaction between the state, a sovereign territorial unit, and the market a coordinating mechanism where buyers and sellers exchange goods and services at prices determined by supply and demand.[145] We normally associate the state with the political pursuit of power, and the market with the economic pursuit of wealth, and the market is not totally removed from power considerations.[146] An inherent tension exists between the state and the market because the market's association with economic openness and the removal of state barriers poses a threat to state sovereignty.[147]

Moreover, Amin aptly provides a brief historical context of political economy theory by stating that:

> "Political economic theory in the nineteenth century was dominated by the figures of the great classics—Adam Smith, Ricardo, then Marx and his devastating critique and the triumph of *fin-de-siécle* globalization brought to the foreground a new "liberal" generation, driven by the desire to prove that capitalism was "unsurpassable" because it expressed the demands of an eternal, trans-historical rationality.[148] Walras, a central figure in this new generation (whose discovery by contemporary economists is no coincidence), did everything he could to prove that markets were self-regulating. He had as little success proving it then as neoclassical economists have today."[149]

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[145] Cohn T H (2012) 6th ed *Global Political Economy* (Pearson Inc) 3-4.
[146] *Ibid.*
[147] *Ibid.*
[148] Amin A (2000) "The Political Economy of the Twentieth Century" *Monthly Review Press* available at https://monthlyreview.org/2000/06/01/the-political-economy-of-the-twentieth-century/ (accessed 27 July 2019).
[149] Amin A (2000) "The Political Economy of the Twentieth Century" *Monthly Review Press* available at https://monthlyreview.org/2000/06/01/the-political-economy-of-the-twentieth-century/ (accessed 27 July 2019).

In conclusion, all the above theories offers a perspective that enables scholars to engage with international human rights law in connection with any other discipline that may be relevant to the particular focus of study.[150] For example, one cannot purport to examine socio-economic rights in Africa without analysing the effects that international economic law, and international trade law in particular, may have had on them – whether these effects are as a result of the actions of international trade organisations or those of MNCs.[151] It is in this light that the enforcement of human rights standards against MNCs is analysed to give proper impetus to the broadness of the human rights language and multiple solutions provided within African epistemology.

1.3 The research problem

International human rights law an offshoot, international law amongst other factors lays down rules with regard to the sales of goods, market access, government procurement, subsidies and dumping.[152] The above background has positioned the discourse on business and human rights within the colonial structures and systems that dramatically impacts on the enforcement of human rights standards against MNCs. Thus, the problem of enforcements of human rights standards against the MNCs is based on the assumption of a society which is atomised and individualistic, a society of endemic conflict.[153] Similarly, it is argued that the universalistic claim made for the Western conceptualisation of human rights in the UDHR and other UN Conventions presents a problem of enforcements of human rights in non-Western societies such as those in Africa.[154]

The values implicit in all this are alien to those of African societies. Africa assumes harmony, not divergence of interest, competition and conflict as it is more inclined to

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[150] Badaru O A (2008) "Examining the Utility of Third World Approaches to International Law for International Human Rights Law" *International Community Law Review*, Vol. 10, No 4, 382.
[151] *Ibid.*
[152] Chimni B S (2006) "Third World Approaches to International Law: A Manifesto" *International Community Law Review* Vol. 8, 8; Many of these rules are designed to protect the MNCs in the Global North from efficient production abroad even as Global South markets are being pried open for its benefit.
[153] Ake C (1987) "the African Context of Human Rights" *Africa Today, Indiana University Press* Vol. 34, No 1/2, 5.
[154] Magnarella P J (2001) "Assessing the Concept of Human Rights in Africa" *Human Rights & Human Welfare* Vol 1, No 2. (A review of Human Rights in Africa: The Conflict of Implementation by Richard Amoako Baah. Lanham, MD: University Press of America, 2000. 123) 25.

think of our obligations to other members of our society rather than our claims against them.[155] The western notion of human rights stresses rights which are not very interesting in the context of African realities.[156] Baah further, argues that human rights as presented in the Universal Declaration of Human Rights (UDHR) with its focus on the individual is basically a Western notion that nevertheless has relevance for Africa.[157] He disagrees with those who claim that African societies historically have had human rights in the UDHR sense.[158] Instead, Baah sides with R. J. Vincent who holds that in African thought collective rights take precedent over social and economic rights that, in turn, precede civil and political rights.[159]

Other problems of enforcement of human rights standards against MNCs, includes the absence of adequate judicial systems allowing victims to seek justice in home States (i.e. where the parent company is based), legal obstacles due to the complex structure of MNCs and the inconsistency between what is permissible under corporate law and what is required under human rights law.[160] In addition to States' failing to take measures to ensure the fulfilment of their international human rights obligations, the scope of the responsibility directly imposed on businesses (although slowly being recognised) has yet to be clearly defined.[161] In the face of these structural obstacles at the national level, there is no forum or blurred structures or institutions that are available at the international level for victims to directly address the responsibility of corporations.[162]

This human rights outlook presupposes a society of people conscious of their separateness and their particular interests and anxious to realise them.[163] The legal right is a claim which the individual may make against other members of society and

[155] Ake (note 154 above) 5.
[156] *Ibid.*
[157] *Ibid.*
[158] Magnarella (note 155 above) 25.
[159] *Ibid.*
[160] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 15, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).
[161] *Ibid.*
[162] *Ibid.*
[163] Ake (note 155 above) 5.

simultaneously an obligation on the part of society to uphold this claim.[164] Therefore, Chimni sums-up the international human rights discourse as being manipulated to further and legitimise neo-liberal goals – the economic and political independence of the Global South is being undermined by policies and laws dictated by the Global North and the international institutions it controls including MNCs.[165]

In summation there are three major problems that this thesis aims to deal with;

(a) The employment of human rights language as a vehicle through which enforcement of human rights standards against MNCs is undertaken;
(b) The colonial structures and systems and how they still operate within the colonial dependency syndrome between the Global South and Global North which impacts the enforceability of human rights against the MNCs; and
(c) The neglect of the African episteme in solving African problems especially emanating from the actions of MNCs.

1.3 The aims of the study

The aims of this study is to critically analyse human rights language ‘s effectiveness in relation to holding MNCs accountable and to employ an African epistemology as a solution to the enforcement of human rights against MNCs. The aforementioned analysis will be undertaken in line with the five theories mentioned above TWAIL, which is seeks to deconstruct the notion of human rights language as a continuation of colonialism in the consciousness of formerly colonized peoples, and in institutions imposed in the process of colonization.[166] It is common parlance that it takes political stability, effective legal system and economic growth to bring about the realisation of human rights. Therefore, the thesis aims is to assess the integrated systems such as global economy, international trade, and political instability impact on the enforcement of human rights on MNCs. Finally, and most importantly, thesis proposes mechanism

[164] *Ibid.*
[165] Chimni (note 152 above) 3.
[166] Shetty V D (2011) “Why TWAIL Must Not Fail: Origins and Applications of Third World Approaches to International Law” available at https://www.publicinternationallaw.in/node/32; see also Ramina L (2018) “TWAIL-Third World Approaches to International Law and Human Rights: Some Considerations” *Revista de Investigatcoes Constitucionais* (*Journal of Constitutional Research*) Vol. 05, No. 1, 263.

such as, Ubuntu, thought leadership, and Africa Rising narratives in the promotion of the rights language against MNC's.

Thus, the objectives of the study are:

(a) To assess the effectiveness of the use of human rights language to enforce human rights standards against MNCs by critically analysing the legal framework that impact on the existing enforcement measures in the protection and promotion of rights human against MNCs.[167]
(b) To offer mechanisms of disruption of the legacy of colonisation, imperialism and capitalist systems and structures by cultivating and invoking an African epistemology as a viable solution to hold MNCs accountable.[168]

1.4 Research questions

In the context of the aim which this study seeks to achieve, the following questions are raised:

(a) Is human rights language the appropriate medium upon which MNCs can be held accountable?
(b) To what degree does colonial legacy and global capitalism affect the enforcement of human rights standards against MNCs in the Global South?
(c) Whether an African epistemological outlook cannot provide a viable, sustainable and effective solution to the problem of human rights violations by MNCs?

[167] Chimni (note 152 above) 22.
[168] Lobakeng R (2017) "African Solutions to African Problems: A Viable Solution Towards a United, Prosperous and Peaceful Africa?" *Institute for Global Dialogue* 1.

1.5 Research methodology

To answer the above questions the study undertakes a qualitative and doctrinal approach.[169] This means that the study critically analysis primary sources of business and human rights instruments at domestic, regional and international level.[170] A qualitative study which is ordinarily employed in legal research employs the analysis of constitutions, statutes, administrative regulations, depositions, and interrogatories among the many readily available sources lawyers draw from.[171] Moreover, it interrogates the events embedded within legal processes that produce these pieces of evidence and their interconnected.[172] Qualitative analysis tools are specifically designed to study these interdependencies, and thus are particularly useful for legal scholars.[173] And Doctrinal analysis and social science methods often lead scholars to choose and evaluate evidence in conflicting ways.[174]

Therefore, the thesis employs this research approaches that makes the literature and dialectic analysis of business and human rights instruments within the Global South and Global North significant. Because of the broadness of the critic of human rights language its location in colonial-imperial-capitalist structure, a single methodology would have been deficient to properly discharge the argument herein made.

The study focuses on the African region and its struggles against the legacy of colonialism, with specific reference to jurisdictions of South Africa, Nigeria, and Democratic Republic of Congo. The said countries have been selected because their economic performance in their region, influence and growth rate in the African continent. South Africa is dubbed the gateway to Africa with immense economic

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[169] Creswell W J (2003) *Research Design, Qualitative, Quantitative and Mixed Methods Approaches* 2nd ed (Sage Publications, Thousand Oaks, London, New Delhi) 18. Creswell defines qualitative approach as one in which the investigator primarily uses post positivistic claims for developing knowledge (i.e., cause and effect thinking reduction to specific variables and hypotheses and questions, use of measurement and observation, and the test of theories), employs strategies of inquiry such as experiments and surveys and collects data on predetermined instruments that yield statistical data. See also Silverman D (2013) *Doing Qualitative Research* 4th ed (Sage Publishers, Los Angeles, London, New Delhi) 123.

[170] QSR International, available at http://www.qsrinternational.com. (Accessed 11 November 2014).

[171] Linos K & Carlson M (2017) "Qualitative Methods for Law Review Writing" *The University of Chicago Law Review* Vol, 84. No, 213, 214.

[172] *Ibid*; For example, rules of precedent link cases, making the sequence in which cases are decided very important.

[173] *Ibid.*

[174] *Ibid.*

leverage although sometimes it exchanges the number one spot with Nigeria which is the most populous nation in Africa with real serious issues pertaining to oil MNCs that have troubled many indigent Nigerians.[175] The DRC has, however, remained amongst the bottom poorest despite it being the richest in mineral resources that fuel 70 per cent of the world's technology with respect to the coltan mineral.[176] The analysis of this countries is undertaken with the recognition that the Global South is "made up of a diverse set of countries, extremely varied in their cultural heritages, with very different historical experiences and marked differences in the patterns of their economies - but too much is often made of numbers, variations, and differences in the presence of structures and processes of global capitalism that continue to bind and unite.[177]

Having adopted TWAIL as theoretical framework, it is worth noting that the methodology involves diversity and heterogeneity of ideas that are aimed at critically assessing human rights violations perpetrated by the MNCs.[178] Moreover, the study engages in an analysis of scholarly literature in Africa because of its historical and current status as a place of rights violations at the hands of MNCs. The study is also a multi[179]-inter[180] and trans-disciplinarily[181] in its approach, as it sought to provide solutions to the legal complex issues through TWAIL theoretical framework and the other interrelated frameworks that centre, power, race and economics as named above in the theoretical framework section. This mode of analysis is pertinent because it includes other disciplines such as global economy, business principles, international

[175] Business Report (2019) "SA's Role as an Economic Gateway to Africa" *Business Report* 4 February 2019, 8:30pm.
[176] Lalji N (2007) "The Resource Curse Revised Conflict and Coltan in the Congo" *Harvard International Review* Vol. 29, No. 03, 35; see also Almeida, London "They Drink It in the Congo review – on the Rocky Road of Good Intentions" available at https://www.theguardian.com/stage/2016/aug/28/they-drink-it-in-the-congo-almeida-review (accessed 12 August 2019).
[177] Chimni (note 152 above) 3.
[178] Ramina L (2018) "TWAIL-Third World Approaches to International Law and Human Rights: Some Considerations" *Revista de Investigatcoes Constitucionais* (*Journal of Constitutional Research*) Vol 05, No 1, 264.
[179] Aboelela S W, Larson E, Bakken S, Carrasquillo O, Formicola A, Glied S A, Haas J, and Gebbie K M (2006) 'Defining Interdisciplinary Research: Conclusions from a Critical Review of the Literature' *Health Service Research* Vol. 42, No. 01, 337. It is an approach in which teams work in parallel or sequentially from their specific disciplinary base to address a common problem.
[180] *Ibid.*
[181] *Ibid* ; see also Ramina (note 180 above) 264; Concerning methodology, the "transdisciplinarity" though not a solely TWAIL initiative or methodology, as an analytical tool enables scholars to successfully employ this conceptual framework in their methodological inquiries into the current state of the TWAIL contributions.

trade, foreign direct investment policies, competition aspects, civil society activism and African epistemology. The adopted approaches is in recognition of the fact that law itself cannot solve all the problems and it functions within a political and economic dialectic. Thus, a mixture of different disciplines is deemed necessary in establishing what could be the effective and adequate method in dealing with human rights violations perpetrated by MNCs.

Finally the thesis is descriptive and analytical with respect to human rights instruments with respect to their strength and weakness so far as the enforcement of human rights standards against MNCs are concerned. This follows Dworkin's thinking when he asserts that, "legal theorists and indeed anyone seeking to know what law is must engage in an interpretive process which requires them to make moral and political value judgements in order to know which propositions of law are true: such propositions will be true when they flow from interpretive argument putting a given community's legal practices in their best moral and political light in terms of their ability to justify the imposition of collective force."[182] Moreover the descriptive methodology should first provisionally fix the domain of relevant propositions of law, at least approximately - it should then propose, at a second stage, a set of principles that explain how legal propositions work within such a domain.[183] It must finally, at a third stage, have the principles tested against the observations made.[184]

1.6 Limitations of the study

The thesis does not aim to do an exhaustive case analysis but to take few cases in Nigeria, South Africa and the DRC to the extent of their relevance to the study that displays how courts have dealt with human rights violations by MNCs. Further, the title displays the words human rights in inverted commas to evidence the critique of the human rights language in a oxymoronic fashion. Moreover, the study does not discuss the modalities of how MNCs can be held accountable in the strict sense of rights based

[182] Dickson J (2006) "Descriptive Legal Theory" *IVR Encyclopaedia of Jurisprudence* 3, available at http://www.law.ox.ac.uk/jurisprudence/dickson.shtml (accessed 26 July 2019); Dworkin R (1986) ***Law's Empire*** (Harvard University Press, United Sexual).
[183] Eleftheriadis P "Descriptive Jurisprudence" available at www.juridicas .unam.mx (accessed 26 July 2019) 122.
[184] *Ibid.*

approach but the thesis attempts to evaluate the evolutions of MNCs with their inherent link with colonialism and how the normative human rights approach has not yielded sufficient results in terms of protection of peoples in the Global South. Therefore, the golden thread throughout the thesis will be the analysis of the human rights language against the material evidence that shows the imbalance of enforcement of human rights standard against MNCs. Finally, the thesis employs the term of human rights not only in the UN defined sense but also explains it in terms that centres African ethos, norms, principles and values.

1.7 The structure of the thesis

The thesis is demarcated as follows:

Chapter one provides the introduction and background by highlighting the theoretical framework and the context of the research problem. Further, it explains the aims and objective of the study. It also outlines the research questions and research methodology utilised in the undertaking of the research. Finally, the thesis sets out the limitations of the study.

Chapter two is divided into two parts: **Part A** focuses on critical analysis of relevant human rights instruments, which includes specific documents dealing with business and human rights instruments such as the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. **Part B** deals with the literature review on business and human rights. The purpose of this chapter, therefore is to gauge not only the current discourse but also to assess the current regulatory framework and their effectiveness in promoting and respecting rights by MNCs.

Chapter three provide a critical analysis of the regional framework on how the African Union, European Union, and Organisation of American States regions have responded to business and human rights. This chapter asses the enforcement of human rights standards against MNCs in these regions and the obstacles which has impeded progress, especially with Africa as a largely colonised continent (with exception of Ethiopia and Liberia).

Chapter four answers questions one and two of the study by demonstrating how the colonial structures and systems still operate within the colonial dependency syndrome between the Global South and Global North which negatively impacts on the enforceability of human rights standards against the MNCs and simultaneously demonstrate how the human rights language becomes part of the “manoeuvring” in furthering human rights abuse by MNCs under the guise of economic development of the Global South. Therefore, concepts or phenomenon such as globalisation, corporate governance, international trade, politics, and foreign direct investments will be assessed with due regard to their impact on human rights obligations by MNCs. Moreover, this chapter explains how the above integrated systems becomes the number one priority ahead of promotion and protection of human rights especially pertaining to holding MNCs accountable.

Chapter five critically analyse the impact of MNCs on the enforcement of rights on three developing states in the Global South that have faced incredible problems regarding the abuse of human rights at the hands of MNCs, namely; South Africa, Nigeria and the Democratic Republic of Congo (DRC). The analysis simultaneously centres the colonial structure of economic exploitation which still pervades the post-colonial Global South. The said countries are selected due to their economic performance in their region, influence, and growth rate in the African continent. Thus, the importance of this chapter is to target major global economic players (MNC) and assess their human rights track record.

Chapter six is the conclusion and recommendations which offers an alternative solutions to the enforcement of human rights standards against MNCs which aims to put more emphasis on African epistemology to provide an effective and sustained solution of human rights in Africa as it pertains to MNCs. The recommendations are phrased in political, economic and ethical fashion based on the understanding that effective governance brings about strengthened people and institutions that can adequately enforce human rights standards against MNCs within framework of Botho.

CHAPTER TWO

CRITICAL ANALYSIS OF UNITED NATIONS INSTRUMENTS AND INTERROGATION OF BUSINESS AND HUMAN RIGHTS DEVELOPMENT

2.1 Introduction

Chapter two is divided into two parts: **Part A** focuses on the critical analysis of relevant human rights documents at the United Nations (UN) level and other organisations such as the Organisation for Economic Co-operation and Development (OECD). Further, it will analyse specific documents dealing with business and human rights instruments such as the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and John Ruggie's Guiding Principles on Business and Human Rights. This instruments are seminal to the study of business and human rights as they form the existing regulatory framework at the UN and other entities such as the OECD.

Part B is dealing with the literature review on business and human rights. The purpose of this part, is to critically asses the past-present-future discourse within the business and human rights especially pertaining to enforcing human rights standards against MNCs. The exploration of the literature review is aimed at critically analysing the first research question which seek to ascertain whether the human rights language is an efficient mechanism to hold MNCs accountable. Secondly, to critically assess the impact of colonialism in shaping the landscape of enforcements of human rights standards against MNCs which is aimed at answering the second question in part it will be mainly dealt with in chapter four and five.

The above analysis will be undertaken in line with Third World Approach to International Law (TWAIL), Critical Race theory, Dialectal Utility theory and Post-colonial theory as part of how the formulation and enforcement of human rights standard against MNCs has taken shape in the past 73 years of human rights language especially at the United Nations (UN) level and non-UN structures such the OECD mentioned above. Therefore, chapter two in totality, answers the question of whether the human rights language as it developed from the UN especially pertaining

to business, is an effective mechanism to enforce human rights standards against MNCs.

It is important to preface this chapter with the display of inherent defect of the UN and its propagation of human rights language at an international level. The commencement of human rights language at the UN level took place after victorious states of the World War II including South Africa crafted the UN Charter establishing the UN in 1945 with the objective of saving succeeding generations from the scourge of war which twice in the history of the world brought untold sorrow to mankind.[1] The preamble of the UN Charter seeks to re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.[2]

The UN Charter is premised upon the maintenance of international peace and security;[3] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;[4] and To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[5]

Govindjee argues that the UN Charter is not primarily a human rights instruments and that there are several defects its human rights provisions which are characterised by:[6]

> "First, they are vague and give no indication of the rights protected, apart from that of non-discrimination. Secondly, no enforcement machinery is

[1] Govindjee A (2016) *2nd* ed *Introduction to Human Rights Law* (LexisNexis, South Africa) 6; see also Preamble of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html (accessed 18 June 2019).
[2] Preamble of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html (accessed 18 June 2019).
[3] Article 1(1) of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html (accessed 18 June 2019).
[4] *Ibid.*
[5] *Ibid.*
[6] Govindjee (note 1 above) 7.

> provided for, unless the denial of human rights assumes such egregious propositions that it constitutes a threat to international peace under Chapter VII of the Charter. Thirdly, it is not clear that the clauses create any legal obligations for states. Fourthly, there is a conflict between the human rights clauses and article 2(7) of the UN Charter."

A reason why the UN Charter does not protect human rights more forcefully is that its drafters, abandoned the idea after considering the inclusion of bill of rights.[7] This is because they feared that differing views among the victorious states "on the proper contents of an international bill of rights having binding force would delay the inauguration of the world body" such a lack of agreement:[8]

> "Was to be expected, for each of the principal victorious powers had troublesome human rights problems of its own. The Soviet Union had its Gulag, the United States its de jure racial discrimination, France and Great Britain their colonial empires. Given their own vulnerability as far as human rights concerned, it was not in the political interest of these countries to draft a Charter that established an effective international system for the protection of human rights, which is what some smaller democratic nations advocated".

It is important to note that South Africa became a member state to the UN Charter on 7th November 1945, Nigeria on the 7th October 1960, and the Democratic Republic of Congo on 20th September 1960.[9] This means that the international instruments ratified by the three countries will be binding if it is a treaty and if the instrument adopted is a declaration or guidelines then the said states must promote the principle therein enshrined. Therefore, the assessment of the enforcement of human rights standards against MNCs is intrinsically linked to state obligations to respect, promote, protect, and remedy human rights violations perpetrated by MNCs domestically and extraterritorially depending on the nature of the violation. However, the orthodox view

[7] Govindjee (note 1 above) 7.
[8] *Ibid.*
[9] United Nations Treaty Collection available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&lang=en (accessed 18 June 2019).

of international law and international human rights law has undermined a move towards enforcement mechanism to regulate MNCs by creating a legal minefield without any effective and productive solution.[10]

PART A

2.2 CRITICAL ANALYSIS OF IMPORTANT UNITED NATIONS HUMAN RIGHTS INSTRUMENTS DEALING WITH MULTINATIONAL CORPORATIONS

2.2.1 Introduction

Human rights documents in the form of treaties are binding on states that have consented to them and the declarations and guidelines are non-binding because they constitute a body of ideals and norms that the international community (UN affiliated states) through the United Nations aspires for.[11] Therefore, Part A first deals with UN crafted human rights instruments such as Universal Declaration on Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) because they constitute the International Bills of Human Rights that ushered in the jurisprudence of international human rights law which states such as South Africa, Nigeria and the Democratic Republic of Congo have ratified.

The mechanisms under the UN human rights treaty instruments specifically with regard to the ICCPR and the ICESCR requires that South Africa, Nigeria and the Democratic Republic of Congo assumes the general obligation to respect, protect, and fulfil the rights and freedoms contained in the respective covenant primarily because the three countries have ratified the said treaties and are obligated to:[12]

[10] Nartey E K (2018) "MNCS and Human Rights Violations – Litigation in the Intersection of National and International Law" *Global Legal Review (GLR) Justice Reviewed*, 4-5.
[11] Dugard J (2018) 5 ed et al *International Law – A south African Perspective* (Juta Publishers, South Africa)1-2; see also Dugard J (2014) 4 ed *International Law – A south African Perspective* (Juta Publishers, South Africa) 1; see also Brownlie I (2008) Principles of Public International Law 6 ed (Oxford University Press, London) 3-4.
[12] De Schutter O (2010) "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 25.

> "respect which means that the state must refrain from interfering with or hindering or curtailing the exercise of such rights by individuals; protect individuals and groups against violations of their rights by others, including private actors; and fulfil or implement [in order] facilitate the exercise of such rights by all."

Secondly, Part A also deals with specific business and human rights instruments such as United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and Organisation for Economic Co-operation Development (OECD) Guidelines for Multinational Enterprises and John Ruggie's Guiding Principles on Business and Human Rights to name just a few. Therefore, since MNCs are not states and cannot be bound by some of the traditional basic human rights instruments, the contention made in this chapter is that there is a *lacuna* in business and human rights law that is contributing to the lack of enforcement of human rights standards against MNCs.

It is at this juncture that the critical analysis of international human rights instruments are analysed with regard to the provisions that directly and indirectly enforce human rights standards against the actions of MNCs. It is important to note that the United Nations framework has made significance difference in the abolishment of colonialism beginning with the General Assembly 1946 Resolution to the 1965 resolution on South Africa.[13] This movement of decolonisation became more pronounced during the early developments of the UN when the pressure to decolonise came only from the Pan-African Congresses and led to the Declaration on the abolishment of colonial regimes.[14] However, the gains are being undermined by neo-colonialism which placed independent countries in a position of inequality through economic or military dependence.[15] And, as Mushkatt asserts, have eliminated the true meaning of

[13] Mushkatt M (1972) "The Process of Decolonisation International Legal Aspects" *University of Baltimore Law Review* Vol. 2, No.1, 22-23; see also 15 December, The General Assembly requested the Secretary-General to establish a United Nations Trust Fund for South Africa to provide humanitarian assistance to persons persecuted under discriminatory and repressive legislation in South Africa and to their dependants; available on https://www.sahistory.org.za/topic/united-nations-and-apartheid-timeline-1946-1994 (accessed 28 May 2019).
[14] Mushkatt (note 13 above) 22-23; see also Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by General Assembly resolution 1514 (XV) of 14 December 1960.
[15] *Ibid.*

independence and emptied of the Declaration of 14 December 1960, of decolonisation of practical value.[16]

2.2.2 Universal Declaration of Human Rights

The United Nations system for the promotion and protection of human rights is based on the Universal Declaration of Human Rights and the core international treaties (the ICCPR and ICESCR which will be discussed below) that have given it legal form (though fiercely debated by scholars).[17] The rights established by these instruments are universal, indivisible, interdependent and interrelated and they belong to each individual person.[18] However, individually assessed the UDHR is the most comprehensive human rights document crafted by the UN,[19] albeit its non-binding nature on member states. The UDHR is a recommendatory resolution adopted by the UN General Assembly.[20]

It is important to note that sovereign African countries barely existed when the United Nations adopted the UDHR in 1948, three years after end of world war II, only four countries Egypt, Ethiopia, Liberia and South Africa were UN members and three countries signed, with the exception of South Africa as it still wanted to maintain colonial-apartheid.[21] It is this foundation that undermines the claim of universalism of the UDHR from the perspective of the Global South because of its lack of consultative process with the continent that was most oppressed. Therefore, even though MNCs are busily engaged in international transactions with states - UDHR in the main regulates the relationship between states and its human subjects to the exclusion of non-state actors such as MNCs and thus fail to qualify as international subjects.[22] It

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[16] *Ibid.*
[17] De Schutter (note 12 above) 24; see also UN, Vienna Declaration and Programme of Action, adopted and signed on 9 October 1993, § 5.
[18] *Ibid.*
[19] Govindjee A (2016) *2nd* ed *Introduction to Human Rights Law* (LexisNexis, South Africa) 8.
[20] Dugard (note 11 above) 460.
[21] Kuwomnu F (2019) "Africa's Freedom Struggles and the Universal Declaration of Human Rights" *AfricaRenewal* available at https://www.un.org/africarenewal/magazine/december-2018-march-2019/africa's-freedom-struggles-and-universal-declaration-human-rights (accessed 12 June 2019).
[22] Dugard (note 11 above) 2; see also International Law in its broad context state that to qualify as a subject under the traditional definition of international law, a state had to be sovereign: Needed a territory, a population, a government and the ability to engage in diplomatic or foreign relations. States within the United States, provinces and cantons were not considered subjects of international law

is also within this *lacuna* of non-state actors such as MNCs that the universalism and aspirational utilisation the UDHR serves only as an ideal of how MNCs must promote, respect and remedy human rights violations.

The resolution was adopted by majority of 48 countries from among the 58 members of the UN at that time, however, 8 abstained and the Republic of Hondarus and the Mutawakkilite Kingdom of Yemen did not vote.[23] It is important to note the absence of African countries with exception of Egypt, Ethiopia, Liberia and South Africa. The preamble of the UDHR recognises that member states to the United Nations Charter have undertaken to promote social progress and better standards of life to maximise freedom.[24] The UDHR also proclaims both civil and political rights and economic, social, and cultural rights in the language of aspiration.[25] It is in this vain that the UDHR inspired the creation of the ICCPR and the ICESCR which will be discussed below.[26] A simple argument is made which is that, from the inception the UDHR albeit widely lauded as the most comprehensive human rights documents – it suffers from legitimacy from the Global South to regulate human rights generally and business and human rights specifically.

Umozurike notes in support of the above argument, that international law not only validated imperialism and colonial practices but also has, since its inception, been "directed toward the promotion of European interests."[27] He further aptly states that

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because they lacked the legal authority to engage in foreign relations. In addition individuals did not fall within the definition of subjects that enjoyed rights and obligations under international law. A more contemporary definition expands the traditional notions of international law to confer rights and obligations on intergovernmental international organizations and even on individuals. The United Nations, for example is an international organization that has the capacity to engage in treaty relations governed by and binding under international law with states and other international organizations. Individual responsibility under international law is particularly significant in the context of prosecuting war criminals and the development of international Human Rights, available on https://legal-dictionary.thefreedictionary.com/international+law (accessed on 25 January 2018). Or in relation to Global South, International law in its proper perspective refers to European Diasporic Agreements on Trade and Governance with itself and peoples of the world (usually their "former" colonies.

[23] United Nations, History of the Document, available at https://www.un.org/en/sections/universal-declaration/history-document/index.html (accessed at 03 July 2019).

[24] Preamble of UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 24 February 2015].

[25] Dugard (note 11 above) 460.

[26] *Ibid.*

[27] Grovogui S N (1996) *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press) 14; see also Umozurike U O (1979) *International Law and Colonialism in Africa* (Nwamife Publishers, Nigeria).

TWAIL points out the inadequacies of the international law system, particularly its failure to restore rights and dignity to postcolonial societies.[28] In addition to the fundamental flaw of the UDHR of not being a treaty but merely a UN General Assembly resolution having no force of law, Burgenthal argues on in its redemption by stating that:[29]

> "In the decades that have elapsed since its adoption in 1948, the UDHR has undergone a dramatic transformation. Today few international lawyers would deny that the UDHR is a normative instrument that creates at least some legal obligations for the Member States of the UN. The dispute about its legal character concerns not so much claims that it lacks all legal force. The disagreement focuses instead on questions about whether all the rights it proclaims are binding and under what circumstances, and on whether its obligatory character derives either from its status as an authoritative interpretation of the rights obligations contained in the UN Charter, its status as customary international law, or its status as general principle of law".[30]

Despite its lack of enforceability the UDHR provides that everyone has the right to an effective remedy by a competent national tribunals for infringements of fundamental rights granted by the constitution or by any other law.[31] The significance of the said provision is that the UDHR provides jurisdiction upon which victims of human rights violations by MNCs can have recourse. Moreover, article 10 of the UDHR aid the victims of MNCs as it provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his/her rights and obligations and of any criminal charge against persons (both natural and juristic)".[32]

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[28] Grovogui (note 27 above)14.
[29] Burgenthal T (2009) *International Human Rights in a Nutshell* (West) 33-34; see also Govindjee (note 7 above) 8-9.
[30] *Ibid.*
[31] Article 8 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 24 February 2015].
[32] *Id* article 10; persons is taken to include both natural and juristic.

Despite the UDHR articles mentioned above that are aimed at protecting human rights violations perpetrated by the MNCs, there is at present no convention dealing directly with the responsibility of non-state actors, through which they could enforce human rights violations against MNCs before the UN mechanisms.[33] Thus, it is argued that the language of enforceability of human rights standards against MNCs on the basis of the most important human rights documents (the UDHR) is unattainable.

Moreover, Khoury summarises the moderate gains and ineffective usage of human rights language:[34]

> "Notwithstanding, the Universal Declaration's (UDHR) assertion that human rights oblige every individual and all organs of society there are major obstacles to this human rights utopia. Legislative processes and implementation mechanisms are not value-free and the personal beliefs and opinions of legislators and judges play a role in determining its laws by way of drafting Protocols and interpreting existing provisions. The lacuna in the Court's jurisprudence regarding corporate liability is the result of a market-friendly and trade-related paradigm of human rights."

2.2.3 International Convention on Civil and Political Rights

South Africa ratified the ICCPR on the 10th of December 1998 and it came into force on the 10th March 1998, Nigeria ratified it on the 29th of July 1993 and came into force on the 29th October 1993, and the Democratic Republic of Congo ratified the ICCPR on the 1st November 1976 and came into effect on the 1st February 1977.[35] This means that the ICCPR is binding on all three countries and are obligated to promote, protect and remedy violations of the ICCPR perpetrated by both natural and juristic persons such as MNCs.

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[33] De Schutter (note 12 above) 26.
[34] Khoury S (2010) "Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to accountability" Sortuz. Oñati Journal of Emergent Socio-legal Studies, Vol. 4, No. 1, 70.
[35] United Nations Treaty Collection available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (accessed 04 July 2019).

The capacity of South Africa, Nigeria and the Democratic Republic of Congo to enforce human rights standards contained in the ICCPR begins with the ratification and ends with implementation. It is therefore pertinent to evaluate the implementation of the ICCPR against the MNCs to evaluate whether its provisions (human rights language) is upheld by the states and any person whose rights are violated. The ICCPR like many other UN created human rights instruments were adopted in the three countries and in the Global South generally rather rapidly. This is because the ICCPR enshrines protection of rights that were previously denied to most states and peoples in the Global South.

In employing TWAIL, CRT, and Political Economy, the argument below demonstrate that despite this rapid ratification of the ICCPR, the preventive mechanism herein enshrined have not yielded in protection of human rights in the Global South by especially those human rights violations perpetrated by MNCs. To this end, the Human Rights Committee[36] with regard to the ICCPR, takes the view that the positive obligations on states parties to ensure that ICCPR rights will only be fully discharged if individuals are protected by the State, not just against violations of the ICCPR rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of the ICCPR rights in so far as they are amenable to application between private persons or entities.[37] The above lays a concrete foundation upon which the MNCs can be held accountable utilizing the ICCPR.

Furthermore, in relation to the Global South countries and their ability to promote and protect human rights, the ICCPR provides for the right to self-determination.[38] This means that states have the right to freely determine not only their political status, but

[36] The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

[37] Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); see also Skinner G, McCorquodale R & De Schutter O (2013) “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business” *The International Corporate Accountability Roundtable (ICAR), CORE and The European Coalition for Corporate Justice (ECCJ)*.

[38] Article 1(1) of UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html (accessed 26 February 2015).

also freely pursue their economic, social and cultural development.[39] It is in the freedom to pursue the economic independence that is contested between peoples in the Global South and MNCs which in many instances in their operations impedes upon human rights.[40] The diminished impetus of human rights language with respect to the enforcement of human rights standards against MNCs is evident when explored through TWAIL, CRT, Dialectal Utility, Post-colonial, and Political Economy.

Global South have, due to colonialism, been dispossessed of agency to freely dispose of the natural wealth and develop its economies despite the fact that the ICCPR provides that "all people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law".[41] The ICCPR prohibits the deprivation of all persons from undertaking their own means of subsistence.[42] The reality of deprivation is that, like in colonial times, the deprivation of natural resources by MNCs happens through trade regimes that largely benefit from former colonist or emerging empires such as China.[43]

MNCs have been directly and indirectly complicit in rights violations and the situation worsens when MNCs are working together with government in the abuse and

[39] *Ibid.*

[40] *Okpabi and others v Royal Dutch Shell plc and another* [2018] EWCA Civ 191 (*Okpabi*), UK-Okpabi v Shell Advocacy Open Letters 2018, Over the last 24 years, a series of cases has been brought in the UK relating to alleged harm suffered by people in developing countries as a result of the operations of UK multinational companies. These cases have related to: mercury poisoning, mesothelioma, asbestosis and silicosis suffered by workers in South Africa; the health effects of toxic waste dumping in Ivory Coast; allegations of corporate complicity in torture and ill-treatment by the Peruvian police; and injuries and deaths at a mine site in Tanzania. Often, it is extremely difficult to pursue such cases in the local courts of the jurisdiction where the harm occurred and where the subsidiary operations are located, due to corruption, fear of persecution and lack of access to information. Funding for appropriately-resourced legal representation is virtually impossible to access. In such cases, bringing a claim in the UK against the parent company offers a vital route to justice. Yet the judgment in *Okpabi* suggests a highly restrictive approach to parent company liability and should it stand, is likely to drastically limit the options that victims of abuse have to access justice, and potentially encourage further irresponsible business behaviour.

[41] Article 1(1) of UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html (accessed 26 February 2015).

[42] *Id* article 1(2).

[43] Daniel L (2018) "Debt Colonialism: Is China Trying to Buyout Africa's Resources?" available at thesouthafrican.com (accessed 07 July 2019); Mourdoukoutas P (2018) "What is China Doing in Africa?" available at forbes.com (accessed on 07 July 2019), Chinese corporations are all over Africa. In June 2017 a McKinsey & Company report estimated that there are more than 10,000 Chinese owned firms operating in Africa.

suppression of human rights.[44] The impact of this complicity with governments lessens the strength upon which human rights standards can be enforced against MNCs, for example in the *Kiobel* case were Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute, alleging that respondents - certain Dutch, British, and Nigerian MNCs—aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria.[45] Moreover, article 2(3)(a) of the ICCPR seeks to protect persons by providing that states must ensure that everyone whose rights are violated shall have an effective remedy, notwithstanding, that the violation has been committed by persons acting in an official capacity.[46] Furthermore, the state must ensure that everyone claiming such a remedy shall have the right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.[47] Moreover, and of paramount importance in this regard is that the states must ensure that the competent authorities enforce such remedies when granted.[48]

In line with TWAIL, one of the global plagues perpetrated by the unlawful operations of most of the largest MNCs is slave labour which has very strong roots in colonial-capitalist-imperialist world history with respect to the Global South.[49] The ICCPR

[44] Global Issues: available at http://www.globalissues.org/article/51/corporations-and-human-rights (accessed on 03 February 2017).
[45] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013), Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute, alleging that respondents—certain Dutch, British, and Nigerian corporations—aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. §1350. The District Court dismissed several of petitioners' claims, but on interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. This Court granted certiorari, and ordered supplemental briefing on whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.
[46] Article 2(3) (a) of the ICCPR.
[47] *Id* article 2(3) (b).
[48] *Id* article 2(3) (c).
[49] Lee M C (2006) "The 21st Century Scramble for Africa" *Journal of Contemporary African Studies, 24, 3, Sept*. 317; see also Human Rights and Business Country Guide: South Africa (*the South African Human Rights Commission and the Danish Institute for Human Rights* 2015) states that 'The 2013 Global Slavery Index ranked South Africa 115th out of 162 countries, with an estimated 44,500 people in 'slavery, slavery-like practices (including debt bondage, forced marriage, and or sale of or exploitation of children), human trafficking and forced labour',287. At the regional level, South Africa ranked 41st out of 44 countries.

states that no one shall be required to perform forced or compulsory labour.[50] Connected to the right not to be forced to work is the provision that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of her/his interests.[51] Moreover, nothing in article 22(2) of the ICCPR shall authorize state parties to the International Labour Organisation Convention (ILO) of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in the ICCPR.[52]

Everyone is equal before the law and are without any discrimination, entitled to the equal protection of the law.[53] Thus, the ICCPR prohibits any forms of discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[54] Furthermore, property is a criterion for non-discrimination and is relevant in attempting to locate a justification upon which a charge can be laid against MNCs. Property in the broader context means resources, capacity, trade and power. Therefore, abuse of persons in extractive industries and manufacturing sectors persist because MNCs have the power (property) to facilitate the suppression of labour rights for people who have little bargaining rights even with the assistance of trade unions.[55]

Moreover, utilising the optics of TWAIL as it relates to the dependency syndrome between the Global North and South[56], it is evident that the illusion of the eradication of poverty through FDIs has made it possible for the continual exploitation of the Global

[50] *Id* article 8 (3)(a).
[51] *Id* article 22(1).
[52] *Id* article 22(3).
[53] Article 7.
[54] *Id* article 26.
[55] Osuntogun A J (2015) *Global Commerce and Human Rights: Towards an African Legal Framework for Corporate Human Rights Responsibility and Accountability* (PhD Thesis at the School of Law at the University of the Witwatersrand) 34-36.
[56] Chimni B S (2006) "Third World Approaches to International Law: A Manifesto" *International Community Law Review* Vol. 8, 3; Armed with the powers of international financial and trade institutions to enforce a neo-liberal agenda, international law today threatens to reduce the meaning of democracy to electing representatives who, irrespective of their ideological affiliations, are compelled to pursue the same social and economic policies. Even international human rights discourse is being manipulated to further and legitimize neo-liberal goals. In brief, the economic and political independence of the third world is being undermined by policies and laws dictated by the first world and the international institutions it controls.

South.[57] Africa still languishes in poverty despite post-colonial democratisation and constitutionalism that have been achieved. Thus, colonial property (mainly land and the economy) is still vested in the remote control of the Global North. Equality, therefore, in the "post-colonial" era has been achieved in part and an autonomous Africa seems to be a fading and a regressing dream. In light of the aforesaid realities, the human rights language appears not to be an appropriate vehicle to hold MNCs accountable to the extent of their actions in contributing to the human rights decay in the Global South.[58]

The ICCPR provides for the establishment of the Human Rights Committee.[59] The Human Rights Committee plays an important role in the enforcement of rights standards. This puts the Human Rights Committee at the centre of the global measure on the performance of United Nations institutions. The Committee comprises of citizens of the state parties to the ICCPR who must be persons of high moral character and recognised competence in the field of human rights, with consideration being given to some persons having legal experience.[60] The members of the Committee are elected and serve in their personal capacities.[61]

Despite the fact that the ICCPR deals with political participation by citizens, politics-law-economy are intertwined and interdependent. Therefore, the MNCs' meddling in

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[57] Lee (note 49 above).

[58] Chukwuemeka E, Anazodo R and Nzewi (2011) "African Underdevelopment and the Multinational-A Political Commentary" *Journal of Sustainable Development* Vol. 4, No. 4, 102, The policies and programmes have failed to make impact in the economic development of the new states. The effects of these policies and programmes on the activities of multinational enterprises need no further emphasis. It is open secret that after several years of independence of countries like, Nigeria, Ghana, Ethiopia, Sierra Leone, South Africa etc., only very little improvement has been recorded in just few sectors of the economy of these countries. Some of these economies still operated on monocultures and vertically integrated with the parent industries of the neo-colonials themselves (Izunwa, 2005) It is against this background that the following thought provoking questions and assertions bug the mind. Can African nations be truly independent when the activities of multinational enterprises have partially destroyed local entrepreneurship drive, which have an important effect on development? Does the presence of global firms raise the cost of capital and makes insufficient fund available to local firms? This counters the development posture of leaders of the third world nations, Agreeing with this point, Bernal (2005), stated that "it is frequently contended that the international firm sups up local capital either by borrowing locally or by receipt of investment incentives". Multinational enterprises do not encourage improvement of balance of payment of host countries. Multinational enterprises have been used as a foreign policy instrument of their home governments, to the disadvantage of host country's economic development (Ugwu, 2010).

[59] *Id* article 28(1); The Committee shall consist of eighteen members and shall carry out the functions hereinafter provided.

[60] *Id* article 28(2).

[61] *Id* article 28(3).

the political space of the States and the funding of political elites for economic gains have been bedfellows for time immemorial. Hence, there is a need for the Committee to enforce rights against the MNCs. In order to monitor and have a progressive measure for the implementation of the ICCPR, article 40 provides that the state parties must undertake to submit reports on the measures they have adopted which give effect to the rights recognised in the ICCPR and on the progress made in the promotion and protection of those rights within one year of the entry into force of the ICCPR for the state parties concerned and thereafter whenever the Committee so requests.[62]

All the reports must be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration.[63] This reports shall indicate the factors and difficulties, if any which affect the implementation of the ICCPR.[64] The Secretary-General of the UN may, after consultation with the Committee, communicate to the specialised agencies concerned, copies of such parts of the reports as may fall within their field of competence.[65]

The Committee must study the reports tendered by the state parties to the ICCPR.[66] It shall distribute its reports and such general comments as it may consider appropriate to the state parties.[67] The Committee may also publish to the Economic and Social Council these comments along with the copies of the reports it has received from state parties to the ICCPR.[68] The state parties to the ICCPR may submit to the Committee observations on any comments that may be made in accordance with article 40(4).[69] It is, however, astonishing that with so many states being parties to the ICCPR[70] both from the Global North and the Global South, the mechanism provided by the Committee has not yielded any notable difference to the Global South as far as the enforcement of human rights standards against MNCs.

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[62] *Id* article 40(1) (b)
[63] *Id* article 40(2) (a).
[64] *Id* article 40(2) (a).
[65] *Id* article 40(3).
[66] *Id* article 40(4).
[67] *Id* article 40(4).
[68] *Id* article 40(4).
[69] *Id* article 40(5).
[70] Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (accessed 03 February 2017).

The premise of public international law is the consent to be bound by international instruments and norms through signature, ratification and domestication. However, a stark contrast to this fundamental vintage point is that a state party to the ICCPR may at any time declare under article 41 that it recognises the competence of the Committee to receive and consider communications to the effect that a State party claims that another state party is not fulfilling its obligations under the ICCPR.[71] Communications under this article may be received and considered only if submitted by a State party which has made a declaration recognizing in regard to itself the competence of the Committee.[72] No communication shall be received by the Committee if it concerns a State party which has not made such a declaration.[73]

The implementation of the ICCPR is largely at the mercy of what the State parties deem satisfactory and this is evidenced (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the states parties concerned, the Committee may, with the prior consent of the States parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission).[74] The good offices of the Commission shall be made available to the States parties concerned with the view of achieving an amicable solution of the matter on the basis of respect for the ICCPR.[75]

The provisions for the implementation of the ICCPR shall apply without prejudice to the procedures prescribed in the field of rights by or under the constituent instruments, the conventions of the UN.[76] Further, specialised agencies and shall not prevent the states parties to the ICCPR from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.[77]

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[71] *Id* article 41.
[72] *Id* article 41.
[73] *Id* article 41.
[74] *Id* Article 42(1) (a); The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
[75] *Id* article 42(a).
[76] *Id* article 44.
[77] *Ibid.*

No provisions in the ICCPR shall be interpreted as infringing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.[78] MNCs play an important role in the creation and maintenance of global economy but in their activities throughout the world, they have violated the various ICCPR provisions.[79] MNCs are legal persons endowed with rights and responsibilities and their actions directly affect the rights of natural persons under the ICCPR.

The main point of debate relates to states' extraterritorial obligations.[80] In other words, states obligations where mother companies of MNCs are incorporated in their jurisdiction to regulate the activities of these corporations outside their territories and to eventually sanction them if found to be involved in human rights violations abroad.[81] The ICCPR's Committee in action in corporate-related human rights abuses although having quasi-judicial status and a certain authority, the Committee's rulings on individual complaints are not legally binding.[82] However, it is generally considered that states have an obligation in good faith to take Committees' opinions into consideration and to implement their recommendations.[83] This state of affairs from the operation of the Human Rights Committee is telling on its ability to realise the human rights language and it is contended that it is insufficient to be effectively enforced against MNCs.

The ICCPR functions within the colonial-imperial-capitalist framework, since TWAIL asserts that international human rights law is Eurocentric - CRT has located the benefactors of the UN legal regime in the Global North and the Political Economic theory has demonstrated that the capitalist imperatives are what forms the goal of the global economy. Therefore, the ICCPR and its provisions on prohibition of slave labour for everyone (especially in the Global South) remains operative within the colonial legacy paradigm to the benefit of the Global North MNCs.

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[78] *Id* article 47.
[79] Kicsi R and Buta S (2012) "Multinational Corporations in the Architecture of Global Economy" *The USV Annals of Economics and Public Administration* Vol. 12, No. 2(16) 140.
[80] De Schutter (note 12 above) 27.
[81] *Ibid.*
[82] *Id* 28.
[83] *Ibid.*

2.2.4 International Covenant on Economic, Social and Cultural Rights

South Africa signed the International Covenant on Economic, Social and Cultural Rights (ICESCR), on the 3rd of October 1994 and ratified it on the 12th of January 2015, Nigeria ratified the ICESCR on the 29th of July 1993, and the Democratic Republic of Congo ratified the ICESCR on the 1st November 1976.[84] The ICESCR which was drafted at the same time as the ICCPR, came after the UDHR, covers rights that are central to the effectiveness of both the formulation of the rights and ensuring that they are implemented and enforced by State parties, including non-state actors such as MNCs. The above is also echoed by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) has adopted.[85] Moreover, regional human rights courts and expert bodies established under regional human rights instruments have routinely affirmed that a State is responsible for regulating the conduct of private persons.[86]

On 10 December 2008, the General Assembly adopted the Optional Protocol to the ICESCR.[87] This was an important breakthrough, in that it instituted a mechanism for individual complaints to the ICESCR, settling the difficult debate on the question of the "justiciability" of economic, social and cultural rights.[88] Uruguay was the 10th state to ratify the Optional Protocol to the ICESCR, which triggered its entry into force on 5 May 2013, along with the individual complaint mechanism.[89] As of March 2016, 47 states had signed the Optional Protocol, and 21 states had ratified it.[90]

The ICESCR recognises the inherent dignity and the equal and inalienable rights of all members of the human family as to foundational to freedom, justice and peace in

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[84] United Nations Treaty Collections, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (accessed 06 July 2019).
[85] Committee on Economic, Social and Cultural Rights, General Comment No. 12: The right to adequate food, Art. 11, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1995).see also Skinner G, McCorquodale R & De Schutter O (2013) "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business" *The International Corporate Accountability Roundtable (ICAR), CORE and The European Coalition for Corporate Justice (ECCJ)*.
[86] Skinner G, McCorquodale R & De Schutter O (2013) "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business" *The International Corporate Accountability Roundtable (ICAR), CORE and The European Coalition for Corporate Justice (ECCJ)*.
[87] De Schutter (note 12 above) 28.
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*

the world.[91] Therefore, the enforcement of this covenant against MNCs in the Global South must or should have a multiple layer that speaks to the totality of protection of rights. Furthermore, similar to the UDHR, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy economic, social and cultural rights, as well as peoples' civil and political rights.[92] The problem with human rights language especially with respect to the enforcement of the ICESCR is that it is usually limited by the economic considerations of a particular state especially in the Global South.[93]

For example, Chella cites a Sudanese case where:

> "the Canadian multinational oil corporation Talisman Energy faced legal action from the local community while extracting oil in Sudan. A class action lawsuit was lodged in the United States District Court pursuant to the *Alien Tort Statute*. The plaintiffs alleged that Talisman facilitated crimes against humanity in Sudan around 1998. These crimes were alleged to have been carried out by the Sudanese Government at the time Talisman were building supporting infrastructure, such as roads and airports, leading up to their extraction site."[94]

The operative terms of freedom from fear and want cannot be what the UN has pushed in the determination of socio-economic autonomy of the Global South and certainly not of Africa.[95] In actual fact, the Zimbabwean sanctions,[96] the North Korea sanctions[97]

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[91] Preamble of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, 3, available at: http://www.refworld.org/docid/3ae6b36c0.html (accessed 13 April 2015).
[92] *Ibid.*
[93] Chella J (2012) *The Complicity of Multinational Corporations in International Crimes: An Examination of Principles* (PhD thesis, Bond University) 6.
[94] *Ibid*; see also *Presbyterian Church of Sudan v Talisman Energy Inc.,* (Docket No. 07-0016-cv) U.S.C.A. 2nd Circuit, 2 October 2009; the *Alien Tort Statute* is codified at 28 U.S.C. Section 1350; see also *Presbyterian Church of Sudan v Talisman Energy Inc.,* (Docket No. 07-0016-cv) U.S.C.A. 2nd Circuit, 2 October 2009; this action was brought pursuant to the United States *Alien Tort Statute,* but the claim was rejected by the District Court which found Talisman lacked the requisite *mens rea*.
[95] Okubo S (2007) "Freedom from Fear and Want and the Right to Live in Peace and Human Security" *Institute of International Relations and Area Studies, Ritsumeikan University,* 5.
[96] "EU Imposes Sanctions on Zimbabwe," *the Guardian Mon 18 Feb 2002 17 24 GMT.* Available on https://www.theguardian.com/world/2002/feb/18/zimbabwe (accessed 21 October 2017).
[97] Rennack D E (2006) "North Korea: Economic Sanctions" *CRC Report for Congress,* 1. The United States imposes economic sanctions on North Korea for four primary reasons: (1) North Korea poses a threat to U.S. national security, as determined by the President and renewed annually under the terms

and the Libyan unprovoked destruction[98] were not done in the best interest of humanity nor of any real concern for the principles of the ICESCR. Therefore, what remains is to state that the Global South generally and Africa specifically is in "fear" and have been "wanting" of better socio-economic and cultural rights, for the past three hundred and sixty seven years with no end in sight.

The ICESCR, like the UDHR and the ICCPR provides that everyone have the right of self-determination.[99] This means that people can freely determine their political status and freely pursue their economic, social and cultural development.[100] And all people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law.[101] However, the ICESCR provides that in no case may people be deprived of their own means of subsistence.[102] The state parties to the ICESCR, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination and shall respect that right in conformity with the provisions of the Charter of the United Nations.[103]

Articles 1(1), 1(2) and 1(3) of the ICESCR above incorrectly assume a society where Global South States have autonomy from their colonisers to freely make decisions that will sustain development for their own people. Thus, human rights language has to a large degree been the stronghold of the Global North on the Global South and the maintenance of high levels of inequality.

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of the Trading with the Enemy Act and National Emergencies Act; (2) North Korea is designated by the Secretary of State as a state sponsor or supporter of international terrorism, pursuant to the Export Administration Act of 1979; (3) North Korea is a Marxist-Leninist state, with a Communist government, and stated as such in the Export-Import Bank Act of 1945, and further restricted under the Foreign Assistance Act of 1961; and (4) North Korea has been found by the State Department to have engaged in proliferation of weapons of mass destruction pursuant to the Arms Export Control Act, Export Administration Act of 1979, and Iran, North Korea, and Syria Non-proliferation Act of 2000.

[98] Ong N (2016) "Economic Sanctions and Libya: on the Factors that Influence the Success" (*Bachelor thesis Politicologie: Internationale Betrekkingen en Organisaties*) 3-4.

[99] *Id* article 1(1).

[100] *Id* article 1(1).

[101] *Id* article 1(2).

[102] *Ibid.*

[103] *Id* article 1(3).

The other problematic provision is article 2(1) which provides that State parties must undertake to take steps, individually and through international assistance and co-operation, especially, economic and technical, to the maximum of its available resources, with the view of achieving progressively the full realisation of the rights recognized in the ICESCR by all appropriate means, including particularly the adoption of legislative measures.[104] This provision, for example, as entrenched in the South African Constitution[105] has until recently denied many University students the majority of them being the indigent Africans, the opportunity to study on account of the inability of the state to provide free higher education which it can afford safe as corruption and maladministration in government.[106] Furthermore, the inability for African states to deal with Illicit financial flows (IFFs) being committed by the Global North MNCs has had a devastating blow on the implementation of rights.[107] Mbeki aptly argues that the biggest driver of IFFs similar to the colonial era is (MNCs) for example, "the South African authorities informed the Panel about a case in which a MNCs was found to have avoided $2 billion in taxes by claiming that a large part of its business was conducted in the United Kingdom (UK) and Switzerland, which at that time had lower tax rates for their business, and moving the legal site of their business to these jurisdictions".[108] Developing countries, with due regard to rights and their national economy, may determine the extent to which they would guarantee the economic rights recognized in the ICESCR to non-nationals.[109]

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[104] *Id* article 2(1).

[105] Section 29(1) of the Constitution of the Republic of South African, 1996 provides that everyone has the right to (a) basic education, including adult basic education; and (b) to further education, which the State, through reasonable measures, must make progressively available and accessible.

[106] Bond P (2006) *Looting Africa: the economics of exploitation* (Zed Books and University of KwaZulu-Natal, London) 5, Many critics of North-South power relations – such as Walter Rodney in How Europe Underdeveloped Africa – have already identified the basic processes: The question as to who and what is responsible for African underdevelopment can be answered at two levels. Firstly, the answer is that the operation of the imperialist system bears major responsibility for African economic retardation by draining African wealth and by making it impossible to develop more rapidly the resources of the continent. Secondly, one has to deal with those who manipulate the system and those who are either agents or unwitting accomplices of the said system.

[107] Mbeki T (2014) illicit Financial Flows "Report of the High Level Panel on Illicit Financial Flows from Africa" Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development. Available at http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 18 October 2017) 27; see also Nkurunziza J D (2012) "Illicit Financial Flows: A Constraint on Poverty Reduction in Africa" *BULLETIN No 87-FALL.* 15.; according to estimates by Global Financial Integrity (GFI), these flows amounted to between USD 854 billion and $1.8 trillion over the period 1970-2008 (GFI 2010).

[108] *Ibid.*

[109] Article 2(3) of the ICESCR.

Similar to the ICCPR, the State parties to the present ICESCR undertake to guarantee that the rights enunciated in the covenant will be exercised without discrimination on property (power).[110] The States parties to the ICESCR undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the ICESCR.[111] The state parties to the ICESCR recognise the right to work which includes the right of everyone the opportunity to gain a living by work which she/he freely chooses or accepts and will take appropriate steps to safeguard this right.[112]

The ICESCR 's General Comment No. 18 "The obligation to respect the right to work includes the responsibility of States Parties to prohibit forced or compulsory labour by non-state actors. Private enterprises – national and multinational – while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognize the labour standards elaborated by the ILO and aim at increasing the awareness and responsibility of enterprises in the realization of the right to work.[113]

State parties to the ICESCR must undertake to achieve the full realisation of this right by including technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.[114]

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[110] *Id* article 2(2), it provides that The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[111] *Id* article 3.
[112] *Id* article 6(1).
[113] De Schutter (note 12 above) 29; see also ICESCR, The right to work, General Comment No. 18 , 24 November 2005, E/C.12/GC/18 (2006), §§ 25 and 52.
[114] Article 6(2) of the International Covenant on Economic, Social and Cultural Rights, The right to work, General Comment No. 18 , 24 November 2005, E/C.12/GC/18 (2006).

Furthermore, the ICESCR provides that States parties recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:[115]
    (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work[116];
    (ii) A decent living for themselves and their families in accordance with the provisions of the ICESCR[117];
(b) Safe and healthy working conditions[118];
(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence[119];
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.[120]

The ICESCR protects everyone's right to form trade unions and join the trade union of his and her choice.[121] Nothing in this ICESCR shall authorize state parties to the International ILO concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would not prejudice, or apply the law in such a manner as would undermine the provisions contained in the ICESCR.[122]

The provisions below show the huge gap between the ideals on paper and the reality of the Global South's capacity to provide adequate living standard. The ICESCR provides that everyone has the right to an adequate standard of living for herself and her family, including adequate food, clothing and housing and to the continuous improvement of living conditions.[123] The ICESCR – The right to adequate food,

[115] *Id* article 7 (a).
[116] *Id* article 7(a) (i).
[117] *Id* article 7(a) (ii).
[118] *Id* article 7(b).
[119] *Id* article 7(c).
[120] *Id* article 7(d).
[121] *Id* article 8(1) (a).
[122] *Id* article 8(3).
[123] *Id* article 11(1).

General Comment No. 12 “The private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society. As part of their obligations to protect people’s resource base for food, States Parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.[124]

The State parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on “free consent”.[125] The State parties to the ICESCR, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:[126]

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources[127];

(b) Taking into account the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.[128]

The purpose of highlighting these provisions is to illuminate the inconsistencies in the world concerning the well-being of so-called sustainable development, eradication of poverty and the strengthening of the Global South. This is so to the extent that post-colonial States have failed due to constrained resources, largely due to the perpetual exploitation by the Global North thus making it difficult to realise the provisions in the ICESCR.

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[124] De Schutter (note 12 above) 29; see also ICESCR, The right to adequate food, General Comment No. 12, 12 May 1999, E/C.12/1999/5, §§ 20 and 27.
[125] *Id* article 11(1).
[126] *Id* article 11(2).
[127] *Id* article 11(2) (a).
[128] *Id* article 11(2) (b).

In South Africa for example, 34 minors were murdered simply because they were enforcing the above mentioned rights (e.g. article 6 on the right to fair wages).[129] A brief history may illuminate this tragic story of violations of the ICESCR. "Lonmin was initially christened in 1909 as the London and Rhodesian Mining and Land Company Limited. Focused on mining and ranching, it was at one point an unprofitable flop, foreshadowing its eventual fate. "Tiny" Rowland, a corporate raider and maverick, would take up the reins and transform the group into a sprawling African business empire."[130]

Stoddard aptly sums-up the fall of Lonmin in the following passage:

> "Lonmin, which at one time was the world's third-largest platinum producer, died on Friday, 7 June 2019, at the age of 110. This script was not set in stone. The company faced many of the challenges that confronted its rivals, some of whom are now thriving. These included depressed prices, unyielding geology, and waves of social and labour unrest. In the end, the boardroom dug its own grave as a series of poor management decisions ultimately laid the company to rest."

Unfortunately, the death of Lonmin did little to resurrect the hope of realising human rights enshrined in the ICESCR as many people died in vain for wages and the ones who survived still receive them and now the burden is passed upon Sibanye-Stillwater.[131] Sibanye-Stillwater is an independent, global precious metal mining group, producing a unique mix of metals that includes gold and the platinum group metals (PGMs).[132] Respect to the Marikana massacre, there was a Commission of Enquiry instituted by the President and despite the fact that it is not a court of law and

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[129] Tolsi N (2017) "Marikana : One Year after the Massacre" available at http://marikana.mg.co.za/ (accessed 15 July 2017); see also Marikana Massacre 16 August 2012: available at www.sahistory .org.za/article/marikana-massacre-16-august-2012 (accessed 12 February 2018).
[130] Stoddard E (2019) " Obituary: After the Marikana Massacre, the writing was on the wall for Lonmin" 12 June, available at https://www.dailymaverick.co.za/article/2019-06-12-obituary-after-the-marikana-massacre-the-writing-was-on-the-wall-for-lonmin/ (accessed 09 July 2019).
[131] Sibanye-Stillwater successfully takes over Lonmin available at http://www.702.co.za/articles/351329/sibanye-stillwater-successfully-takes-over-lonmin (accessed 08 July 2019).
[132] Available at https://www.sibanyestillwater.com/about-us (accessed 10 July 2019).

the terms of reference dealt only mostly with the massacre, none of the ICESCR provisions have been utilised to assess the rights of miners in relation to Lonmin to the extent of their relevance is highlighted below.[133]

The Commission inquired into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines:

1 The conduct of Lonmin Plc, in particular:

(a) Whether it exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between Lonmin and its labour force on the one hand and generally among its labour force on the other;[134]

(b) Whether it by act or omission, created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct;

(c) To examine generally its policy, procedure, practices and conduct relating to its employees and organized labour; and

(d) The role played by the Department of Mineral Resources or any other government department or agency in relation to the incidents and whether this was appropriate in the circumstances, and consistent with their duties and obligations according to law.

In relation to (a) the Commission found that Lonmin PLC did not use its best endeavours to resolve the disputes that arose between itself and the members of its work force who participated in the unprotected strike and between the strikers and

[133] Farlam I G, Hemraj P D & Tokota B R (2015) "Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of The Tragic Incidents at The Lonmin Mine in Marikana, in The North West Province" 1- 660.
[134] *Id* 2.

those workers who did not participate in the strike. It also did not respond appropriately to the threat and outbreak of violence.[135]

In relation to (b) the Commission found that Lonmin also failed to employ sufficient safeguards and measures to ensure the safety of its employees. In this regard it failed to provide its security staff with the armoured vehicles they needed for their protection despite being requested to do so. It also insisted that its employees who were not striking come to work despite the fact that it knew that it was not in a position to protect them from attacks by strikers.[136]

Finally in relation to (c), the Commission found that Lonmin PLC created an environment conducive to the creation of tension and labour unrest by failing to comply with the housing obligations undertaken by its two subsidiaries in the SLPs on the strength of which it obtained new order mining rights.[137]

The above conduct of Lonmin PLC, a UK MNCs demonstrates a clear disregard of the provisions of the ICESCR pertaining to article 7 (fair remuneration and safe and healthy working conditions) which obligated South Africa as a state to compel Lonmin to abide by international human rights law as ratified by South Africa and forming part of South Africa Law. An argument informed by TWAIL and CRT can be made that this particular conduct of Lonmin would have been met with severe punishment had the events took place in the Global North, but because it has happened in South Africa, no notable leader of the MNC has faced prosecution or been rendered a delinquent director as a result of the massacre that happened.

It is trite that states have a duty of promoting and protecting human rights and this is also true with regard to human rights violations perpetrated by MNCs. Therefore, it is in this regard that the provisions espoused in the ICESCR are adhered to their fullest extent by the member state. There are 70 signatories and 164 states that have ratified

[135] Farlam I G, Hemraj P D & Tokota B R (2015) "Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of The Tragic Incidents at The Lonmin Mine in Marikana, in The North West Province" 556.
[136] *Id* 557.
[137] *Ibid.*

the ICESCR.[138] The large number of ratification shows the seriousness of state parties to uphold the provisions of the ICESCR. However, given the appalling living conditions in the Global South these, "excellent" provisions with good intentions leave one wondering whether human rights language provides the best framework to eradicate societal problems or not.

The formulation of treaties and norms has never been a problem for the international community. However, the enforcement has always been a major problem. The problem with little or no enforcement of the ICESCR is not because of lack of resources or the often-mentioned rhetoric regarding corrupt Africans.[139] The inability to contextualise and enforce rights documents drafted by the United Nations, is due to little or no input at all historically from the Global South and the silencing of their voices.

The preamble of the ICESCR states that there must be conditions created to realise the provisions enshrined in the covenant.[140] In the Global South the conditions dire with respect to resources, governance, and legal capacity which has and is shaped by colonialism from a resource and capacity perspective. Therefore, there is an inextricable link between the realisation of rights and their entrenchment and structural colonisation. Finally, the analysis of the ICESCR much like any other United Nations human rights documents, is dealt with much critique and circumspection not necessary on its textual ideal but it is unrealistic endeavour that negates the dependency syndrome between the Global North and the Global South.

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[138] United Nations Treaty Collections: available at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty; (accessed 15 April 2015).

[139] Kufandarerwa RTM (2017) "Corruption is Africa's Greatest Foe" News24 (25 January 2017, 08:47) available at https://www.news24.com/MyNews24/corruption-is-africas-greatest-foe-20170125 (accessed 10 July 2019).

[140] Preamble of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 993, 3, available at: http://www.refworld.org/docid/3ae6b36c0.html (accessed 13 April 2015).

2.2.5 United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (herein referred to as the Draft Norms) constitute an authoritative guide to corporate social responsibility.[141] Hillemanns states that the Draft Norms is a set of comprehensive international rights norms specifically aimed at and applying to MNCs and other business enterprises.[142] He furthermore, asserts that;

> "The Draft Norms set out the responsibilities of MNCs with regard to rights and provide guidelines for MNCs in conflict zones. It prohibits bribery and provide obligations with regard to consumer protection and the environment. Furthermore, the general provisions of implementation include the obligation to provide reparation for failure to comply with the Draft Norms. The Draft Norms recognise that States have the primary responsibility to promote, fulfil, respect, and protect rights. MNCs as organs of society are responsible for the promoting and securing the rights entrenched in the UDHR".[143]

The evolutionary and dynamic operations of MNCs is summed up properly by the preamble of the Draft Norms which provides that MNCs have the capacity to foster economic wellbeing, development, technological improvement and wealth as well as

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[141] Hillemanns C F (2003) "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" *German Law Journal* Vol. 04, No. 10; see also De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 26, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019), The UN Draft Norms on the Responsibilities of Transnational Corporations and other Business enterprises with regard to Human Rights, elaborated in 2003 by the Sub-Commission on the Promotion and Protection of Human Rights, aimed at codifying the respective responsibilities of states and business enterprises. However, despite raising these important issues, the Norms were never adopted. In 2005, a new special procedure, the UN Secretary General Special Representative for Business and Human Rights; Ruggie J (2011) "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' UN Doc.A/HRC/17/31.

[142] *Ibid.*

[143] Preamble of the United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

the capacity to cause harmful impacts on the rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities.[144] Mnyongani states that the provisions include *inter alia* the "right to equal opportunity and non-discriminatory treatment, rights to security of persons, rights of workers, obligations with regard to consumer protection and obligations with regard to environmental protection".[145]

One exercises patience with regard to how slow legal reform and practices transpire. However, one fundamental question which the Global South has to wrestle with in relation to MNCs is how global colonial-capitalism can ensure equity of trade. If the answer is the negative then the Draft Norms and specifically the provisions dealing with ensuring development of the Global South remain a myth for Africa. This is because:

> "The working group and its proposed Norms met with vehement opposition from corporate lobby groups. Already in 2003, the International Chamber of Commerce (ICC) and other major business associations – which included prominent Global Compact members –had started organizing the derailment of the suggested course of action. They did not support the idea of genuinely integrating the Norms into the Global Compact, let alone the notion of the United Nations actually adopting and enforcing legally-binding Norms. Instead, they used the Global Compact to campaign against their adoption".[146]

The Draft Norms provide that MNCs undertake further standard-setting and implementation which are required currently and in the future.[147] The operative words and phrases "further standard-setting and implementation" entail a pro-active mechanism upon which the international community can prevent as opposed to

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[144] *Ibid.*
[145] Mnyongani F D (2016) *Accountability of Multinational Corporations for Human Rights Violations Under International Law* (LLD Thesis, University of South Africa) 94.
[146] Martens J (2014) "Corporate Influence on Business and Human Rights Agenda of the United Nations" *Bischöfliches Hilfswerk MISEREOR* (working paper) 16.
[147] Draft Norms (note 143 above).

concentrating on reactionary measures of non-binding instruments. The Draft Norms' preamble provides that it acknowledges the "universality, indivisibility, interdependence and interrelatedness of rights, including the right to development which entitles all people to participate in the contribution to and enjoyment of economic, social, cultural and political development in which all rights and fundamental freedoms can be fully realized".[148]

Mnyongani correctly contends that "the human rights content of the Draft Norms is vague and inaccurate, the implementation provisions of the Draft Norms are burdensome and unworkable and that the Draft Norms duplicate other initiatives and standards, particularly the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration".[149]

This is a significant rendition of the idealism of how MNCs are supposed to function with the levels of management being responsible for the development of law. However, many Global South countries and specifically Africa have not benefited significantly from the promotion and protection of rights. The MNCs have an obligation to respect and protect rights within their respective spheres of activity and influence and have an identical obligation that also encompasses the rights and interests of indigenous people and other vulnerable groups.[150]

The Draft Norms have a non-discriminatory clause in which discrimination based on race, social status and indigenous status is prohibited, to name just a few.[151] In fact South Africa is an excellent example in that the economy is still in the hands of Europeans who have gained this unfair, unlawful and prejudicial advantage due to legalised discrimination.[152] Enforcement of the Draft Norms is essential,

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[148] *Ibid.*
[149] Mnyongani (note 145 above) 96.
[150] *Ibid.*
[151] *Id* article 2.
[152] Apartheid translated from the Afrikaans meaning 'apartness', apartheid was the ideology supported by the National Party (NP) government and was introduced in South Africa in 1948. Apartheid called for the separate development of the different racial groups in South Africa. In basic principles, apartheid did not differ that much from the policy of segregation of the South African governments existing before the Afrikaner Nationalist Party came to power in 1948. The main difference is that apartheid made segregation part of the law. Apartheid cruelly and forcibly separated people, and had a fearsome state apparatus to punish those who disagreed. Another reason why apartheid was seen as much worse than segregation, was that apartheid was introduced in a period when other

notwithstanding its status as a non-binding instrument to give effect to the general body of rights instruments regulating MNCs. The problem is that the "international" has as its main preoccupation the making of empires and sustenance of inequality between the Global South and Global North. This is evidenced by the fact that with the Draft Norms being the first attempt at the treaty making process, it was left as just norms. Furthermore, had the Draft Norms been made as a treaty and adequately enforced, this would have a material effect on colonial architecture. However, Osuntogun argues that the "UN was not ready for a binding regulatory framework for corporate human rights responsibility and accountability and that occasioned the unceremonious treatment of the UN Draft Norms".[153]

It is imperative, however, to illuminate implementation strategies which form the central issue in this study, coupled with the fact that the Draft Norms is the first attempt from the UN to regulate MNCs at an international level, regionally and nationally. As an initial step towards implementing the Draft Norms, each MNCs shall adopt, disseminate and implement internal rules of operation in compliance with the Draft Norms and thereafter must periodically report.[154] Further, each MNCs shall implement the Draft Norms in their agreement of operations with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the MNCs or business enterprise to ensure respect for and implementation of the said Draft Norms.[155]

Recognising the historical oppression of the Global South the Draft Norms state that MNCs shall provide immediate, effective and adequate reparation to those persons, entities and communities that have been negatively affected by failures to comply with the Draft Norms.[156] This can be achieved through, mechanisms such as; reparations, restitution, compensation and rehabilitation for any damage done or property taken.[157] In connection with the determination of damages in regard to criminal sanctions and

countries were moving away from racist policies. Available at https://www.sahistory.org.za/article/history-apartheid-south-africa (accessed 15 July 2018).

[153] Osuntogun A J (2015) *Global Commerce and Human Rights: Towards an African Legal Framework for Corporate Human Rights Responsibility and Accountability* (PhD Thesis at the School of Law at the University of the Witwatersrand) 157.

[154] Article 15 of the UN Draft Norms (note 143 above).

[155] *Ibid*.

[156] *Id* article 18.

[157] *Ibid.*

in all other respects, the Draft Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.[158]

Unlike the UDHR, ICCPR, and the ICESCR, the Draft Norms has entrenched reparations, restitution and compensation and this is very significant for the Global South because much of the colonial legacy still by and large determines the economic path for the Global South. However, in Africa, many peoples are yet to receive such reparations, and the so-called "post-colonial" states are still paying colonial debts.

Furthermore, Bilchitz provides that:

> "The reaction to the Draft Norms was mixed and many international human rights non-governmental organisations (NGOs) endorsed the Draft Norms. However, the business community, represented by the International Chamber of Commerce and International Organisation of Employers, was strongly opposed. Further, the Draft Norms were submitted to the Commission on Human Rights where they received largely hostile reception from many States".[159]

However, the Draft Norms represent an improvement in terms of both formulation and implementation of rights standards over earlier such attempts at the international level.[160] Therefore, the Draft Norms are still inadequate of what is required for an effective international regulatory regime for MNCs accountability.[161] The Draft Norms is moreover, considered by international law scholars as "soft law" and could also provide the basis for drafting a rights treaty on corporate social responsibility (CSR).[162] Though one may be inclined to accept the difficulty for members of the UN to agree on treaty aimed at holding MNCs accountable, it is important to reiterate the point that the difficulty is born out of political, economic considerations and the ability of global

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[158] *Ibid.*
[159] Bilchitz D (2010) "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" *SUR* Vol. 7, No. 12, 201.
[160] Deva S (2003-2004) "UN 's Human Rights Norms for Transnational Corporations and other Business Enterprise: An Imperfect Step in the Right Direction" *10 ILSA J. Int'l &Comp. L,* 495.
[161] *Ibid.*
[162] Weissbrodt D (2006) "Business and Human Rights" *U. Cin. L. Rev,* Vol. 74, No. 55, 14.

North MNCs' continual to exploit largely Global South countries as opposed to fundamental legal differences.

The Draft Norms provide for expansive provisions to ensure adequate enforcement of human rights standards against MNCs however, they are non-binding and have fallen into disuse for most part. However, the greatest travesty is the disregard of the Draft Norms by MNCs which has resulted in lip-service at best and outright rejection at worse because they affect the Global North economic growth. This is a betrayal of the "shall" in the general wording of the Draft Norms even it is just part voluntary guidelines. Finally, the language of human rights offers only standards with moderate impact on the enforcement of human rights standards against MNCs.

2.2.6 Organisation for Economic Co-operation Development (OECD) Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (hereinafter the OECD Guidelines) are part of the OECD Declaration on International Investment and Multinational Enterprises dating from 21st June 1976.[163] They were drafted at a time of rapid change in the structure and operation of MNCs, which were diversifying their activities and investing directly abroad whilst expanding into developing countries.[164] The Guidelines, by way of the voluntary and non-binding rules that they encompass, were presented as a necessary counterbalance to the protection of the rights of investors by the Organisation for Economic Co-operation and Development (OECD).[165] Given the growing impact of economic globalisation the Guidelines were revised in June 2000, notably so as to include references to the requirement of MNCs to respect human rights and combat bribery.[166]

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[163] *Ibid*; Following the adoption of the revised OECD Guidelines for Multinational Enterprises on June 27th, 2000, the OECD published a booklet containing the revised text of the Guidelines and commentaries, the procedures for their implementation, and the Declaration on International Investment and Multinational Enterprises. The official text is available in English and French, as well as in Arabic, German, Chinese, Korean, Spanish, Hungarian, Polish, Slovak, Swedish, Czech and Turkish. Other translations are available on the websites of adhering states. www.oecd.org/dataoecd/56/36/1922428.pdf (accessed 10 July 2019).

[164] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. Available at http://dx.doi.org/10.1787/9789264115415-en (accessed 19 May 2015) 3.

[165] *Ibid.*

[166] *Ibid.*

The 31 member countries of the OECD adhere to the Guidelines, as do an additional 11 other countries (e.g. Argentina, Brazil and Egypt).[167] Of the EU Member States only Bulgaria, Cyprus and Malta have yet to join.[168] Egypt remains the only African nation to have signed up to the OECD Guidelines.[169] Companies present in all adhering states, operating in or from their territories, are covered by the OECD Guidelines (including, furthermore, their operations in countries that have not adhered to the Guidelines). According to an OECD study in 2005, the territories of adhering states account for around 90% of foreign direct investment and host 97 of the top 100 largest multinational enterprises.[170]

There is 8 years between the promulgation of the Daft Norms and the OECD Guidelines. The pertinent question is, what was inadequate with the Draft Norms and does it help to compound it with other non-binding human rights documents that are aimed at humanising MNCs?. The OECD Guidelines are recommendations addressed by governments to MNCs operating in or from adhering countries.[171] They provide non-binding principles and standards for responsible business conduct in a global context and are consistent with applicable laws and internationally recognised standards.[172] The OECD Guidelines are the only multilaterally agreed and comprehensive codes of responsible business conduct that governments have committed to promoting.[173]

Although the OECD Guidelines are non-binding, they do provide a step towards an understanding of what constitutes good MNC behaviour in an increasingly global economy.[174] Moreover, they are clear that home countries of MNCs have a moral duty to ensure that the standards contained in the OECD Guidelines are maintained

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[167] *Ibid*; Australia, Austria, Belgium, Canada, Chile, Korea, Denmark, Spain, USA, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, South Africa Netherlands, Poland, Portugal, Czech Republic, Slovakia, United Kingdom, Sweden, Switzerland, Turkey (additional countries are Estonia, Israel, Latvia, Lithuania, Peru, Romania and Slovenia).

[168] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. Available at http://dx.doi.org/10.1787/9789264115415-en (accessed 19 May 2015) 3.

[169] *Ibid.*

[170] *Ibid.*

[171] *Ibid.*

[172] *Ibid.*

[173] *Ibid.*

[174] Clapham A (2010) *Human Rights Obligations of Non-State Actors* (Oxford University Press, New York) 203.

globally.[175] Given that the UK adhered to the OECD Guidelines as a member of that organisation, in future the English courts may have to pay heed to their contents when determining issues of public interest in litigation involving MNCs.[176]

The OECD Guidelines is one of the most important documents in the endeavour to efficiently regulate MNCs. The OECD Guidelines begins by laying a foundation which deals with the Declaration on International Investment and Multinational Enterprises.[177] In this regard, the OECD Guidelines provides that member States must be cognisant of the fact that international investment is of major importance to the global economy and that international co-operation can improve the foreign investment climate and thus, encourage the positive contribution which MNCs can make to economic, social and environmental progress resulting in the minimisation and resolution difficulties which might arise from their operations.[178] Thus, the benefits of international co-operation are enhanced by addressing issues relating to international investment and MNCs through a balanced framework of inter-related instruments.[179]

Compliance with domestic laws is the first obligation of MNCs.[180] The OECD Guidelines are not a substitute for and nor should they be considered to undermine domestic law and regulation.[181] This is because the OECD member states are obliged to establish National Contact Points (NCP) which has the primary responsibility to ensure the follow-up of the Guidelines at the national level.[182] While the OECD Guidelines extends beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements.[183] However, in countries where domestic laws and regulations conflict with the principles and standards of the OECD, they should seek ways to honour such principles and

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[175] *Ibid.*
[176] Muchlinski P (2001) *Multinational Enterprises and the Law* (Oxford University Press, New York 2001b) 24; see also Clapham A (2010) *Human Rights Obligations of Non-State Actors* (Oxford University Press, New York) 203.
[177] *Id* 7 of the OECD.
[178] *Ibid.*
[179] *Ibid.*
[180] *Id* 2, under concepts and principles.
[181] *Ibid.*
[182] *Černič* J L (2008) "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises" Hanse Law Review (Hanse LR) *International Law/Internationales Recht* Vol. 3, No. 1, 77.
[183] OECD *Id* 2.

standards to the fullest extent which does not place them in violation of domestic law.[184] This arrangement is unhelpful to States with a weak regulatory framework to protect rights against the MNCs.

The OECD Guidelines are not aimed at introducing differences of treatment between MNCs and domestic enterprises as they reflect good practice for all.[185] The Guidelines can also be viewed as the principal soft law tool of MNCs accountability.[186] Accordingly, MNCs and domestic enterprises are subject to the same expectations as regards their conduct wherever the Guidelines are relevant to both.[187] Furthermore, the OECD Guidelines general principles state that enterprises should take full account of established policies in the countries in which they operate and consider the views of other stakeholders.[188] Enterprises are encouraged to contribute to economic, environmental and social progress with the view of achieving sustainable development.[189] This entails supporting domestic capacity building through close co-operation with communities including business interests as well as developing the enterprise's activities in domestic and foreign markets consistent with the need for sound commercial practice.[190]

Despite the failure of many governments to set up functioning NCPs which operate within reasonable delays, Evans, the General Secretary of Trade Union Advisory Council to the OECD, points out that there are other satisfactory outcomes and thus suggests "greater use of the OECD Guidelines in the context of receipt of public subsidies, access to export credit guarantees, the drafting of bilateral investment treaties, collective bargaining and workers' pension and saving funds".[191]

Clapham provides that the OECD Guidelines framework represents a potentially useful regime to hold MNCs accountable for failure to respect the rights in the UDHR

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[184] *Ibid.*
[185] *Ibid.*
[186] Morgera E (2006) "An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review" *The Georgetown Int'L Envtl. Law Review* Vol. 18, 752.
[187] OECD *Id* 5.
[188] *Id* 19.
[189] *Ibid.*
[190] *Ibid.*
[191] Clapham (note 174 above) 209.

and for any complicity in other rights violations.[192] The prospects for success will depend in part on the attention that is given to ensuring that NCPs feel accountable beyond the business sector.[193]

De Schutter demonstrate the concept of an investment nexus as interpreted by the Dutch NCP – Chemie Pharmacie Holland BV[194] in the following manner:

> "In 2003, the Institute for South Africa in the Netherlands (Niza & Co.) brought together a number of NGOs, including Milieudefensie and Oxfam Novib, to file a complaint with the Dutch NCP against the company Chemie Pharmacie Holland BV (CPH). It was accused of having contributed, via its US business partner Eagle Wings Resources International (EWRI), to illegally exploiting mineral resources at the time of the conflict in eastern Democratic Republic of the Congo between 1998 and 2002. Several principles of the Guidelines had allegedly been violated by CPH; namely Chapter II, sections 10 and 11; Chapter IV, sections 1(b) (c) and 4 (b) and Chapter V, sections 2 and 3".

The relationship between CPH and EWRI was that the offices of EWRI were situated in Bukavu (in eastern DRC), Bujumbura (Burundi) and in Kigali (Rwanda). Suppliers were paid following confirmation of small shipments of minerals made to the offices of EWRI. EWRI then sent the shipments to Kigali. CPH then took over the transportation of the minerals from Kigali to their final destinations via Rotterdam. CPH was also responsible for financing the transactions: the money transfer from Kigali to Bujumbura being made by order of EWRI, who then proceeded to pay the suppliers. EWRI retained sole ownership over the goods as well as entrepreneurial risk over the commodities. CPH hired a controller agency to inspect the shipments at the request of EWRI. The relationship between EWRI and CPH lasted from October 1999 until March 2002.

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[192] *Id* 211.
[193] *Ibid.*
[194] De Schutter (note 12 above) 347.

In May 2004 the NCP published its decision. According to the NCP, there existed no investment like relationship between CPH and EWRI, nor between CPH and EWRI's suppliers.

The reasons given were:

(a) The duration of the partnership between EWRI and CPH: 2 1/2 years.
(b) The nature of the influence exercised by CPH over EWRI: even if CPH had acted as a facilitator of EWRI's operations by way of logistics and through financing, it was never the owner of the goods in question and had worked only on a commission basis. The controller responsible for inspecting shipments had been hired by CPH by order of EWRI.

Novib and Niza expressed their displeasure with the findings in a press release on 15th June 2004. If, as had been claimed by the NCP, the business relationship between CPH and EWRI could only be regarded as a trade relationship and not as an investment relationship, this would reflect a misinterpretation of the OECD Guidelines in respect of the provisions relating to supply chains. The NGOs stated that there should be a distinction drawn between the relationship between a parent company and its subsidiary and a relationship linking a company with its suppliers. In the latter case, the OECD Guidelines may still be applicable in cases where there exists no direct influence (i.e. in the absence of a direct investment nexus).

Furthermore, the NCP recognised that CPH could have done more to get information on the conditions under which mineral resources were being sourced, and yet it refused to apply the OECD Guidelines in this respect. For Novib and Niza the sheer fact of embarking, over an extended period, upon a regular stream of business transactions (as was the case between CPH and its partners) should constitute a conscious investment in the commercial relations between them. By relying only on their services, CPH explicitly assumed the risk of becoming dependent on its suppliers. All these factors should have led the NCP to acknowledge the existence of an investment nexus between these trading partners."

In addition, hella aptly illustrate the problem of human rights language pertaining to enforcement with regard to MNCs:[195]

> "The OECD Guidelines establish national contact points to deal with issues pertaining to corporate conduct. *Global Witness v Afrimex (UK) Ltd*[196] is an example of how the NCPs deal with the corporate social responsibilities of MNCs. The matter involved a complaint brought by Global Witness who alleged that Afrimex Ltd, a British MNCs, had breached the OECD Guidelines when it bribed rebel groups in the Democratic Republic of Congo, and also purchased various minerals from mining MNCs in the DRC that employed child and forced labour. The British NCP, in its official findings, came to the conclusion that Afrimex had contributed to the engagement of child and forced labour".

Also, it was found to have failed to adequately ensure that its business operations complied with occupational health and safety standards. In doing so, Afrimex breached the OECD Guidelines. The NCP delivered an official statement that, after approval by the Minister for Trade and Consumer Affairs, would be placed in the public libraries of the House of Commons and the House of Lords. The assumption could be made that this was done to deter corporations that do not wish to incur public disapproval or damage to their reputations. No further steps were taken against Afrimex. Hence, a major concern with the OECD Guidelines is that, because they are voluntary, they are not legally enforceable. This is a limitation expressly provided in the OECD Guidelines themselves."[197]

2.2.7 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises

The International Labour Organization (ILO) was founded in 1919.[198] Since 1946 the ILO has functioned as a specialised agency of the United Nations, responsible for

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[195] Chella J (2012) *The Complicity of Multinational Corporations in International Crimes: An Examination of Principles* (PhD thesis, Bond University) 47.
[196] Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: *Global Witness v Afrimex (UK) Ltd* (28 August 2008), in Chella J (2012) *The Complicity of Multinational Corporations in International Crimes: An Examination of Principles* (PhD thesis, Bond University) 47.
[197] Chella (note 195 above) 48.
[198] De Schutter (note 12 above) 72.

developing and overseeing international labour standards.[199] It has a unique tripartite structure that enables the representatives of workers' and employers' organizations to take part in all discussions and decision-making, on an equal footing with governments.[200] The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (hereinafter referred to as the Declaration) was adopted by the Governing Body of the International Labour Office on 16 November 1977 and was amended in November 2000.[201] Like the OECD Guidelines, the Tripartite Declaration contains principles of relevance to both MNCs and national enterprise.[202]

Declarations are statements of agreement on basic norms and conducts, however, this should not be undermined as far as their ability to culminate in accepted as strong legal instruments.[203] Where MNCs are already bound to respect certain legal obligations, their inclusion is declaratory and serve as a reminder of those existing obligations.[204] Clapham 's assertion in this regard cannot be sustained because by virtue of the Declaration being a declaration means that it does not have legal force and is thus unenforceable.[205] Notably, there is specific reference to rights which state that "all the parties concerned by this Declaration should respect the UDHR and the corresponding international Covenants adopted by the General Assembly of the United Nations".[206]

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[199] *Ibid.*
[200] *Ibid.*
[201] Preamble of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises *(adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session(March 2006).*
[202] Clapham (note 171 above) 213; see also De Schutter O (2010) "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights* 76; "List of international labour Conventions and Recommendations referred to in the Tripartite Declaration Principles concerning Multinational Enterprises and Social Policy", Annex, in ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 4th edition, 2006, article 7. The Declaration was approved by the Governing Body of the ILO, and is intended to give MNEs, governments and employers' and workers' organizations basic guidance in the domain of employment, training, working conditions and life and industrial relations. It refers to many ILO conventions and recommendations. The Declaration sets out principles that governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a voluntary basis.
[203] Gunther F. Handl G F, W. Michael Reisman W M, Bruno Simma B, Pierre Marie Dupuy P M and Christine Chinkin C (1988) "A Hard Look at Soft Law" *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 82, 371.
[204] Clapham (note 174 above) 213.
[205] *Ibid.*
[206] *Ibid.*

Moreover, Islam and McPhail states:

> "Business leaders mounted critiques, not only of the Norms document itself, but also of any expansion of the concept of corporate liability for rights responsibilities that went beyond the current model of self-regulation through corporate codes of conduct, social responsibility policies and the like. Partly as a consequence of this aggressive lobbying, the Norms have effectively been sidelined. Therefore, this Declaration is but just another addition from the labour regulatory sector which is bound to be given little attention at best by the MNCs".[207]

The implementation of the Declaration first focuses on the Sub-Committee on MNCs.[208] This sub-Committee conducts a periodic survey whereby member states and national employees' and workers' organisations provide information on their experience in implementing the Declaration.[209] The second mechanism follow-up activity mirrors the OECD clarifications procedure.[210] There has been a procedure for interpretation of the provisions of the Declaration since 1981.[211] In order for this procedure to be applicable, there has to be a disagreement on the meaning of the Declaration which arises from an actual situation.[212]

The third follow-up activity is promotion and studies.[213] According to the replies received in June 2003 survey, it would seem that Declaration is still unknown in many countries and that many organisations feel unqualified to report on its implementation.[214] Without some sort of grievance procedure with the possibility of reparation or some other meaningful remedy, it seems unlikely that the Declaration

[207] Islam M A and McPhail K (2011) "Regulating for corporate human rights abuses: The emergence of corporate reporting on the ILO's human rights standards within the global garment manufacturing and retail industry" *Critical Perspectives on Accounting* Vol. 22, 791.
[208] Clapham (note 174 above) 216.
[209] Ibid.
[210] *Id* 217.
[211] *Ibid.*
[212] *Ibid.*
[213] *Ibid.*
[214] *Id* 218.

will capture the imagination of those who are most affected by the breaches of its principles.[215]

De Schutter summarises the moderate contribution of the Declarations to the enforcement of human rights against MNCs:[216]

> "Although an interpretation procedure was set up to clarify the content of the Declaration in cases of disagreement between parties, it has been dormant for many years. This means that it is not very useful as a direct recourse strategy for victims of violations of human rights by MNCs. The Declaration reflects an agreed understanding that, whilst ILO Conventions and recommendations address the responsibilities of governments and are intended for application by governments, many of their underlying principles can also be applied by MNCs. This is arguably one of the Declarations' most important contributions to the corporate responsibility debate. Over the years, the MNCs Declaration has provided an unambiguous refutation of the argument sometimes made by business that, as ILO Conventions and Recommendations address governments, they are not for application to MNCs activities. Some stakeholders, especially unions, would like the ILO to revise the MNE Declaration".[217]

2.2.8 The UN Global Compact

Launched in July 2000, the UN Global Compact is a leadership platform for the development, implementation and disclosure of responsible and sustainable MNCs policies and practices.[218] Endorsed by chief executives, it seeks to align MNCs operations and strategies everywhere with ten universally accepted principles in the areas of rights, environment and anti-corruption.[219] With nearly 8,000 corporate participants in over 140 countries, the UN Global Compact is the world's largest voluntary corporate sustainability initiative.[220]

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[215] *Ibid.*
[216] De Schutter O (note 12 above) 84-85.
[217] *Ibid.*
[218] UN Global Compact available on https://www.unglobalcompact.org/. (accessed 25 July 2017).
[219] *Ibid*; see also Chella (note 195 above) 52.
[220] *Ibid*.

The UN Global Compact is not a regulatory instrument, but rather a voluntary initiative that relies on public accountability, transparency and disclosure to complement regulation and to provide space for innovation and collective action.[221]

Despite its success, the Global Compact has flaws which Bilchitz outlines as follows:

(a) Firstly, it is non-binding and has no force in international law;
(b) Secondly the provisions are vague and expressed in an abstract language;
(c) Thirdly, the Compact relies on the goodwill of the companies and does not have any monitoring mechanisms and,
(d) Finally, it is often merely used by companies as a public-relations exercise."[222]

MNCs from any industry sector, except those MNCs involved in the manufacture, sale *etc*. of anti-personnel land mines or cluster bombs, MNCs that are the subject of a UN sanction or that have been blacklisted by UN Procurement for ethical reasons.[223] Private military MNCs and tobacco MNCs, often excluded by other initiatives or ethical funds, are allowed to become participants.[224] To participate, a company simply sends a letter signed by their CEO to the UN Secretary General in which it expresses its commitment to (i) the UN Global Compact and its ten principles; (ii) engagement in partnerships to advance broad UN goals; and (iii) the annual submission of a Communication on Progress (COP).[225]

MNCs joining the United Nations Global Compact commit to implement the ten principles within their sphere of influence. They are expected to make continuous and comprehensive efforts to advance the principles wherever they operate, and integrate

[221] *Ibid.*
[222] Mnyongani (note 145 above) 93.
[223] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 481.
[224] *Ibid.*
[225] *Ibid.*

the principles into their business strategy, day-to-day operations and organisational culture.[226]

2.2.8.1 The Ten Principles of the United Nations Global Compact

The ten principles covers mainly three areas of concern namely; “human rights”, environmental issues, and anti-corruption:

Rights

- Principle 1: businesses should support and respect the protection of internationally -proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses. Labour Standards;
- Principle 3: businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies;

Anti-Corruption

- Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.

[226] *Ibid.*

The utilisation of these principles is evidenced by Shell's *Management Primer* as illustrated below:

> *"*The responsibilities of Shell companies, as articulated in the business principle, include the promotion of equal opportunity and non-discrimination in employment practices; ensuring that freedom of association and the right to organise are respected, guaranteeing that the Shell companies do not use slave labour, forced labour or child labour; ensuring that healthy and safe working conditions are provided; that the security of employment is created and that the rights of indigenous people and communities are respected".[227]

MNCs are encouraged, within their capacity to take action, ensure that the Global Compact Principles are implemented and respected.[228] This must take place within areas where MNCs has control, such as on operation sites or in defining employment conditions, the MNCs has full responsibility for meeting rights standards.[229]

However, since its creation, the Global Compact has been criticised by many civil society organisations for offering MNCs an easy way of "green-washing or bluewashing," as participants are listed on the UN website, can request permission to use a version of the Global Compact logo and can represent their company as respecting the 10 principles without having to prove that they act in accordance with these principles.[230] In 2004 and as a result of numerous criticisms against the Global Compact allowing MNCs which blatantly violate the principles to participate in the initiative, and to restore its credibility, the Global Compact adopted "integrity measures".[231] In December 2008, the UN Secretary General, Ban Ki-Moon encouraged the Global Compact "to further refine the good measures that have been taken to strengthen the quality and accountability of the corporate commitment to the

[227] Clapham (note 174 above) 219.
[228] Mnyongani (note 145 above) 93.
[229] *Ibid.*
[230] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 481.
[231] *Ibid.*

Compact. As we move forward, it will be critical that the integrity of the initiative and the credibility of this organisation remain beyond reproach."[232]

The practicality of the Global Compact came to the for when calls for Nestlé to be expelled from the Global Compact was made.[233] In June 2009, a report was submitted to the Global Compact Office alleging that Nestlé 's reports were misleading and that Nestlé used its participation in the initiative to divert criticism so that abuses of human rights and environmental standards can continue.[234] Concerns raised by the International Labour Rights Fund, trade union activists from the Philippines, Accountability International and Baby Milk Action include:[235]

(a) aggressive marketing of baby milks and foods and undermining of breastfeeding, in breach of international standards;
(b) trade union busting and failing to act on related court decisions;
(c) failure to act on child labour and slavery in its cocoa supply chain;
(d) exploitation of farmers, particularly in the dairy and coffee sectors;
(e) environmental degradation, particularly of water resources.

The report claims that Nestlé:

> "Used the UN Global Compact to cover up its malpractice so that abuses could continue. The Global Compact Office dealt with this matter under its integrity measures dialogue facilitation process. The matter was forwarded to the company in question and both the company and person raising the matter exchanged correspondence. According to the Global Compact Office, the company has indicated that it remains willing to engage in further dialogue about the matters raised and therefore Nestlé has not been designated as "non-communicative". No decision has been made public as to whether Nestlé will be removed from the Global

[232] *Ibid.*
[233] *Id* 485. See also Nestlé Critics, Presse release, www.nestlecritics.org/index.php?option=com_content &task=view&id=61&Itemid=79 (accessed 10 July 2019).
[234] *Ibid.*
[235] *Ibid.*

> Compact. In the meantime, activists denounced that Nestlé remain one of the main sponsors of the Global Compact Summit have held in June 2010".[236]

2.2.9 United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights are the first universally accepted global framework addressing and aiming to reduce corporate-related rights abuses.[237] Regional organisations such as the Council of Europe, the European Union, and the Organisation for American States have expressed support for the Guiding Principles.[238] They were developed as a means to implement the UN's "Protect, Respect and Remedy" Framework that had been drawn up in a six year process of extensive consultations with governments and stakeholder groups, including NGOs and businesses, and were endorsed by the Human Rights Council in June 2011.[239] The work was led by Harvard Professor Dr John Ruggie, who served as the UN Secretary-General's Special Representative for Business and Human Rights from 2005-2011.[240]

Mnyongani rightly points that:

> "Having been appointed after the failure to adopt the Draft Norms, and aware of the concerns that led to the non-adoption of the Draft Norms, there was no way that Ruggie was going to steer the discussions to the same direction of imposing direct obligations on MNCs. Instead, Ruggie designed a conceptual and policy framework that is premised on the differentiated but complimentary responsibilities of the obligations of the state and those of corporates."[241]

The Ruggie Framework comprises of three core principles:

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[236] De Schutter (note 230 above) 485.
[237] Ruggie J (2011) "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' UN Doc.A/HRC/17/31, 1.
[238] Dugard J (2018) 5 ed et al *International Law – A South African Perspective* (Juta Publishers, South Africa) 483.
[239] Ruggie (note 237 above) 1.
[240] *Ibid.*
[241] Mnyongani (note 145 above) 96.

> "The first principle is the state's duty to protect against rights abuses by third parties, including MNCs; the second principle is corporate responsibility to respect rights; and the third principle is the need for more effective access to remedies.[242] These three principles form a complementary whole in that each supports the others in achieving sustainable progress.[243]

2.2.9.1 State Duty to Protect

Governments have a duty to foster a corporate cultures in which respecting rights is an integral part of doing business.[244] This would reinforce steps MNCs themselves are required to take to demonstrate their respect for rights.[245] Policy alignment is an essential component for ensuring that promotion and protection of rights is undertaken efficiently.[246] Bilchitz notes that the "duty to promote and protect becomes evident that this forms part of the state's function as an enforcement agent of international law, this means that the state is itself tasked with ensuring that other entities such as MNCs understand and comply with their responsibilities concerning fundamental rights".[247]

Effective guidance and support at the international level would help states achieve greater policy coherence.[248] The rights instruments can play an important role in making recommendations to states on implementing their obligations to protect rights *vis-à-vis* MNCs activities.[249] The Office of the High Commissioner for Human Rights (OHCHR) can contribute to capacity-building in states that may lack the necessary tools by providing technical advice.[250] This is particularly important for states with weak legal systems, political instability and are in conflict zones.

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[242] Ruggie (note 237 above) 1.
[243] *Ibid.*
[244] *Id* 10.
[245] *Ibid*.
[246] *Ibid.*
[247] Bilchitz D (2010) "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations" *12 SUR – Int'l J. on Hum Rts,* 203.
[248] Ruggie (note 237 above) 13.
[249] *Ibid.*
[250] *Ibid.*

Endeavours have been made in these situations, where the use of Security Council sanctions targeting certain MNCs, who are deemed to have contributed to conflicts in the Democratic Republic of the Congo, Sierra Leone and Liberia, demonstrated a restraining effect.[251] A report by the Secretary-General recommends that this enforcement tool be continued and improved.[252] Furthermore, the Secretary-General notes, States need to do more to "promote conflict-sensitive practices in their business sectors".[253]

The above cannot be realised because as Deva puts it:

> "Rather than attempting to develop robust measures to secure corporate accountability for rights violations by the MNCs, the focus of the Guiding Principles with regard to UN Norms shifted in putting in place whatever was acceptable to the Norms antagonists. In other words, the consensus rhetoric partly explains why the Guiding Principles have treated rights too lightly."[254]

Finally, the rights regime rests upon the bedrock role of states.[255] That is why the duty to protect is a core principle of the business and rights framework.[256] But meeting business and rights challenges also requires the active participation of business directly.[257] MNCs exploit the weak legal systems of states who are unable to control the power of the MNCs, which results in the continual dominance and rights violations of citizens.

2.2.9.2 The Corporate Responsibility to Respect

In addition to compliance with international, regional and national laws, the baseline responsibility of companies is to respect rights.[258] The scope of this duty he claims is

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[251] *Id* 14.
[252] *Ibid.*
[253] *Ibid.*
[254] Deva S (2013) "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Deva S and Bilchitz D *Human Rights Obligations: Beyond the Corporate Responsibility to Respect* (Cambridge University Press) 97-80.
[255] Ruggie (note 237 above) 14.
[256] *Ibid.*
[257] *Ibid.*
[258] *Id* 16.

defined largely by social expectation and the notion of a company's social license to operate.[259] Grave failure for MNCs has ended up with adverse public opinion, comprising (exploitation) employees, communities, consumers, civil society, as well as investors and law suits.[260]

The MNCs responsibility to respect rights exists independently of States' duties. Therefore, there is no need for distinction between "primary" state and "secondary" MNCs obligations.[261] Further, because the responsibility to respect is a baseline expectation, MNCs cannot compensate for rights infringement by performing good deeds elsewhere.[262] Finally, Ruggie states that "doing no harm" is not merely a passive responsibility for MNCs, but entail positive steps - for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.[263]

The Guiding Principles provide that to fulfil the responsibility to respect rights by MNCs requires due diligence.[264] The due diligence concept describes the steps a MNCs must take to become aware of, prevent and address adverse rights impacts.[265] However, this is not a new concept of due diligence can be traced back to the U.S. Securities Act of 1933, which provided for a due diligence defence for broker-dealers when accused of inadequate disclosure of material information to investors.[266] Comparable processes are typically already embedded in because in many countries, MNCs are legally required to have information and control systems in place to assess and manage financial and related risks.[267]

Due diligence entails a consideration of the three factors:

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[259] Bilchitz (note 247 above) 204.
[260] Ruggie (note 237 above) 16.
[261] *Id* 17.
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.*
[265] *Ibid.*
[266] Taylor M B, Zandvliet L and Forouhar M (2009) "Due Diligence for Human Rights: A Risk-Based Approach." *Corporate Social Responsibility Initiative Working Paper* No. 53. Cambridge, MA: John F. Kennedy School of Government, Harvard University. 2.
[267] Ruggie (note 237 above).

> "Firstly, the country contexts in which their business activities take place, to highlight any specific rights challenges they may pose. Secondly is what rights impacts their own activities may have within that context - for example, in their capacity as producers, service providers, employers, and neighbours. Thirdly is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances".[268]

Sphere of influence remains a useful mechanism for MNCs in the assessment about their rights impacts beyond the workplace and in identifying opportunities to support rights, which is what the Global Compact seeks to achieve.[269] However a more robust approach is required to define the parameters of the responsibility to respect and the MNCs' due diligence component.[270]

The MNCs' responsibility to respect rights includes avoiding complicity or indirectly causing situations which will result in rights abuse.[271] The concept has legal and non-legal pedigrees, and the implications of both are important for companies.[272] Complicity refers to indirect involvement by MNCs in rights abuses where the actual harm is committed by another party, including governments and non-State actors.[273] Due diligence can help MNCs avoid complicity.[274] Moreover, Bilchitz, correctly states that what the Guidelines envisages for MNCs obligations, is the narrow focus of corporate obligations to the largely negative task of avoiding harm to fundamental rights, whether it is the corporation's own actions or whose it is associated with – rather than requiring that MNCs assume positive obligations actively to take steps to assist in the realisation of those rights.[275]

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[268] *Ibid.*
[269] *Id* 19.
[270] *Ibid*.
[271] *Id* 20.
[272] *Ibid.*
[273] *Ibid.*
[274] *Ibid.*
[275] Bilchitz (note 247 above) 207.

2.2.9.3 Access to Remedies

Effective grievance mechanisms play an important role in the State duty to protect, in both its legal and policy dimensions, as well as in the corporate responsibility to respect.[276] State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses.[277] Providing access to remedy does not presume that all allegations represent real abuses or bona fide complaints.[278]

Judicial mechanisms are often under-equipped or simply non-existent to provide effective remedies for victims of MNCs abuse.[279] Victims face particular challenges when seeking personal compensation or reparation as opposed to more general sanction of the corporation through a fine or administrative remedies.[280] They may lack a basis in domestic law on which to found a claim.[281] Even if they can bring a case, political, economic or legal considerations may hamper enforcement.[282]

Some complainants have sought remedy outside the state where the harm occurred, particularly through home state courts, but have faced extensive obstacles.[283] Costs may be prohibitive, especially without legal-aid, non-citizens may lack legal standing and claims may be barred by statutes of limitations.[284] In Africa or in matters concerning "indigenous people" MNCs in extractive industry fail to conduct their activities in a culturally sensitive manner, impairing the ability of "indigenous people living in the area to preserve their way of life.[285] Matters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary.[286] In common law countries, the court may dismiss the case based on *forum non convenience* grounds - essentially, that there is a more appropriate forum

[276] Ruggie (note 237 above) 22.
[277] *Ibid*.
[278] *Ibid.*
[279] Id 23.
[280] *Ibid.*
[281] *Ibid.*
[282] *Ibid.*
[283] *Ibid.*
[284] *Ibid.*
[285] Kinley D and Tabaki J (2004) "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" *Virginia Journal of International Law* Vol. 44, No. 4. 987.
[286] Ruggie (note 237 above) 23.

for it.[287] Even the most independent judiciaries may be influenced by governments arguing for dismissal based on various "matters of state".[288] These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce.[289]

States have a duty to strengthen judicial capacity to adjudicate complaints and enforce remedies against all MNCs operating or based in their territory, while also protecting against frivolous claims.[290] States should address obstacles to access to justice, including for foreign plaintiffs - especially where alleged abuses reach the level of widespread and systematic rights violations.[291] Extraterritoriality is not necessarily the most suitable or effective and efficient framework, but merely one of the options which could, and should, be tried by home states to tame the activities of MNCs.[292] The evolution of extraterritorial regulation of MNCs should be viewed as part of a broader spectrum, or an integrated structure, which combines multiple regulatory models.[293] As the extraterritorial model of MNCs regulation is essentially a state-centered method of regulation, it faces inherent limitations as a consequence of MNCs' nature, structure, influence and modus operandi.[294]

Currently, the primary means through which grievances against MNCs play out are litigation and public campaigns.[295] For a company to take a bet on winning lawsuits or successfully countering hostile campaigns is at best optimistic risk management.[296] An effective grievance mechanism is part of the corporate responsibility to respect.[297] Like the Draft Norms, the ILO, and the OECD, the UNGPs are neither legally binding nor do they introduce new international law on Business and Human Rights.

As Ruggie stated in his report to the UN Human Rights Council (UNHRC), that:

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[287] *Ibid.*
[288] *Ibid.*
[289] *Ibid.*
[290] *Ibid.*
[291] *Ibid.*
[292] Deva S (2004) "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'" *Melbourne Journal of International Law* Vol. 5, 63.
[293] *Ibid.*
[294] *Ibid.*
[295] Ruggie (note 237 above) 24.
[296] *Ibid.*
[297] *Ibid.*

> "Normative contribution lies in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it could be improved".[298]

Today, the UNGPs enjoy wide recognition and support from the business and civil society communities.[299] Some of the UNGP's core provisions have also been incorporated into key international documents, including the new rights chapter in the OECD Guidelines for Multinational Enterprises and ISO 26000, and in strategies adopted by international institutions, such as the new Sustainability Policy of the International Finance Corporation, the EIB's Environment and Social Handbook and the European Commission's policy on Corporate Social Responsibility.[300] Furthermore, promote the dissemination and implementation of the UNGPs, the UN Human Rights Council established a Working Group on Human Rights and Transnational Corporations and other Enterprises in 2011, renewing the mandate in 2014.[301]

However, most of the focus of the debate around the enforcement of human rights standards against MNCs has been on the responsibilities of the state where the parent MNCs is operating and where the harm occurs.[302] Dine, however, suggests that even the home state of parent-MNCs (the state where the parent corporation is incorporated or has its headquarters) has a duty to ensure the protection of rights through regulation of the "way the parent exercises control over the subsidiary".[303] Both proposed mechanism have failed because the home state thrives on the exploitation of weak legal systems and parent MNCs are only interested in amassing profits which in turn benefits their state.

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[298] Council of the European Union, "commission staff working document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2016) 3.
[299] *Ibid.*
[300] *Ibid.*
[301] *Ibid.*
[302] Clapham (note 174 above) 267.
[303] *Ibid.*

2.2.10 Open-Ended Intergovernmental Working Group (OEIGWG)- Chairmanship Revised Draft on Legally Binding Instrument To Regulate, in International Human Rights Law, The Activities of Transnational Corporations and other Business Enterprises

On 26 June 2014, the United Nations Human Rights Council (HRC) adopted Resolution 26/9 establishing an Open-Ended Intergovernmental Working Group on a Legally Binding Instruments on MNCs and other business enterprises (OBEs) with Respect to Human Rights -OEIGWG with the mandate to "elaborate on an international legally binding instrument to regulate in international human rights law, the activities of MNCs and OBEs".[304]

The first and second sessions of the open-ended intergovernmental working group on MNCs and OBEs with respect to human rights (OEIGWG) were dedicated to conducting constructive deliberations on the content, scope, nature and form of a future international instrument to regulate, in international human rights law, the activities of MNCs and other business enterprises.[305] During the third session, the Working Group discussed elements for a draft legally binding instrument prepared by the Chairperson-Rapporteur of the OEIGWG took into consideration the discussions held during the first two sessions.[306]

Based on these previous sessions, as well as a series of open informal consultations held in 2018, the Permanent Mission of Ecuador, on behalf of the Chairmanship of the

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[304] Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. available at https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/session4/pages/session4.aspx (accessed 20 June 2019); see also De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 8, At the June 2014 Human Rights Council session, a resolution establishing an Inter-Governmental Working Group (IGWG) to provide an international legally-binding instrument was also adopted, even though with a weaker political mandate as the Council was divided. The IGWG convened for the first time before the 30th Human Rights Council session (September 2015), and thereafter, meet for one week annually for an indefinite duration.

[305] Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. available at https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/session4/pages/session4.aspx (accessed 20 June 2019); The first two sessions were dedicated to open deliberations about the format, scope and content of the future instrument, and a document with elements of the treaty was presented to the third session in 2017. The fourth session of the OEIWG opens on 15 October with a zero draft of a treaty prepared by the Working Group Chairperson on the table for discussion.

[306] *Ibid.*

OEIGWG, prepared a Zero Draft legally binding instrument to regulate, in international human rights law, the activities of MNCs and OBEs, as well as a Zero Draft optional protocol to be annexed to the Zero Draft legally binding instrument.[307] The draft treaty served as the basis for negotiations during the fourth session of the OEIGWG which took place from 15 to19 October 2018.[308]

There is now a report from the fourth session which will be discussed below which was published on the 17th July 2019.[309] The preamble of the Revised Draft provides that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the state, and that states must protect against human rights abuse by third parties, including MNCs, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law.[310]

The purpose of this (Legally Binding Instrument) is:[311]

(a) To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities;
(b) To prevent the occurrence of such violations and abuses, and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities;
(c) To promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses.

Article 4 of the OEIGWG Draft provides a plethora of provisions with regard to the rights of victims. Some of the provisions includes the victim's right to life, dignity,

[307] *Ibid.*
[308] *Ibid.*
[309] Revised Draft of proposed binding treaty on business & human rights available at https://www.business-humanrights.org/en/revised-draft-of-proposed-binding-treaty-on-business-human-rights (accessed 11 September 2019).
[310] Preamble of the Open-Ended Intergovernmental Working Group (OEIGWG)- Chairmanship Revised Draft.
[311] Article 1(a)-(c) of the Open-Ended Intergovernmental Working Group (OEIGWG)- Chairmanship Revised Draft.

access to justice, restitution, compensation, and victims shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties.[312]

Prevention is also one of the key mechanism suggested for dealing with MNCs' accountability by identifying and assessing any actual or potential human rights violations or abuses that may arise from their own business activities, or from their contractual relationships; carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, including those of a transnational character etc.[313] Moreover, in setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), state parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law.[314]

The OEIGWG further sets parameters upon which legal liability can be imputed to MNCs in terms of article 6(1) which provides that state parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character. Liability of legal persons shall be without prejudice to the liability of natural persons and Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts.[315]

Jurisdiction has been the most contested issue with respect to enforcement of human rights standard against MNCs and therefore the regurgitation below is warranted:

> Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in

[312] *Id* Article 4(1)-(8).
[313] *Id* Article 5.
[314] Article 5(5) Open-Ended Intergovernmental Working Group (OEIGWG)- Chairmanship Revised Draft.
[315] *Id* Article 6(2)-(3).

violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:[316]

(a) such acts or omissions occurred; or
(b) the victims are domiciled; or
(c) the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.

A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its:[317]

(a) place of incorporation; or
(b) statutory seat; or
(c) central administration; or
(d) substantial business interests.

Article 11 calls upon international corporation in good faith to enable the implementation of commitments under this (Legally Binding Instrument) and the fulfilment of the purposes of this (Legally Binding Instrument). Closely linked to the international corporation is the consistency with international law which provides that state parties must carry out their obligations under this (Legally Binding Instrument) in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of non-intervention in the domestic affairs of other states.[318]

Article 12(3) provides that nothing in the present (Legally Binding Instrument) shall affect any provisions that are more conducive to the respect, promotion, protection and fulfilment of human rights in the context of business activities and to guaranteeing

[316] *Id* Article 7(1).
[317] *Id* Article 7(2).
[318] Article 12(1) of the Open-Ended Intergovernmental Working Group (OEIGWG)- Chairmanship Revised Draft.

access to justice and remedy to victims of human rights violations and abuses in the context of business activities which may be contained:

(a) In the domestic legislation of a State Party; or
(b) In any other regional or international, treaty or agreement in force for that State.

The implementation of human rights instruments dealing with MNCs begins with state parties taking all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure effective implementation of this (Legally Binding Instrument).[319] Further, In implementing this (Legally Binding Instrument), State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.[320]

When signing, ratifying, accepting, approving or acceding to this (Legally Binding Instrument), or at any time thereafter, a State Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any State Party accepting the same obligation:[321]

(a) Submission of the dispute to the International Court of Justice;
(b) Arbitration in accordance with the procedure and organization mutually agreed by both State Parties.

The proposed Revised Draft is commendable and it is the right step towards a treaty that may be useful in holding MNCs accountable for human rights violations. However, the problem of human rights language as is evident in the above mentioned Revised Draft is that all the “promises” of holding MNCs accountable are already covered in

[319] *Id* Article 14 (1).
[320] *Id* Article 14 (4).
[321] Article 16 (2) of the Open-Ended Intergovernmental Working Group (OEIGWG)- Chairmanship Revised Draft.

the Constitutions of many countries including South Africa, Nigeria and the DRC. Therefore, the remaining question becomes, if these protection of dignity to victims and compensation for damages suffered at the hands of a juristic person, just to name a few are covered at the UN, regional human rights and domestic – what then becomes the stumbling block to holding MNCs accountable especially those operating in the Global South?

The argument herein made is that as much as a treaty will become a significant step towards consistency in applying international human rights law in holding MNCs accountable, the problem stems from the dependency syndrome between the Global North and the Global South. Global economy as it will be elaborated on in chapter four shows that the profitability of MNCs trumps human rights language. Moreover, the colonial-imperial-capitalist structure that shapes the relationship between the Global South and Global North is antagonistic to the human rights language and it would still achieve minimal results even if the human rights language was an effective mechanism to hold MNCs accountable.

PART B

2.3 LITERATURE REVIEW ON CURRENT DEVELOPMENTS IN BUSINESS AND RIGHTS

Part B deals with literature review on business and human rights. The purpose of this part, is to critically asses the past-present-future discourse within the business and human rights especially pertaining to enforcing human rights standards against MNCs. The exploration of the literature review is aimed at critically analysing the first research question which seek to ascertain whether the human rights language is an efficient mechanism to hold MNCs accountable. Secondly, to critically assess the impact of colonialism in shaping the landscape of enforcements of human rights standards against MNCs which is aimed at answering the second question in part it will be mainly dealt with in chapter four and five.

There is one out of the three basic foundation which are interrelated of TWAIL which will be assisting in this part as a tool of analysis for firm grasp of the enforcement of

human rights against MNCs. Therefore, Part B not only does it highlight the literature of business and human rights but also seeks to understand deconstruct, and unpack the uses of human rights language as a medium for the creation and perpetuation of a racialised hierarchy of international norms and institutions that sub-ordinate the Global South to the Global North in line with the TWAIL, CRT, Post-colonial, and Political economy approach.[322]

It is important to not especially with respect to the second question of the thesis that the history of the MNCs is linked with the history of colonialism.[323] Many of the first MNCs were commissioned at the behest of the European monarchs in order to conduct expeditions. Many of the colonies not held by Spain or Portugal were under the administration of some of the world's earliest MNCs. One of the first arose in 1660: The East India Company, founded by the British, It was headquartered in London, and took part in international trade and exploration, with trading posts in India. Other examples include the Swedish Africa Company, founded in 1649 and the Hudson's Bay Company, which was incorporated in the 17th century.[324]

Mills best describes better the negation of colonialism better in human rights language that permeates even within the enforcement of human rights standards against MNCs in the following passage:

> "White supremacy is the unnamed political system that has made the modern world what it is today. You will not find this term in introductory, or even advanced, texts in political theory. A standard undergraduate philosophy course will start off with Plato and Aristotle, perhaps say something about Augustine, Aquinas, and Machiavelli, move on to Hobbes, Locke, Mill, and Marx, and then wind up with Rawls and Nozick. It will

[322] Mutua M & Anghie A (2000) "What is TWAIL?" *Proceedings of the Annual Meeting (American Society of International Law* (Cambridge University Press), Vol. 94 (April 5-8) 31, TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that sub ordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholar ship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.

[323] Rise of the Multinational Corporation available at investopia.com (accessed 10 July 2019).

[324] Rise of the Multinational Corporation available at investopia.com (accessed 10 July 2019).

> introduce you to notions of aristocracy, democracy, absolutism, liberalism, representative government, socialism, welfare capitalism, and libertarianism. But though it covers more than two thousand years of Western political thought and runs the ostensible gamut of political systems, there will be no mention of the basic political system that has shaped the world for the past several hundred years. And this omission is not accidental. Rather, it reflects the fact that standard textbooks and courses have for the most part been written and designed by whites, who take their racial privilege so much for granted that they do not even see it as political, as a form of domination.[325]

The language of human rights and business is fairly recent, having regard to the fact that the United Nations only took serious notice of it within the last forty seven (47) years. However, this must not be confused with the establishment of business entities in the form of trans-border carriage of business or MNCs. This area of law has not been given due recognition and this is evidenced by lawsuits only starting to appear in and around the year 1972,[326] with a difference of forty seven between recognition and formulation of policies in the international legal framework that attempts to govern business and rights. The process of addressing these concerns was set in motion on 02 July 1972 when the Economic and Social Council of the United Nations (UN) adopted Resolution 1721 (LIII), 216 requesting the Secretary General of the UN to establish a Group of Eminent Persons, with a three-fold mandate.[327] The task at hand was to study the role of MNCs and their impact on the process of development, especially that of the Global South and their implications for international relations.[328]

The evolution of MNCs saw an emergence of different schools of thought, starting from the questioning legitimacy of human rights language and its application to business in general and MNCs in particular. The contestation carried on to the theories on accountability, and institutional capacity for enforcement of human rights against MNCs especially as non-state actors within the public international law strata. The

[325] Mills C W (1997) *Racial Contract* (Cornell University Press, Itacha and London) 1.
[326] Chirwa DM (2006) "In Search of Philosophical Justification and Suitable Models for the Horizontal Application of Human Rights" *South African Journal of Human Rights* Vol. 8, No. 2, 78.
[327] *Ibid.*
[328] Mnyongani (note 145 above) 88.

body of knowledge analysed in this work will show how far the discourse of business and rights has come, and also illuminate contemporary issues in accordance with the existing literature that affect enforcement of human rights against MNCs.

The common features amongst most highly publicised authors agree on the importance of the need to recognise and regulate the conduct of MNEs.[329] This is the case in point where it is said that one of the most significant developments within international human rights law over the past two decades has been the growing importance of a range of non-state actors.[330] Non-state actors by definition are placed at the margins of the resulting international legal regime.[331] The recognition of non-state entities came with conceptual confusion as authors have not as yet even settled the terms which best describe this entities.[332]

There are four existing dominant views amongst authors in business and human rights discourse which are well elucidated below:

(a) The application of human rights language to business in order to hold MNCs responsible and accountable for rights violations, especially the non-binding instruments that specifically apply to business and human rights.
(b) The application of conventional public international law to deal with non-state actors such as MNCs; and

[329] Muchlinski P T (1995) *Multinational Enterprises and the Law* (Blackwell Publishers, Great Britain); see also Steiner H J, Alston P, and Goodman R (2007) *International Human Rights in Context, Law, Politics, and Morals 3rd ed* (Oxford Press, New York); see also Ruggie J (2011), "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy' Framework. "Report of the Special Representatives of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises; see also Alston P and Goodman R (2013) *International Human Rights, The Successor to International Human Rights Context: Law, Politics and Morals* (Oxford Press, United Kingdom) 1460.
[330] Steiner H J, Alston P, and Goodman R (2007) *International Human Rights in Context, Law, Politics, and Morals 3rd ed* (Oxford Press, New York) 1385 : see also Alston P and Goodman R (2013) *International Human Rights, The Successor to International Human Rights Context: Law, Politics and Morals* (Oxford Press, United Kingdom) 1460.
[331] Alston P and Goodman R (2013) *International Human Rights, The Successor to International Human Rights Context: Law, Politics and Morals* (Oxford Press, United Kingdom) 1460.
[332] Sagafi-Nejad T & Dunning H J (2008) *The UN and Transnational Corporations from Code of Conduct to Global Compact* (Indiana University Press, Indiana, USA).2. See also Fieldhouse D K "The Multinational: a critique of a concept" in Teichova A, Levy-Leboyer M and Nussbaum (1986) *Multinational Enterprise in Historical Perspective* (University of Cambridge Press, New York & Editions De Le Maison Des Sciences De L' Homme, Paris) 6.

(c) Finally, the "procrastination" regarding the pace of the UN and the Global North in firmly dealing with the enforcements of human rights standards against violations by the MNCs especially taking place in the Global South.

Business and human rights discourse is battling for legitimacy as it is seen as lacking proper basis for the assimilation of both disciplines, (business as a vehicle for profit and human rights language). Muchlinski, notes that the basis of human rights obligations for MNCs is:

> "The observance of fundamental rights which can be said to lie at the heart of ethical business practice. However, in relation to business ethics, the use of human rights is replete with conceptual difficulties. Indeed, there are a number of strong arguments against such an extension of rights responsibility to MNEs. First, MNCs and other business enterprises are business and for MNCs, the only social responsibility appears to be the exploitative practices to amass huge profits for their shareholders. Secondly, private non-state actors do not have any positive duty to observe human rights. Thirdly, which human rights are MNCs and other enterprises to observe?".[333]

The above conceptual difficulties by Muchlinski is echoed by Steiner, Philip, and Goodman who state that: "For rights proponents, the growth of corporate power raises the question of how to ensure that the activities of MNCs in particular are consistent with rights standards and how to promote accountability when violations of those standards occur." [334] Further, Ruggie, states that because MNCs can have an impact on the entire field of internationally recognised rights and their responsibility to respect applies to all such rights.[335]

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[333] *Ibid.*

[334] Steiner (note 330 above) 1389.

[335] Ruggie J (2011), "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy' Framework. "Report of the Special Representatives of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. 13.

It is argued that there may be difficult to find legitimacy for human rights language in the Global South though radially accepted by the respective countries for the following reason;

> "Human rights activists see this proposal (to have a legally binding instrument) as an attempt to reopen a battle fought during the 1970s, when the regulation of MNCs was a major component of the attempts to establish a 'New International Economic Order', or as a resurrection of the proposal made in 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights for the adoption of a set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (Draft UN Norms). These attempts failed due both to the resistance of the business community and of capital-exporting countries, and to a certain naïveté in transposing to MNCs norms designed to be addressed to states."[336]

Mutua aptly describes why apart from the legalistic attempts of human rights language there is far more deeper problem with human rights that diminishes its legitimacy in the Global South. In his seminal work, Savages, Victims, and Savior: the Metaphor of Human Rights – he states that the human rights story, the savior is the human rights corpus itself, with the United Nations, Western governments, International Non-Governmental Organisations (INGOs), and Western charities as the actual rescuers, redeemers of a benighted world (the Global South).[337]

He contends that:

> "In reality, however, these institutions are merely fronts. The savior is ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy. The human rights corpus, though well-meaning, is fundamentally Eurocentric,' and suffers from several basic and

[336] De Schutter O (2016) "Towards a New Treaty on Business and Human Rights" *Business and Human Rights Journal*, Vol. 1, pp 41-67.
[337] Mutua M (2001) "Savages, Victims, and Saviors: The Metaphor of Human Rights" *Harvard International Law Journal* Vol. 42, No 1, 205.

> interdependent flaws captured in the SVS metaphor. First, the corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions. Precisely because of this cultural and historical context, the human rights movement's basic claim of universality is under mined. Instead, a historical understanding of the struggle for human dignity should locate the impetus of a universal conception of human rights in those societies subjected to European tyranny and imperialism. Unfortunately, this is not part of the official human rights narrative."[338]

The link between colonisation and MNCs necessitates that any attempt of discourse on business and human rights begins with the role of MNCs in the Global South. The economies of the Global North today through the MNCs are fuelled by the raw resources and exploitation of labour from the Global South.[339] In the case of South Africa the minimum wage was negotiated at R3,500 ($277 USD) which an individual cannot survive on let alone a family of four which is minimum household for South Africa and many peoples in the continent.[340] Therefore, the enforcement of human rights against MNCs does not only involve the non-binding instruments by the UN and INGOs but it requires the interrogation of the structural legacies of colonialism that is still important to the Global North.

Human rights language position the victors of World War II as the moral authors of the New World Order and its governance therefore as astutely observed by Donnelly in the passage below:[341]

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[338] *Ibid.*

[339] Human Rights and Business Country Guide: South Africa (*the South African Human Rights Commission and the Danish Institute for Human Rights* 2015) states that The 2013 Global Slavery Index ranked South Africa 115th out of 162 countries, with an estimated 44,500 people in 'slavery, slavery-like practices (including debt bondage, forced marriage, and or sale of or exploitation of children), human trafficking and forced labour'.287 At the regional level, South Africa ranked 41st out of 44 countries.

[340] Crabtree J and Turak N (2018) "South Africa's New Minimum Wage is the 'Beginning of a long, difficult Process,' Finance Minister Says" *CNBC* available at https://www.cnbc.com/2018/06/01/south-africa-minimum-wage-the-beginning-of-a-difficult-process-finance-minister-nene.html (accessed 15 July 2018).

[341] Donnelly J (1984) "Cultural Relativism and Universal Human Rights" *Human Rights Quarterly* Vol. 6, No. 4, 402.

> "The dangers of the moral imperialism implied by radical universalism hardly need be emphasized. Radical universalism, however, is subjected to other moral objections as well. Moral rules, including human rights, function within a moral community. Radical universalism requires a rigid hierarchical ordering of the multiple moral communities to which individuals and groups belong. In order to preserve complete universality for basic rights, the radical universalist must give absolute priority to the demands of the cosmopolitan moral community over all other ("lower" moral communities. This complete denial of national and subnational ethical autonomy and self-determination is dubious."

Moreover, on an issue pertinent to enforcement of rights standards, Ruggie, states that grievance mechanism can only serve its purpose if there is reasonable advocacy and legitimacy to the people it is meant to serve and are able to use it.[342] These criteria provide a yardstick for creating, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice.[343] Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the processes as it is the case in the Global South.[344]

The human rights language in the greater scheme of public international law has been traditionally viewed as "soft law."[345] Therefore, the infusion of business and human rights has the potential of further weakening enforcement mechanism that exist in both areas of law. Testament to the grand narrative of human rights language, Donnelly states that "when things are not going well, human rights are a last resort in the realm of rights - no higher rights appeal is available. Human rights claims characteristically seek to challenge or change existing institutions, practices or norms – especially legal practice. The Universal Declaration of Human Rights[346] for example, presents itself as

[342] Ruggie (note 237 above).
[343] *Ibid.*
[344] *Id* 27.
[345] Gunther F. Handl G F, W. Michael Reisman W M, Bruno Simma B, Pierre Marie Dupuy P M and Christine Chinkin C (1988) "A Hard Look at Soft Law" *Proceedings of the Annual Meeting (American Society of International Law)* Vol 82, 371.
[346] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html (accessed 1 December 2017).

a standard of achievement for all the peoples of all nations'. To the extent that governments protect rights, they are legitimate."[347] This view of human rights is part of the problem though well-meaning of enforcement of human rights against MNCs as it assumes equality of between the Global South and Global North and negates the negative impact global capitalism.

The other issue that human rights language has been battling with is the domestic enforcement of human rights against MNCs. This is because domestic law usually applies to MNCs in the state in which they operate and enforce human rights documents that they have adopted or ratified.[348] Domestic law, however, has proved to be inadequate where the local authorities are unable or unwilling to enforce rights foreign investors usually MNCs for fear of losing them to less demanding countries for investments.[349] First, the state will be internationally responsible for the acts of entities which, even if they are not state organs, are actually empowered by the law of that state to exercise elements of governmental authority, and are acting in that capacity.[350] Second, where MNCs are directed or controlled by a state in carrying out their conduct, the state will be internationally responsible for their acts.[351] Third, states are responsible for omissions which leave individuals devoid of human rights protection from MNCs - the scope of these positive obligations depends on the relevant international rights obligation.[352] In the case of business and human rights there are no enforceable legal obligations for MNCs is there are all norms and guidelines.

Clapham on the issue of jurisdiction states that:

> "Legal disputes concerning MNCs may be resolved through binding judicial settlements - in such situations, the parties will have to rely on judges or arbitrators with jurisdiction over the dispute, and that jurisdiction may be governed by international law, as well as doctrines such as act of state and

[347] Donnelly J (2013) *Universal Human Rights in Theory and Practice* (Cornell University Press, USA) 12.
[348] Clapham (note 174 above) 237.
[349] *Id* 238.
[350] *Ibid.*
[351] *Id* 239.
[352] *Ibid.*

forum non conveniens.[353] On the one hand, international treaties may oblige states to ensure that they have jurisdiction over MNCs offences - for example, the Convention for the Suppression of Financing of Terrorism (1999)[354] compels states parties to 'take the necessary measures to enable a legal entity located in its territory or organised under its laws to be liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence.[355] In addition, states parties must ensure that such legal entities are subject to effective sanctions".[356]

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)[357] established an International Centre for the Settlement of Investment Disputes (ICSID), which is based at the World Bank[358] in Washington, DC.[359] The ICSID Convention operates not only to facilitate conciliation or arbitration for disputes, but also ensures that awards can be enforced through the national courts of the contracting parties to the Convention.[360] Clapham aptly states that there is currently little appetite among states to develop new international treaties focused on the issue of human rights abuses facilitated or committed by MNCs, nor does it appear that the rights treaty bodies are ready to interpret the UN human rights treaties to directly impose obligations on non-state actors or individuals.[361]

It is common parlance that customary international law binds all states.[362] It is evident that international law has criminalised certain acts, international law creates individual

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[353] Clapham (note 174 above); see also the *forum non conveniens* appears to have used first in a series of Scottish decisions in the late 1800's to describe what was by then a settled rule of Scottish practice, i.e., trial courts could refuse to hear cases when the end of justice would best be served by trial in another forum.
[354] UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349, available at: http://www.refworld.org/docid/3dda0b867.html (accessed 17 May 2018).
[355] *Id* 240.
[356] *Ibid.*
[357] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID, 1965]) 575 UNTS 159.
[358] The World Bank: Conceived in 1944 at the Bretton Woods Monetary Conference in Bretton Woods, New Hampshire, the World Bank's initial aim was to help rebuild European countries devastated by World War II. Its first loan was to France in 1947 for post-war reconstruction.
[359] Clapham (note 174 above) 239.
[360] *Ibid.*
[361] *Ibid.*
[362] *Id* 244.

criminal responsibility for certain acts, now known as international crimes, such as: slavery, genocide, crimes against humanity, certain war crimes, and torture.[363] This is evidenced by Nuremberg judgments which provides that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[364]

The failure in Rome to agree to bring MNCs within the jurisdiction of the International Criminal Court (ICC) has been held in the context of human rights litigation against Talisman Oil in the US Courts as evidence of a "lack of any accepted rules or standards for corporate criminal responsibility under international law".[365] Moreover, the explicit references in the financing of terrorism treaty were presented as evidence that "earlier criminal law conventions focusing on individual criminal responsibility are not intended to create a regime of corporate criminal responsibility".[366] These arguments were however rejected by Judge Schwartz, who held that "MNCs may also be held liable under international law, at least for gross human rights violations".[367] This legal dilemma demonstrate the illegitimate nature of the language of human rights because on one hand though forming part of public international law, the legal traditions of public international law as non-state actor puts MNCs at the margins of accountability. On the other hand there is no binding human rights instruments to be enforced against MNCs.

Wells and Juanita have highlighted how traditional assumptions about international law have hampered progress in the field of criminal corporate responsibility and they state the following;

> "It is not such an imaginative leap to conceive MNCs as the subject of international law. While the mind-set of the criminal lawyer is to think about individuals, that of the international lawyer was until the middle of the last century, to think about states. Yet the ICC and other war crimes tribunals finalize the break in that mould by addressing specifically the crimes of

[363] *Ibid.*
[364] *Ibid.*
[365] *Id* 246.
[366] *Ibid.*
[367] *Ibid.*

individual human agents. For the international lawyer to embrace a MNCs entity is therefore less of a conceptual hurdle than for a domestic jurisdiction to move away from the individual. As people become more accustomed to conceiving of collective entities as wrongdoers, the conceptual gulf may become much less wide".[368]

Yusuf provides that essentially, human rights are a pact between governments and individuals.[369] However, he states that:

"There is a progressive expansion of the reach of international law which has resulted with private actors (MNCs) are now conferred with duties under international law. Individuals whose actions contravene international criminal law are held directly accountable. A definitive manifestation of this is the creation of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda. The position finds further support in the creation of the International Criminal Court at The Hague for the trial of war crimes, crimes against humanity and genocide based on individual responsibility. Ratner has noted that international law can and should provide for a theory of corporate responsibility. The 'privity theory', it is proposed, is a viable option".[370]

Ratner also argues that where MNCs assists another entity, whether be it a state, a rebel group, another company, or an individual, to commit an international crime, the rules for determining responsibility under international law will be the rules developed in international criminal law.[371] The MNCs will be responsible as an accomplice, whether or not it intended a crime to be committed, if it can be shown that:

(a) the MNCs carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific

[368] *Id* 247.
[369] Yusuf H O (2008) "Oil on troubled Waters: Multi-National Corporations and Realising Human Rights in The Developing World, with Specific References to Nigeria" *African Human Rights Law Journal* Vol. 8, No. 1, 96.
[370] *Ibid.*
[371] Ratner S R (2001) "Corporations and Human Rights: A Theory of Legal Responsibility" *the Yale Law Journal* Vol. 111, No. 3, 448; see also Clapham (note 174 above) 266.

international crime and this support has a substantial effect upon the perpetration of the crime; and

(b) The MNCs had the knowledge that its acts would assist the commission of crime by the principal.[372]

Where a MNCs is alleged to have assisted a government in violating customary international law in circumstances which do not amount to international crimes, but rather to international delicts or torts, the analogous rules for state responsibility suggest that the MNCs must be:

(a) Aware of the circumstances making the activity of the assisted state a violation of international human rights law;
(b) The assistance must be given with a view to facilitating the commission of such a violation and actually contribute significantly to the violation; and
(c) The company itself should have an obligation not to violate the right in question.[373]

However, for now it suffices to state that the non-binding nature of MNCs instruments has certainly not helped the course of remedying infringements of human rights by mostly Global North MNEs. Or said differently the language of business and rights is largely still stuck on the non- binding effect of instruments that are aimed at prohibiting rights violations as discussed in Part A on the respective instruments such as the UN Draft Norms.[374] But for the sake of completeness, the Draft Norms apply to MNCs and domestic corporate.[375] They are not legally binding but are similar to many other UN declarations, principles, guidelines, standards, and resolutions that interpret existing

[372] *Ibid.*
[373] *Ibid.*
[374] See the United Nations Global Compact 2000, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy' Framework. "Report of the Special Representatives of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, The UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (the Norms) were intended as assistance to companies in framing the human rights responsibilities for business. Jun 26, 2004.
[375] *Id* 14.

law and summarise international practice without any treaty specifically for business and human rights.[376]

The Global Compact, which obliges signatories to uphold certain basic standards, has also been significant in the endeavour to regulate MNCs in the area of human rights.[377] Over 9 713 (in 2017) MNCs have signed up, including several in China, where a summit was held in 2005.[378] Though weakly enforced, the Global Compact has some teeth, as evidenced by 335 firms which were struck off its list of signatories in 2006.[379] The human rights language assessed from TWAIL perspective provides a better explanation for the lacklustre position because this attempts though well-meaning does little to foster strong accountability for MNCs in the Global South.

In addition to the Global Compact, the UN appointed Professor John Ruggie to investigate and report on Business and Human Rights. Ruggie's work which has culminated into the Guiding Principles on Business and Human Rights: Implementation the United Nations "Protect, Respect and Remedy" Framework is one of the endeavours that has made a significant impact in the discourse of business and human rights. His work is by far what appears to be a significant step in the right direction that has received more attention than most before it.

The Guiding Principles rests on three pillars:[380]

> "The first is the State's duty to protect against rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate's responsibility to respect rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by

[376] *Id* 14.
[377] Business and Human Rights "Beyond the "genocide Olympics" *The Economist Apr 24th 2008 NEW YORK.* Available at http://economist.com/business/displaystory.cfm?story_id=11090045 (accessed 27 October 2014).
[378] *Ibid.*
[379] *Ibid.*
[380] Ruggie (note 237 above) 4.

> victims to effective remedy, both judicial and non-judicial.[381] Even with this important work of Ruggie, the framework is understood by some as an attempt to create a compromise between what principles dictate, and the pragmatic demands of achieving a world-wide consensus on the ambit of corporate obligations".[382]

Each pillar is an important component in an inter-related, interdependent, and dynamic system of proactive and remedial measures.[383] For instance, State obligation to protect lies at the very core of the international human rights regime.[384] However, on this point Bilchitz offers another view, which states that:

> "The traditional focus of international law has been upon states as the primary subjects of international law, yet, in recent years, greater focus is being placed both in academia and in the United Nations ('UN') upon the legal obligations of non-state actors such as non-governmental organisations, liberation organisations, and MNCs. In particular, given the power of MNCs to impact upon the realisation of fundamental rights, there have been a range of initiatives, mostly voluntary ones, seeking to outline the responsibilities of MNCs in this regard."[385]

Dugard also make the observation that the predecessor of human rights practice, humanitarian law, developed to include humanitarian intervention which permits states to intervene in forcibly in states whose treatment of their own nationals shocks the conscience of mankind, was recognised by international law as early as the 17th century, although in practice it was used for non-altruistic political intervention.[386] This

[381] *Ibid.*
[382] Bilchitz (note 247 above)19.
[383] Ruggie (note 237 above).
[384] *Ibid.*
[385] Bilchitz (note 247 above) 2.
[386] Dugard J (2018) 5 ed et al *International Law – A south African Perspective* (Juta Publishers, South Africa) 454; see also Weinstein W (1976) "Africa's Approach to Human Rights at the United Nations" *A Journal of Opinion* Vol. 6, No. 4, 1. 14-19.

non-ultruistic intervention have always been about MNCs' (state backed, including private military MNCs) control of oil, raw materials, religious and geopolitical power.[387]

Clapham argues that although there are only rare instances of an international tribunal where a MNCs could be the respondent in a dispute, MNCs can still be the bearer of international duties.[388] Lack of international jurisdiction to try MNCs does not mean that a MNCs is under no international legal obligation.[389] Clearly, if the Nuremberg Tribunal judgement is not making legal sense, the individuals tried in Nuremberg must have been under some international obligation before the Nuremberg Tribunal was created to try them.[390] The above contention by Clapham misses a very simple point of the spoils of war and not a legal basis for the Nuremberg Tribunal.[391]

However his view is said to be reinforced by the reason of the International Criminal Tribunal for the former Yugoslavia (ICTY)[392] in the *Tadic*[393] decision of the Appeals Chamber.[394] International obligations can exist independently of any international institution to enforce them, and the ICTY has been at pains to demonstrate that the

[387] Green M (2019) "To What Extent was the NATO Intervention in Libya a Humanitarian Intervention?" available at https://www.e-ir.info/2019/02/06/to-what-extent-was-the-nato-intervention-in-libya-a-humanitarian-intervention/ (accessed 14 July 2019).
[388] Clapham (note 171 above) 197.
[389] *Ibid.*
[390] *Ibid.*
[391] Ratner S R (2001) "Corporations and Human Rights: A Theory of Legal Responsibility" *the Yale Law Journal* Vol 111 No. 3, 448; states that the advocacy to hold MNCs responsible for human rights violations build on earlier attempts by concerned actors to focus attention on private business activity, ranging from the trials of leading German industrialists for war crimes after World War II to campaigns in the United States in the 1970s and 1980s to encourage divestment from corporation doing business in South Africa. All are based on the view that business enterprises should be held accountable for human rights abuses taking place within their sphere of corporations. Corporations, for their part, have responded in numerous ways, from denying any duties in the area of human rights to accepting voluntary codes that could constrain their behavior.
[392] The International Criminal Tribunal for the former Yugoslavia (ICTY) was a United Nations court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s. During its mandate, which lasted from 1993 - 2017, it irreversibly changed the landscape of international humanitarian law, provided victims an opportunity to voice the horrors they witnessed and experienced, and proved that those suspected of bearing the greatest responsibility for atrocities committed during armed conflicts can be called to account, available at http://www.icty.org (accessed 20 February 2018).
[393] *Prosecutor v. Tadic* Int'l Crim. Tribunal for the Former Yugoslavia, Decision on Interlocutory Appeal on Jurisdiction, 1995. Appeals Chamber, Case No. IT-94-1-ar72, 35 I.L.M. 32 (1996).
[394] Clapham (note 174 above); It makes sense to speak of the separation between the obligation under international law and international jurisdiction to try the alleged offender (the Jurisdictional filter). There are clearly violations of international criminal law that exist in the absence of any international jurisdiction to try them. The absence of an international jurisdiction to try MNCs does not mean that MNCs cannot infringe international law.

individuals were bound by existing international law and not due to any law-making exercise by the Security Council itself.[395]

It is also at this juncture that the tenets of international trade and its regulatory framework cannot be disassociated with enforcement of rights violations by MNCs. In the heart of enforcement lies the contractual obligation of parties involved with trade at various level of trade i.e. national, continental and international trade. Furthermore, it is trite that there is also power inequality between MNCs and which country they come from and which country they operate in. This unequal reality has a fundamental impact on the legitimacy of human rights language and the resultant enforcement.

Chauh states that where performance of a duty is provided for by contract, unless the provision contradicts the law or public policy of the country, that contractual provision shall be binding as between the parties.[396] In the examination of relationship between the parties, it is therefore, necessary to extract the contents of the contract and then properly to construe them to determine the extent of that relationship. The contents of the contractual relationship may be found either in expressly stated terms of the contract or may be elicited by the court from the surrounding facts or legal environment.[397]

Flowing from the inequality of power relationship between MNCs from the Global North operating in the Global South and less equipped state capacity in the Global South. However, the state still holds considerable negotiating power at this point of the relationship and this should be the pivotal moment where governments can vet MNCs that want to do business in their countries so that they can adhere to human rights standards even though there are non-binding. However, having said that, many countries in the Global South compromise this sovereign power for economic growth and development coming from the Global North. This particular untenable situation in the main informed by colonial legacy has made the language of human rights

[395] *Ibid.*
[396] Chauh J (2013) 5ed *Law of International Trade: Cross-Border Commercial Transactions* (Sweet & Maxwell, United Kingdom) 2.
[397] *Id* 3.

moderately helpful as enforcement is often negated at the expense of attraction of Foreign Direct Investments (FDIs).

Continuing with state duty to protect, the second pillar put forth by Ruggie is that corporate responsibility to respect rights is essential, because it is the basic expectation that society has of MNCs in relation to human rights.[398] Finally, on the third pillar of access to remedy, it is apparent that even the most concerted efforts cannot prevent all abuse.[399] The Global North has claimed to a certain extend to have sufficient regulatory framework for MNCs, as compared to the Global South that is conducive to exploitative practices of the MNCs. Ruggie argues on this point that the "Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and business integrating them within a single, logically coherent and comprehensive template and identifying where the current regime falls short and how it should be improved".[400]

The enforcement of rights against the MNCs has been the subject of much literature in recent years and different thoughts exist on how such a task may be efficiently achieved. Ruggie's work in this regard puts forth two ideas on the enforcement of human rights standards against MNCs. The first one is human rights due diligence which entails that "the process of due diligence should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed".[401] The second theory is remediation, which says that "where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes. Even with the best policies and practices, a business enterprise may cause or contribute to an adverse rights impact that it has not foreseen or been able to prevent".[402]

[398] Ruggie (note 237 above) 4.
[399] *Ibid.*
[400] *Id* 5.
[401] *Id* 16.
[402] *Ibid.*

Bilchitz argues his dissent from Ruggie's assertions by stating that "Ruggie's rejection of the UN Draft Norms' attempts to assert that there are binding legal obligations upon MNCs for the realisation of human rights and claiming instead that apart from a small class of obligations that MNCs have under international criminal law, any other obligations that MNCs have are not matters of international law but rather matters of social expectations." Therefore, Bilchitz, stress that Ruggie's denial of the binding effect UN Draft Norms upon MNCs under international human rights treaties can in fact be seen to be mistaken.[403] Indeed Ruggie's view is correct because the UN Draft Norms are non-binding and have fallen into disuse.

It is customary practice in international commerce for parties to adopt commonly recognised principles or standard terms.[404] These standardised contracts are very much the result of the growth of large-scale MNCs with mass production and mass distribution.[405] According to Kessler, "the stereotyped contract of today reflects the impersonality of the market."[406] This signifies the evolution of conducting business that has evolved in the negative as far as the contractual conception that may result in the unintended human rights violations by MNCs. Because the evolution takes place within the "unfair" global economy structured to benefit the Global North, it tends to also make language of human rights fit into the same system of non-binding instruments.

Voiculescu and Yanacopulous summarise the current challenges facing business and human rights, and also reveal that there is much more that needs to be done in the area of enforcement human rights standards against MNCs. They aptly state that:

> "The United Nations agencies, for instance have often been at the centre of various initiatives aimed at formulating universally acceptable standards or norms for the activities of business organisation in general and activities of MNCs in particular. Its long-debated and failed draft UN Code of Conduct for MNCs contained a wide range of responsibilities – from respect of tax

[403] Bilchitz (note 247 above) 5.
[404] Chauh (note 396 above) 3.
[405] *Ibid.*
[406] *Ibid.*

> and competition rules to respect for the sovereignty and political system of the host country, as well as respect for human rights norms and abstention from corrupt practices."[407]

Similarly, the OECD has made the "connection between business practices and human rights through various inter-governmentally endorsed documents.[408] Among other things, the OECD Guidelines for MNCs, revised in 2000 addressed the MNCs' duty to contribute to sustainable development in their host countries, to respect rights and to refrain from seeking or accepting exceptions from the host country's regulatory framework in the areas of environment, health and safety, labour rights and other protective measures".[409] However, Deva also notes that the lack of implementation strategy and effective sanctions has been the most critical vacuum of the existing international human rights law of corporate responsibility and accountability for rights violations.[410] It is the above highlighted lacuna by Deva that makes human rights language redundant in the Global South because the results is rhetoric with small gains in isolated instance enforcements such as the case in *Lubbe et al. v. Cape plc*[411] where a settlement way below the initial demand was made. This case and many others demonstrating the same pattern will be discussed in chapter five of the study.

Rights activists concerned with the harmful activities of MNCs have drawn a distinction between corporate responsibility and corporate accountability.[412] According to CorpWatch, corporate responsibility refers to any attempt to get MNCs to behave responsibly on a voluntary basis, out of either ethical or bottom-line considerations.[413]

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[407] Voiculescu A Yanacopulos H (2011) *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (Zed Books, London/New York,) 5.
[408] OECD Investment Committee, available at http://www.oecd.org/daf/inv/oecdinvestmentcommittee.htm (accessed 21 May 2018).
[409] Voicelescu A "Human Rights and the Normative Ordering of Global Capitalism" 10 in Voiculescu A & Yanacopulos H (2011) *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (Zed Books, London/New York) 10.
[410] Deva S (2003) "Human Rights Violations by Multinational Corporations and International Law: Where From Here?" *Connecticut Journal of International Law* Vol. 19, No.1, 513.
[411] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 211; see also *Lubbe et al. v. Cape plc*, op.cit., 1998; *Group Action Afrika et al. v. Cape plc* (QBD 30 July 1999) (2000) 1 Lloyd's Rep. 139; *Rachel Lubbe et al. v. Cape plc*, op.cit., 2000. See also R. Meeran, "Liability of Multinational Corporations : A Critical Stage in the UK", in M.T. Kamminga and S. Zia-Zarifi (eds.), Liability of Multinational Corporations under International Law, Kluwer Law International, The Hague / London / Boston, 2000, p. 258.
[412] Clapham (note 174 above) 195.
[413] *Ibid.*

This approach is said to be "favoured in the earth summit processes, the UN Global Compact and the International Chamber of Commerce. Corporate accountability (or compliance) refers to requiring MNCs to behave according to social norms or face consequences".[414] The latter mechanism is appropriate for the Global South because of the lack of economic power and capacity to enforce human rights standards against MNCs. and More often than not the MNCs due to the colonial global structure have already exerted great power upon the countries they operate in, which renders accountability difficult.

The MNCs preference for voluntary initiatives as opposed to binding legal commitments, is coming under scrutiny by the same groups that throughout the 1990s encouraged such voluntary initiatives (often in the form of corporate social responsibility (CSR) policies).[415] The big fear in the trade union movement is that CRS initiatives become a substitute for respecting legal obligations and collective bargaining with trade unions.[416] It is worth pointing out that, while MNCs may have greater responsibilities with regard to rights obligations, there is no reason to exclude purely national companies from the realm of such obligations.[417] Although some texts, such as the OECD Guidelines, are specifically addressed to MNCs, the Guidelines stress that the same expectations are relevant to both multinational and domestic enterprises.[418]

The language of business and human rights in the global arena in part, attempts to address the power disparity between the Global North, MNCs and the Global South.[419] This endeavour to deal with this power disparity have, ironically, side-lined another well-documented imbalance of power, namely gender inequality.[420] Not only was gender negated but for most part the imbedded structures of colonialism within which MNCs in relation to the Global South takes course. And it is this negation that has rendered textual interpretation of human rights documents and they application

[414] *Ibid.*
[415] *Ibid.*
[416] *Id* 197.
[417] *Ibid.*
[418] *Ibid.*
[419] Meyersfeld B (2013) "Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations, 193, in Bilchitz D and Deva S *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press, Cambridge).
[420] *Ibid.*

moderate in the Global South. This point will be more pronounced when the study asses the EU regional system where it was found that there is greater enforcement for the simple reason – that of lack of dependency syndrome amongst the countries, state capacity and finally lack of racial colonisation (or racial conquest) as the most important factor.[421]

Muchlinski describes the complexities of human rights language between the Global North and Global South by asserting that:[422]

> "The Cold War developed, a stratification of human rights emerged based on ideological preferences. Thus Western powers emphasized the individualistic civil and political rights agenda, as shown for example by the exclusive concentration of the ECHR on such rights, while the Soviet bloc states and their allies emphasized economic, social and cultural rights as pre- requisites which justified, where necessary, even the curtailment of civil and political rights for the improvement of the welfare of the people. The resulting sense of cultural and political relativism in human rights was furthered by the rise of anti-imperialist decolonization movements in Asia and Africa. Their prime opponents were the liberal Western powers. The latter had to live with the paradox of the observance of human rights at home and their denial in overseas colonial possessions."

It is 2019 and the body of knowledge is still finding its way towards theoretical conceptions and formulation of regulatory framework. Literature is steadily moving towards concretising the enforcement, responsibility and accountability of MNCs, and finding best practises and principles that are internationally recognised and hopefully

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[421] Mills C W (1997) *Racial Contract* (Cornell University Press, Itacha and London) 4, The "Racial Contract," then, is intended as a conceptual bridge between two areas now largely segregated from each other: on the one hand, the world of mainstream (i.e., white) ethics and political philosophy, preoccupied with discussions of justice and rights in the abstract, on the other hand, the world of Native American, African American, and Third and Fourth World3 political thought, historically focused on issues of conquest, imperialism, colonialism, white settlement, land rights, race and racism, slavery, jim crow, reparations, apartheid, cultural authenticity, national identity, indigenism o, Afrocentrism, etc. These issues hardly appear in mainstream political philosophy,4 but they have been central to the political struggles of the majority of the world's population.

[422] Muchlinski P T (2001) "Human Rights and Multinationals: Is there a Problem? International Affairs (Royal Institute of International Affairs 1944) Vol. 77, No. 1, 34.

will be accepted, reduced into a treaty, and resulting with their justiciability. However, the tragedy of this prologue is that for the Global North and Africa specifically, the issue is not solely about the creation of a treaty but whether such a treaty if it does materialise will have the effect of disrupting the colonial structure that has thus far despite Constitutions throughout the continent much of its resources are still being plundered by MNCs from the Global North mostly being the former coloniser.[423] However, now China as the emerging empire has also join the fray of plunder of the African spoils of natural resources and cheap labour.

2.4 Conclusion

In Part A, an analysis of the significant general human rights documents beginning with the Universal Declarations of Human Rights and ending of with the International Covenant on Economic, Social and Cultural Rights was undertaken. The UDHR as normative instruments with no binding force because of the preservation of French colonies in Africa, the negro problem in America and the British colonies[424] is a vivid reminder of the human rights language that had from conception become secondary to the interest of the Global North.[425] The MNCs operate intrinsically and inherently within this colonial structure and the negation within the literature that mostly focuses on the legal impediments of the enforcements of human rights standards against MNCs is exactly the critical objective of this thesis.

There are three binding instruments on South Africa, Nigeria and the Democratic Republic of Congo has ratified namely the UN Charter, ICCPR and ICESCR which was analysed and reveal that most of the African countries have adopted this documents which serve as a basis for human rights protection against MNCs. However, the inquiry was about the impact of human rights language in the Global South, the analysis reveals a great legal work on the part of the victorious states of

[423] Tolsi N (2017) "Marikana : One Year after the Massacre" available at http://marikana.mg.co.za/ (accessed on 15 July 2017); see also Marikana Massacre 16 August 2012: available at www.sahistory .org.za/article/marikana-massacre-16-august-2012 (accessed 12 February 2018).
[424] Govindjee A (2016) *2nd* ed *Introduction to Human Rights Law* (LexisNexis, South Africa) 7-8.
[425] The Drafters of the Universal Declaration of Human Rights are Dr. Charles Malik (Lebanon), Alexandre Bogomolov (USSR), Dr. Peng-chun Chang (China), Rene Cassin (France), Eleanor Roosevelt (US), Charles Dukes (UK), William Hodgson(Australia), Hernan Santa Cruz(Chile) John P. Humphrey (Canada), available at https://www.un.org/en/sections/universal-declaration/drafters-universal-declaration-human-rights/index.html (accessed 14 July 2019).

World War II. The abolition of slavery which ended in 1833 had the effect of not formally ending the trade in black (non-European) skin though the exploitation continues till today. An argument is often made by some scholars in the Global South that, "Africans in particular participated in the making and/or properly accepted the human rights language".[426] This particular argument is flawed, first beginning with the fact that during the creation of the UN Charter, and the ICCPR and ICESCR (this must not be confused with the buy in of African countries into the two documents[427]) was the apartheid regime of South Africa that was involved in the deliberations of creating the UN system of to preserve its white domination upon the Africans, secondly the UDHR, Egypt, Ethiopia, and Liberia who withstood the aggression of colonialism and were able to seat on the table and negotiate for themselves.[428] The point of this argument echoes the apt assertion of authors in the Global South such as Mills, Muzrui, Mutua and Fanon, to name but few that assert that law (especially human rights), polity and economics are shaped by Europe. Therefore, if this school of thought is correct, then it should resuscitate the following passage:[429]

> "Today, leaving for a colony is not a choice sought because of its uncertain dangers, nor is it a desire of one tempted by adventure. It is simply a voyage towards an easier life. One need only ask a European living in the colonies what general reasons induced him to expatriate and what particular forces made him persist in his exile. He may mention adventure, the picturesque surroundings or the change of environment. Why then, does he usually seek them where his own language is spoken, where he does not find a large group of his fellow countrymen, an administration to serve him, an army to protect him ? The adventure would have been · less predictable; but that sort of change, while more definite and of better quality, would have been of doubtful profit. The change involved in moving to a colony, if one can call it a change, must first of all bring a substantial profit. Spontaneously, better than language scholars, our traveler will come up

[426] Bratlinger P (1985) "Victorians and Africans: The Genealogy of the Myth of the Dark Continent" *Race, Writing and Difference* Vol, 12, No, 1, 166-203. 167-168.
[427] Govindjee (note 421 above) 25; Most African colonies gained their independence around 1960, in time to make an impact on the drafting of the ICCPR and the ICESCR.
[428] *Id* 7-9.
[429] Memmi A (1974) *The Coloniser and the Colonised* (Earthscan, Publications Ltd, United Kingdom) 48.

> with the best possible definition of a colony: a place where one earns more and spends less. You go to a colony because jobs are guaranteed, wages high, careers more rapid and business more profitable. The young graduate is offered a position, the public servant a higher rank, the businessman substantially lower taxes, the industrialist raw materials and labor at attractive prices."

Moreover, the analysis of the most significant human rights instruments, commencing with the UN Draft Norms and ending with the analysis of Ruggie's Guiding Principles has revealed norms, declarations, principle with no legal. Secondly, the instruments assessed amount to a duplication of provisions one after another without any real progression towards remedying human rights abuses by MNCs in a form of a treaty. Lastly one may assert that even if the UN, NGOs and the Corporate sector were to agree, colonial-imperialist-capitalism would not allow an efficient and just regulation of MNCs especially in the Global South.

Part B analysed seminal literature pertaining to the modalities of enforcing human rights standards against MNCs. The study has revealed firstly, that there is no treaty that is directly applicable to holding MNCs accountable for human rights violations. Secondly that the principle of public international law are insufficient to hold MNCs accountable because MNCs falls outside the margins of states as actors traditionally within international law. Finally, there is no interrogation of the it colonial legacy on the enforcement of human rights standards against MNCs.

The overall impression of chapter two through TWAIL as the broad theoretical framework which is supplemented by CRT, Post-colonial, and Dialectical Utility which is explicit in the critic and properly locating of this discourse has demonstrated that the language of human rights has not had a major impact of holding MNCs accountable in the Global South. To this end Mills summarised in a prophetic way in 1997 what now comes to represent the contestation on the impact of framing and enforcement of human rights against the MNCs:

> "the chasm between a largely white First World and a largely non-white Third World continues to deepen, desperate illegal immigration from the

latter to the former escalates, and demands for global justice in a new world order of "global apartheid" grow louder. Naming this reality brings it into the necessary theoretical focus for these issues to be honestly addressed. Those who pretend not to see them, who claim not to recognize the picture I have sketched, are only continuing the epistemology of ignorance required by the original Racial Contract. As long as this studied ignorance persists, the Racial Contract will only be rewritten, rather than being torn up altogether, and justice will continue to be restricted to "just us."[430]

[430] Mills C W (1997) *Racial Contract* (Cornell University Press, Itacha and London) 1.

CHAPTER THREE

REGIONAL HUMAN RIGHTS SYSTEM THAT REGULATE THE ENFORCEMENT OF HUMAN RIGHTS STANDARD AGAINST MNEs

3.1 Introduction

Chapter two highlighted relevant human rights documents initiated and drafted by UN at an international level which applies to states and non-state actors such as MNCs. Furthermore, chapter two analysed the literature regarding business and human rights and the different arguments concerning the responsibility and accountability of MNCs. Therefore, chapter three will deal with regional human rights systems that are largely informed by UN with some difference as far as the contextualisation of human rights within a specific region. Furthermore, this chapter deals with the legal framework at the regional stage which is aimed at ensuring that human rights standards are enforced against MNCs. There are three main regional groups namely; the African Union (AU), the European Union (EU), and the Organisation of American States (OAS).[1] In each of these regions, rights instruments strictly pertaining to business and human rights will be examined. These three region covers the jurisprudence of human rights in the Global South and Global North and they display different modalities of enforcement of human rights standard against MNCs.

Viljoen describes four levels at which rights protection functions as described below;

> "The inner layer, which forms the core of protection is the national (domestic, or municipal) level. The sub-regional arrangement, which brings together many states in a relatively restricted region (such as a part of a continent), form the second tier. The next layer is the regional level which comprises states that are situated in a particular continent or a hemisphere.

[1] Viljoen F (2007) *International Human Rights Law in Africa* (Oxford University Press, New York) 11; see also Regional rights systems comprises of three major bodies, namely the African Union (AU), European Union (EU), and the Organisation of American States (OAS). This regions will be explored in depth below in their different themes. There are also the League of Arabs States, the Organisation of the Islamic Conference, and the Association of Southeast Asian Nations (ASEAN). Each of these systems operates under the auspices of an intergovernmental organisation, or international national political body; see also Govindjee A (2016) *Introduction to Human Rights Law* (LexisNexis, South Africa) 32.

> The global level which functions under the auspices of the UN forms the outer ring. Thus, viewed from the perspective of the state, the sub-regional, regional and global tiers together comprise the international level".[2]

The rationale for regional rights blocs is that there is geography and relative familiarity with societies at the regional and sub-regional levels which favours specificity and a concern for regional problems.[3] It also thought regionalism may be efficient because closer economic, cultural and political ties and common loyalties are further likely to ensure better implementation and more immediate and effective "mobilisation of shame".[4] Communities sharing bonds of mutuality (common loyalties) are more likely to be attuned to each other than those separated by vast geographical and psychological divides.[5]

The hierarchy of human rights system as per Viljoen displays in no doubt however, the conceptual genesis what is in doubt especially its ability to protect persons in the Global South against human rights violations perpetrated by MNCs. To this end Donnelly's seminal work puts into perspective the problematic nature of the notion of universalism of human rights envisaged by the UDHR and the International Human Rights Covenants.[6] The UDHR provides that all human beings are born free and equal in dignity and rights.[7] He proposes two tools of analysis, namely: cultural relativism and radical universalism which this chapter aims to explore in the assessment of whether human rights language is an adequate vehicle through which MNCs can be held accountable. The former contends that culture is the sole source of the validity of a moral right or rule and the latter holds that culture is irrelevant to the validity of moral rights and rules, which are universally valid.[8] Therefore, despite the particularities of regional human rights system, the universalism of human rights is still informed by UN ethos.

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[2] *Id* 9.
[3] Viljoen (note 1 above) 9.
[4] *Ibid*.
[5] *Id* 9.
[6] Donnelly J (1984) "Cultural Relativism and Universal Human Rights" *Human Rights Quarterly* Vol. 6, No. 4, 402-403.
[7] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html (accessed 16 July 2019).
[8] Donnelly (note 6 above) 400.

Moreover, Mutua appropriately asserts that the modern African state is in many respects colonial in a different guise.[9] The African region has been the subject of such an egregious human rights violations that skepticism about its ability to create an effective regional human rights system is appropriate.[10] The Global South in general and Africa in particular present a slave history that human rights language seeks to ameliorate through the adoption and ratification of human rights instruments mainly from the UN. Notwithstanding, the geographical proximity of states, there is moderate common interest among sub-regional blocs and regional bodies which largely emanates from the colonial partition of Africa.[11] For example, in South Africa, for instance, there are xenophobic attacks against SADC[12] members (mostly Zimbabweans and Mozambique), ECOWAS[13] members (mostly Nigerians and Ghanaians) and firm unity in the AU.[14] In the Global North and specifically in the EU, BREXIT[15] has definitely illuminated this point aptly regarding the non-homogeneous illusion of unity amongst regional human rights systems.

The above contexts finds resonance with the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights which asserts that despite the universality of human rights, many states still interpret their

[9] Mutua M (2000) "The African Human Rights System: Acritical Evaluation" *Prepared for United Nations Development Programme, Human Rights Development Report* 1-2, available at https://digitalcommons.law.buffalo.edu/other_scholarship/16 (accessed 16 July 2019).
[10] *Ibid.*
[11] Khadiagala G M (2011) "ADB Working Paper Series on Regional Economic Integration" *Institution Building for African Regionalism* (Asian Development Bank) 2.
[12] The Southern African Development Coordinating Conference (SADCC), established on 1 April 1980 was the precursor of the Southern African Development Community (SADC). The SADCC was transformed into the SADC on 17 August 1992 in Windhoek, Namibia where the SADC Treaty was adopted, redefining the basis of cooperation among Member States from a loose association into a legally binding arrangement, available at https://www.sadc.int/about-sadc/overview/ (accessed 18 July 2019).
[13] The Economic Community of West African States (ECOWAS) is made up of fifteen member countries that are located in the Western African region. These countries have both cultural and geopolitical ties and shared common economic interest. The region of West Africa is located west of north-south axis lying close to 10° east longitude. The Atlantic Ocean forms the western as well as the southern borders of the West African region. The northern border is the Sahara Desert, with the Ranishanu Bend generally considered the northernmost part of the region. The eastern border lies between the Benue Trough, and a line running from Mount Cameroon to Lake Chad. Colonial boundaries are still reflected in the modern boundaries between contemporary West African states, cutting across ethnic and cultural lines, often dividing single ethnic groups between two or more states, available at https://www.ecowas.int/member-states/ (accessed 18 July 2019).
[14] Pheko M (2015) "Xenophobia Undermines African Unity" *Mayihlome news* available at http://mayihlomenews.co.za/xenophobia-undermines-african-unity/ (accessed 19 May 2018).
[15] BREXIT refers to Britain exit from the European Union.

human rights obligations as being applicable only within their own borders.[16] The Maastricht Principles contends that attempts to limit obligations territorially has led to gaps in human rights protection in various international political processes and a lack of adequate regulation for the protection of human rights.

Gaps in human rights protection have become more severe in the context of globalisation[17] over the past 20 years. These gaps include:

(a) the lack of human rights regulation and accountability of transnational corporations (TNCs);
(b) the absence of human rights accountability of Intergovernmental Organizations (IGOs), in particular international financial institutions (IFIs);
(c) the ineffective application of human rights law to investment and trade laws, policies and disputes; and
(d) the lack of implementation of duties to protect and fulfil ESCRs abroad, inter alia through the obligations of international cooperation and assistance.

This chapter is aimed at assessing the efficacy of human rights language in the main and the impact of colonialism on the enforcement of human rights standards against MNCs at a regional level. The theoretical tools employed in this chapter is the cultural relativism versus the universalism of human rights (as discussed above) particularly in the AU. For example

> "The impact of culture on the shaping of individuals is systematic and may lead to the predominance of distinctive social types in different cultures. There can be little doubt that there are important, structurally determined differences, for example, between the modal "natures" of men and especially women in modern western and traditional Islamic societies. In any particular case, "human nature," the realised nature of real human beings, is a social as well as a "natural" product. The theory of human rights

[16] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013).
[17] The full analysis of the impact of Globalisation is dealt with in chapter 4.

consistent with such an account of human nature and herein the cultural variability of human nature does not permit but requires significant allowance for cross-cultural variations in human rights."[18]

Therefore, the analysis in this chapter commences with the African Union and its regulatory framework and thereafter, the European Union and lastly the Organisation of American States. Further, the implementation of rights is assessed through an analysis of general human rights instruments as well as specific business and rights instruments that each region has constituted. However, like the international human rights framework, only the provisions dealing with enforcement of rights will be the focal point of discussion.

3.2 AFRICAN UNION REGULATORY FRAMEWORK THAT AFFECTS RIGHTS AND MNCS

The genesis in the latter struggle of the Global South for freedom from colonial-imperialism is properly explained by Nkrumah as follows:[19]

"The independence of Ghana in 1957 opened wide the floodgates of African freedom. Within four years, eighteen other African countries achieved independence. This development is the unique factor in world affairs today. For it has brought about significant changes in the composition of the United Nations Organization , and is having a momentous impact upon the balance of world affairs generally. It has resulted in an expanded world of free nations in which the voice of Africa, and of the reborn states of Asia, Latin America and the Caribbean will demand more and more careful attention. This expanding world of free African nations is the climax of the conscious and determined struggle of the African peoples to throw off the yoke of imperialism, and it is transforming the continent. Not all the ramparts of colonialism have yet fallen."

[18] Donnelly (note 6 above) 403.
[19] Nkrumah K (1963) *Africa Must Unite* (Frederick A. Prager, New York) x.

The Organisation of African Unity (OAU), established on 25 May 1963, was the culmination of a number of diverse and far-reaching historical currents and political trends both on the African continent and abroad.[20] For instance the expression Pan-Africanism' did not come into use until the beginning of the twentieth century when Henry Sylvester-Williams of Trinidad, and William Edward Burghardt DuBois of the United States of America, both of African descent, used it at several Pan-African Congresses which were mainly attended by scholars of African descent of the New World.[21] In addition there were also Black American intellectuals such as Martin Delany and Alexander Crummel, who drew similarities between Africans and Black Americans.[22] The sentiment among these intellectuals centred on the belief that in order for African civilization to prosper, it was necessary to establish African nation free from the USA where they would be able to pursue self-determination with dignity.[23] Largely influenced by their own religious - mainly Christian - beliefs, early Pan-Africanists sought to advance the spirit of Pan-Africanism through missionary work on the African continent.[24]

The OAU however, fell into disuse and its fight for human rights because it was inapt for such a task because the Charter of the OAU, did not include the protection of human right as one of its main goals.[25] Furthermore, the OAU had very poor human rights record and failed to act when it was confronted with regimes guilty of gross human rights violations such as Idi Amin in Uganda.[26] This state of affairs has become slightly worse in recent years which demonstrate the incapacity of many of the African states to deal with not only their own domestic human rights problems what more of the MNCs which are far more sophisticated than many of the states in the Global North.

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[20] Langerud M H (2016) *From the Organisation of African Unity to the African Union: From a Policy of Non-Interference to a Policy of Non-Indifference*? (Masters thesis, University of Oslo) 3.
[21] Nkrumah K (1963) *Africa Must Unite* (Frederick A. Prager, New York) x.
[22] Chirisa I E W, Mumba A and Dirwai S O (2014) "A Review of the Evolution and Trajectory of the African Union as an Instrument of Regional Integration" available at *SpringerPlus*, 3, 101. http://doi.org/10.1186/2193-1801-3-101 (accessed at 05 June 2018).
[23] *Ibid*.
[24] The Orgnaisation of African Unity available at http://www.sahistory.org.za/topic/organisation-african-unity-oau (accessed 19 May 2018).
[25] Govindjee A (2016) *Introduction to Human Rights Law* 2nd ed (South Africa, LexisNexis) 25.
[26] *Ibid.*

However, the advent of the African Union (AU) can be described as an event of great magnitude in the institutional evolution of the African region from the Organisation of African Unity.[27] On 9 September 1999, the Heads of States and Government of the OAU issued a Declaration (the Sirte Declaration) calling for the establishment of an AU, with the view, *inter alia*, of accelerating the process of integration in the African continent to play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded by certain negative aspects of globalisation (see chapter 4).[28]

The main objectives of the AU are *inter alia*, to rid the continent of the remaining vestiges of colonisation and apartheid; to promote unity and solidarity among African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of the Member States and to promote international cooperation within the framework of the UN.[29] Furthermore, through the AU Coordinating Committee for the Liberation of Africa, the Continent worked and spoke with undivided determination to forge an international consensus in support of the liberation struggle and the fight against apartheid.[30]

Colonisation in the nineteenth century shattered African political communities because "European countries was meant to capture new markets, raw materials and cheap labour to service their industries which was underpinned by exploitation, racial prejudice, oppression and systematic suppression of the rights of the colonised".[31] The forces of aggression on the ground were and still are MNCs which profit immensely under a situation of political disorder and weak legal systems or outright corruption in the Global South.[32] This required the most important colonial powers, France and

[27] African Union at http://www.au.int/en/about/nutshell#sthash.Hc49O6vl.dpuf (accessed 09 February 2016).
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] Mugwanya *Human Rights in Africa* 25 in Govindjee A (2016) *Introduction to Human Rights Law* 2nd ed (South Africa, LexisNexis) 24.
[32] Amusan L (2018) "Multinational Corporations' (MNCs) Engagement in Africa: Messiahs or Hypocrites? *Journal of African Foreign Affairs (JoAFA)* Vol 5, No. 1, 42. Pp 41-62; Many works are, no doubt, available on the activities of MNCs in developing states (Cohen, 2007; Ivanović, 2015; Nölke, 2014; Schutter, Swinnen & Wouters, 2013). Liberalists who wrote about MNCs (Cohen, 2007; Dicken, 2015) see them as agents of development, employment, clean environment, development of the underdeveloped rural areas through their adherence to ethical, social and environmental responsibilities. Some have the opposite view that their operations in their host countries constitute

Great Britain, to justify their non-application in Africa of their proud "human rights" traditions by having double standards based on racial discrimination.[33] In practice, "colonial local administration was extremely authoritarian and reduced most African rulers to relatively 'minor cogs' in the administrative machinery."[34]

At the heart of colonialism is the question of land. Land was and is still in the hands of the colonisers in most African countries.[35] What is worse is that most of the arable land which is meant to provide food security for Africans is still used as a threat for the downfall of the African economy and in turn to sustain the economic privilege of the colonisers.[36] Notably, the literature on agribusiness shows that MNCs and their activities in the developing countries of the so called "Third World" have put much emphasis on their negative impact.[37] These MNCs have been accused of, among other things not only taking up much of the best productive land and using these lands for the production of luxury crops destined for export to the developed countries but also of using capital-intensive production techniques which do not provide much employment in these countries of mass unemployment and operating vertically integrated networks of production with marketing and distribution based on their own criteria of economic rationality without reference to the priorities of the host economies.[38]

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underdevelopment, unemployment, misery, human rights abuses, environmental degradation, capital flight, tax evasion, and unconstitutional change of government. They further observed that they perpetuate "according-to-rule and against-the-rule" corruption through bureaucrats and politicians (Wilks and Nordhaug, 2013: 301).

[33] Govindjee A (note 25 above) 24.

[34] Dlamini *Human Rights in Africa: Which Way South Africa?* 78, in Govindjee A (2016) *Introduction to Human Rights Law* 2nd ed (South Africa, LexisNexis) 24.

[35] Land Audit Report (2017) version 2; Phase II: Private Land Ownership by Race, Gender and Nationality. Total of 37 078 289 ha farms and agricultural holdings are owned by individuals: 26 663 144 ha or 72% of which are Whites; followed by Coloured at 5 371 383 ha or 15%; Indians at 2 031 790 ha or 5%; Africans at 1 314 873 ha or 4%. Co-owners own 425 537 ha or 1% and other own 1 271 562 ha or 3%.

[36] Mtembu N (2017) "#FarmMurders: Black Monday Idea Reaps Bitter Harvest" *IOL* available at https://www.iol.co.za/weekend-argus/news/farmmurders-black-monday-idea-reaps-bitter-harvest-11751441 (accessed on 20 December 2017).

[37] Pangeti E (1986) "Agribusiness in Colonial Zimbabwe: the case of the Loveld" in Teichova A, Levy-Leboyer M & Nussbaum H (1986) *Multinational Enterprises in Historical Perspective* (University Press, Cambridge, Great Britain) 326.

[38] *Ibid;* 'through its increasing control of arable land in poor countries, agribusiness to grow high-profit crops for export rather than to raise corn, wheat and rice to support a local population without money to pay for it. Such examples as the ecological destruction of the Brazilian Amazon by agribusiness ranching enterprises or the case of Bud Senegal growing vegetables for the European market in the heart of the famine-ridden Sahel and using a virtually labour-free drip irrigation system can be quoted to support these accusations'.

The colony of Southern Rhodesia, as it was called was occupied under the auspices of the London registered commercial corporation, the British South Africa Company (BSAC).[39] The economic power of this company lay in South Africa, where its founder, Cecil John Rhodes and his associates had a substantial interests in diamond and gold mining.[40] Although BSAC relinquished political control to the white settlers in 1923, it retained its hold on the economy.[41] The company was the largest landowner and owned the railways and mineral rights and was the largest owner of foreign capital in the colony.[42] According to Colin Stoneman, the BSAC by 1945 held about half of the total foreign capital in the country (£60 million) half of which was in the railways.[43]

In his speech at the ceremony of the proclamation of the Congo's independence in June 1960 Lumumba asked the following question, "Who will ever forget the shootings which killed so many of our brothers, or the cells into which were mercilessly thrown those who no longer wished to submit to the regime of injustice, oppression and exploitation used by the colonialists as a tool of their domination?"[44]

The State also strengthened the discriminatory measures by a way of legislation such as Company rule, through Land Apportionment Act of 1930, the Maize Control Act of 1931 and other commodity acts and the Industrial Conciliation Act of 1934 which are against African participation in the economy.[45] The Land Apportionment Act was of special significance, since through its provisions it divided land into 'White' and 'African' areas, and significantly reduced the amount of land available to the African majority. Thus, making it imperative for the Africans to rely on wage labour for subsistence.[46] The predicament which the ordinary Africans had to deal with is best captured by Lumumba 's assertion when he states that "we have experienced forced

[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Id* 327.
[44] Lumumba P (1960) "The Truth about Monstrous Crime of the Colonists" *Foreign Languages Publishing House,* 47.
[45] Pangeti (note 37 above) 327.
[46] *Ibid.*

labour in exchange for pay that did not allow us to satisfy our hunger, to clothe ourselves, to have decent lodgings or to bring up our children as dearly loved ones".[47]

In the absence of strong domestic legal framework and complicity by African States in their socio-economic, and legal demise - a supranational entity such as the AU and its rights documents might be of significant in the protection of rights. The African Charter provided for the creation of the African Commission on Human and Peoples' Rights, a mechanism which in turn led to the establishment of the African Court on Human and Peoples' Rights.[48]

The creation of the African Court on Human and Peoples' Rights is an important step to complement the role of the African Commission with enforceable mechanisms that the African system of human rights protection was lacking so far.[49] The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights was adopted on 10 June 1998, and entered into force on 25 January 2004.[50] At the 2004 AU Summit, it was decided that the new Court would merge with the African Court of Justice. As of today, this has yet to be done but nevertheless, the Court is still in operation without the merger. The Court is located in Arusha, Tanzania. The Court gave its first judgement on 15 December 2009.[51]

The impact of colonisation within which the discussion below takes course is described aptly by Nguni in his illustration of how it will constitute historical dishonesty not to locate MNCs within the barbarism of colonial-imperialist-capitalist aggression of the Global North against the Global South as he points out that:[52]

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[47] Lumumba (note 44 above) 47.
[48] Article 30 of the African Union, African Charter on Human and Peoples' Rights, adopted on 27 June 1981, entered into force on 21 October 1986.
[49] African Court on Human and Peoples' Rights available at www.african-court.org/en/ (accessed 20 July 2019).
[50] AU, Protocol to the African Charter on human and peoples' rights on the establishment of an African Court on Human and peoples' rights, adopted on 10 June 1998, entered into force on 25 January 2004.
[51] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 129, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).
[52] Wa Thiong'o N (1986) *Decolonising the Mind: the Politics of Langauge in African Literature* (London: Currey J,; Portsmouth N H; Heinemann) 2.

> "the African realities are affected by the great struggle between the two mutually opposed forces in Africa today: an imperialist tradition in Africa is today maintained by the international bourgeoisie using the multinational and of course the flag-waving native ruling class. The economic and political dependence of the African neo-colonial bourgeoisie is reflected in its culture of apemanship and parrotry enforced on a restive population through police boots, barbed wire, a gowned clergy and judiciary; their ideas are spread by a corpus of state intellectuals, the academic and journalistic laureates of the neo-colonial establishment. The resistance tradition is being carried out by the working people (the peasantry and the proletariat) aided by the patriotic students, intellectuals (academic and non-academic), soldiers and other progressive elements of the petty middle class".

The power of the MNCs in Africa is demonstrated by Africa's Top Employers conducted in October 2018 which found that out of 209 organisations officially registered to participate in 2019 Top Employers Certification Programme, 195 organisations spanning 31 African countries and 23 industry sectors achieved the Top Employers 2019 Certification.[53] A significant finding is that 84% of the enterprises are MNCs whilst the remaining 16% are national companies.[54] The countries with the most certified organisations are: South Africa (99), Kenya (8), Nigeria (8), Egypt (7), Ghana (7), Morocco (6), Mozambique (5), Tanzania (5), Zambia (5), Zimbabwe (5), and Tunisia (5).[55] Certification has also been achieved for the very first time by an organisation in Burkina Faso. The top five industry sectors in Africa with the greatest representation are: Fast-Moving Consumer Goods (55), Transport & Logistics (37), Telecommunications (26), Manufacturing (22) and Pharmaceuticals (14).[56]

[53] Elliot B (2018) "Africa's Top Employers 2019" *Top Employers Institute Country Manager: Africa,* available at https://mg.co.za/article/2018-10-26-00-africas-top-employers-2018 (accessed 20 July 2019).
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*

3.2.1 The African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights entered into force on 21 October 1986, after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of the States and Governments of the Organization of African Unity (OAU, the African Union – AU, since 2001).[57] It has opened a new era for the protection of human rights in Africa, and has been ratified by all State Members of the African Union.[58]

There are important provisions in the preamble of the Banjul Charter, the African Charter on Human and People's Rights (ACHPR) which might be deduced as forming a significant anecdote for the assessment of business rights. The Charter of the Organization of African Unity, stipulates that "freedom, equality, justice and dignity are the essential objectives for the achievement of the legitimate aspirations of the African peoples".[59] To comply with article 2 of the African Charter, Africa promises to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the people of Africa and to promote international cooperation having due regard to the Charter of the UN and the UDHR.[60]

The problem stems from the conflation of article 2 in a way that aligns the African paradigm of human rights as conceived by Nkruma, Donnelly and Mutua with that of the UN and the Global North (universalism) paradigm.[61] If one works on the premise that the UN Charter and the UDHR are creations of the victors of World War II, then

[57] African Union, African Charter on Human and Peoples' Rights, adopted on 27 June 1981, entered into force on 21 October 1986. De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 117, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).
[58] De Schutter (note 51 above).
[59] Preamble of the Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html (accessed 15 February 2016).
[60] *Ibid.*
[61] Mutua M (2000) "The African Human Rights System: Acritical Evaluation" *Prepared for United Nations Development Programme, Human Rights Development Report* 1-2, available at https://digitalcommons.law.buffalo.edu/other_scholarship/16 (accessed 16 July 2019).

the ideas of liberalism, "neo-colonialism",[62] trade liberalisation[63] imbedded within this victory have adversely affected Africa's socio-economic growth resulting in the non-realisation of rights. The tragedy is that this position assumes the supremacy of the "international."

The ACHPR aims to put at the centre the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights.[64] The Charter provides that every individual shall be equal before the law and every individual shall be entitled to equal protection of the law.[65] Moreover, pertinent to the slave labour in Africa it is the provision that states that every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.[66]

To elucidate the above point, it has been reported that in July 2019 that child labour is still rife by cocoa MNCs:[67]

> It has been almost twenty years since leading chocolate manufacturers signed an agreement to eradicate child labour in 2001. Not only did they fail to meet the original 2005 deadline after vowing to achieve it without government oversight, but now a revised goal says it hopes to get rid of only 70 percent of child labour by 2020 – a disappointing scaling-down of its ambitions. Child labour continues to be a serious problem on cocoa farms throughout West Africa, which produces two-thirds of the world's cocoa. It is so prevalent that reporters from the Washington Post who spent

[62] Martinez E and Garcia A (1997) " What is neoliberalism" "Neo-liberalism" is a set of economic policies that have become widespread during the last 25 years or so. Although the word is rarely heard in the United States, you can clearly see the effects of neo-liberalism here as the rich grow richer and the poor grow poorer. Available at https://corpwatch.org/article/what-neoliberalism (accessed 19 May 2018).
[63] Cernic J L (2008) "Corporate Human Rights Obligations at the International Level" *Willamette J. Int'l L. & Dis. Res.* 131 -205. 131;see also Narula who states that "the privatisation and deregulation of economies and the liberalisation of trade have diminished the state's influence on daily economic lives of its people.
[64] *Ibid.*
[65] *Id* article 3.
[66] *Id* article 15.
[67] Martinko K & Treehuger (2019) "Africa: Chocolate Compabies have Failed to Deliver on Promises to Eradicate Child Labour in the Cocoa Industry throughout West Africa" available at https://www.business-humanrights.org/en/africa-chocolate-companies-have-failed-to-deliver-on-promises-to-eradicate-child-labour-in-the-cocoa-industry-throughout-west-africa (accessed 21 July 2019).

a month traveling through Ivory Coast earlier this year, speaking with child farm labourers and farm owners along the way, said that "the odds are substantial that a chocolate bar bought in the United States is the product of child labour."

In analysing why efforts to reduce child labour have failed so far, critics says that efforts have been "stalled by indecision and insufficient financial commitment." For example, the cocoa industry pulls in roughly $103 billion in sales annually, and yet has invested a paltry $150 million over 18 years to deal with child labour. In the words of Antonie Fountain, managing director of the Voice Network, a group working to end child labour in the cocoa industry: "The companies have always done just enough so that if there were any media attention, they could say, 'Hey guys, this is what we're doing.' We haven't eradicated child labour because no one has been forced to... How many fines did they face? How many prison sentences? None. There has been zero consequence".

An even bigger problem is the "dire poverty that afflicts cocoa-growing nations like Ghana and Ivory Coast. With most farmers making an annual income of around $1,900 on smallholder farms of under 10 acres, and with literacy rates under 44 percent, it is exceedingly difficult to afford schooling for children and much easier to put them to work…Third-party certifications, such as Rainforest Alliance and Fairtrade, are seen as a good choice, as they set standards for wages, working conditions, and environmental stewardship that are higher than the average. However, they cannot always guarantee that there's been no child labour used".[68]

The language of human rights by the AU, though necessary, has had dismal results, given the fact that Africa is still a hive of cheap labour and natural resource exploitation by the Global North – it is thus ironic that the AU still soldiers on despite the failure of its promulgated rights instruments that fly in the face of the ACHPR. The AU is trying its uttermost with its plans such as *Agenda 2063: The Africa We Want*, however, one

[68] *Ibid.*

asserts that much like the failure of the Millennium Development Goals[69] that failed to eradicate poverty in 2015,[70] the Africa 2063 will also suffer the same fate. This is because in the Global South, the operating vice of neo-colonialism is that the state which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty.[71] In reality its economic system and thus its political policy is directed from outside.[72]

The African Charter provides that colonised or oppressed people shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the Global North.[73] Furthermore, the African Charter states that all peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.[74] The above provisions have been amongst the most difficult to dismantle, especially in the context of the economy as driven by MNCs. This is so because MNCs are likely to invest in countries with weak institutions (most of the Global South) despite the risks and uncertainty involved, because there is a likelihood of higher returns due to minimal regulations.[75] Therefore, MNCs are not victims of corruption, but instead are active participants who perpetuate corruption by making rational decisions to engage in it for self-gain.[76]

All peoples shall freely dispose of their wealth and natural resources.[77] This right shall be exercised exclusively for the interest of the people. In no case shall a people be deprived of it.[78] In case of spoliation the dispossessed people shall have the right to

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[69] Africa's Millennium Development Goals available at http://www.sahistory.org.za/article/africas-millennium-development-goals (accessed 19 May 2018).
[70] Mbeki T (2011) "Illicit Financial Flows: Report on the High Level Panel on Illicit Financial Flows from Africa" *Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development,* 9. Illicit financial flows (IFFs). Money that is illegally earned, transferred or utilized. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials.
[71] Nkrumah K (1965) *Neo-colonialism, the Last Stage of Imperialism* (Thomas Nelson & Sons, Ltd, London. Published in the USA by International Publishers Co., Inc) 1.
[72] *Ibid.*
[73] Article 20 (2) of the African Charter on Human and Peoples' Rights.
[74] *Id* article 20 (3).
[75] Kimemia D (2018) "Multinational Corporations as Supplier of Corruption" *Africa Insight* Vol. 48, No. 2, 27.
[76] *Ibid.*
[77] Article 21(1) of the African Charter on Human and Peoples' Rights.
[78] *Ibid.*

the lawful recovery of their property as well as to adequate compensation.[79] The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.[80]

Illicit financial flows[81] by MNCs have robbed Africa of the crumbs it usually obtains form the Global North.[82] Coupled with corruption between the Global North and the Global South elites, Africa finds no solace in the language of human rights. Thus, the illicit outflow of capital from Africa is from the same fabric as conquest. It is, therefore, no new phenomenon or accident that Africa leads other regions in terms of the illicit outflows to GDP measure.[83] Furthermore, Kar and Cartwright-Smith findings were that Over the last 50 years, Africa is estimated to have lost in excess of $1 trillion in illicit financial flows.[84] For instance, while illicit outflows from Africa comprise just 7.7 percent of developing country outflows, this loss at an average of 5.7 percent of GDP per annum has an outsized impact on the continent.[85]

Mbeki's report also provides that:

> "Currently, Africa is estimated to be losing more than $50 billion annually in IFFs. But these estimates may well fall short of reality because accurate data do not exist for all African countries, and these estimates often exclude some forms of IFFs that by nature are secret and cannot be properly estimated, such as proceeds of bribery and trafficking of drugs, people and firearms. The amount lost annually by Africa through IFFs is therefore likely to exceed $50 billion by a significant amount".[86]

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[79] *Id* article 21(2).
[80] *Id* article 21(3).
[81] Mbeki T (2011)"Illicit Financial Flows: Report on the High Level Panel on Illicit Financial Flows from Africa" *Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development,* 9.
[82] *Ibid.*
[83] Kar D & LeBlanc B (2013) "Illicit Financial Flows from Developing Countries: 2002-2011" (Global Financial Integrity) 21.
[84] *Ibid.*
[85] *Ibid.*
[86] Mbeki (note 81 above) 13.

State parties to the African Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with the view of strengthening African unity and solidarity.[87] States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that which is practiced by international monopolies so as to enable their people to fully benefit from the advantages derived from their national resources.[88] All people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.[89] States shall have the duty, individually or collectively, to ensure the exercise of the right to development.[90]

This right to development in the Global South is often thwarted by MNCs' violation of human rights as evidenced by African Commission on Human and Peoples' Rights, in its 64th Ordinary Session of the African Commission opened in Sharm El Sheikh, Egypt which stated that:[91]

> "The African Commission has condemned abusive practices in the mining industry, which is thriving in many resource-rich African countries, including the Democratic Republic of Congo. In 2017, it found the Congolese government responsible for a 2004 military operation abetted by copper production company, Anvil Mining, that resulted in the summary execution of over 70 people, and the arbitrary detention and enforced disappearance of scores of others. It ordered the government to pay US$2.5 million in damages to the victims and their families, and publicly rebuked Anvil Mining".

Africa has not been able to freely determine its political status, economy, or freely dispose of its wealth and natural resources in line with the above ideals as contained

[87] *Id* article 21(4) of the African Charter on Human and Peoples' Rights.
[88] *Id* article 21(5).
[89] *Id* article 22(1).
[90] *Id* article 22(2).
[91] Sheikh S E (2019) "African Union Restricts Role of African Commission on Human & Peoples' Rights; NGOs Express Concern over Future Accountability for Human Rights Abuses" "Africa: AU - Uphold Rights Body's Independence", 26 Apr 2019, available at https://www.business-humanrights.org/en/african-union-restricts-role-of-african-commission-on-human-peoples'-rights-ngos-express-concern-over-future-accountability-for-human-rights-abuses (accessed 21 July 2019).

in the African Charter. This has resulted in the incapacity for Africa to feed, improve infrastructure and provide for an adequate health care.[92] The exploitation of new worlds has not been ended by the Westerners and Africa as a refreshment station for the Global North is still perfect and intact as it show no cracks despite "post-colonial", "democratisation", and constitutionalism. The enforcement of these provisions has evaded the African continent and this has little to do with the inability to enforce human rights but rather the institutionalised and structure of Global North's stronghold on Africa's affairs. This has happened in many instance because most of the MNCs that engage in corruption have a local partner or agent who acts as the medium, making it difficult for the country of origin to catch the MNCs involved.[93]

The MNCs are juristic persons with rights and duties. The ACHPR is aptly placed to deal with rights abuses from any persons (natural or juristic). However, it has been over 36 years since the promulgation of the ACHPR and Africa is not closer to any economic autonomy nor compliance with article 21(1)-21(3) which "attempts" to assist African states on how they can dispose and protect their natural resources. For example the case of Shell in Nigeria tells of the complexities of the impact of the power between MNCs' as backed by global economy and the plight of Africans.[94] *The Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, African Commission on Human and Peoples' Right,s[95] the facts were as follows:

> "In March 1996, two NGOs, the Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) submitted a communication to the ACHPR. The communication noted that the government of Nigeria had been directly involved in oil production through the state owned oil company, the Nigerian National Petroleum Company (NNPC), which encompasses the majority of shareholders in a consortium

[92] Mbeki (note 81 above) 13.
[93] Kimemia D (2018) "Multinational Corporations as Supplier of Corruption" *Africa Insight* Vol. 48, No. 2, 34.
[94] ACHPR, Re: Communication 155/96, 27 May 2002, ACHPR/COMM/A044/1, www.cesr.org ; De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 127, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).
[95] *Ibid.*

with Shell Petroleum Development Corporation (SPDC). It was alleged that this involvement caused severe damage to the environment, and consequently led to health problems among the indigenous Ogoni population. The communication also alleged that the Nigerian Government had condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies.

Therefore the communication alleged violations of Articles 2, 4, 14, 16, 18, 21, and 24 of the African Charter. In October, 1996, the communication was deemed admissible by the African Commission, which ruled in 2001, that the government of Nigeria had violated these articles. The Commission recommended to cease attacks on the Ogoni people, to investigate and prosecute those responsible for the attacks, to provide compensation for victims, to prepare environmental and social impact assessments in the future and to provide information on health and environmental risks.

The Commission based its decision on the African Charter and the other treaties to which Nigeria is a signatory, as well as on international resolutions and declarations. These include: ICESCR, ICERD, CRC, CEDAW, UDHR, the Vancouver Declaration on Human Settlements, the Declaration on the right to development, the Draft Declaration on the Rights of Indigenous Peoples, the UN Sub-Commission on prevention and discrimination of Minorities resolution 1994/8 and the Universal Declaration on the Eradication of Hunger and Malnutrition.

The government of Nigeria has an obligation to protect the rights enshrined in these various treaties. It must take all appropriate measures to protect individuals from violations of their rights and should be held accountable if it fails to do so, or if the taken measures are not sufficient. Through its international obligations, the government is expected to have established all necessary measures to protect its citizens from violations committed by transnational corporations.

> Furthermore it was easier to establish a direct government involvement in the case, as the government itself was the majority partner in the oil consortium and owned the private company. It seems that little has been done following the Commission's decision to clean the environmental pollution of the Ogoni land, or to compensate the communities affected. Besides, the unilateral decision of Nigeria, made on 4 June 2008, to replace the Shell Petroleum Development Company of Nigeria (SPDC) with the Nigerian Petroleum Development Company (upstream subsidiary of the NNPC) has been seen by the Ogoni populations as 'a further attempt to deny their stakeholders rights'."[96]

Recognising the human rights abuses in the extractive industries, the African Commission on Human and Peoples' Rights have crafted the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment.[97] The lack of, or weak national regulatory regimes governing the role of the industry on the continent, as well as the sector's inadequate observance of human and peoples' rights and environmental and transparency standards have meant that the operations of extractive industries often result in various human and peoples' rights issues.[98]

3.2.2 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights

The Principles and Guidelines on the Economic, Social and Cultural Rights on the African Charter on Human and Peoples' Rights, assist state parties to comply with

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[96] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 127, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).

[97] African Commission on Human and Peoples' Rights: State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment, available at http://www.achpr.org/files/instruments/state-reporting-guidelines/state_reporting_guidelines_and_principles_on_articles_21_and_24_eng.pdf (accessed 22 July 2019) iv.

[98] *Ibid.*

their obligations under the African Charter.[99] These Principles and Guidelines provide help for the states to understand without access to economic, social and cultural rights, the dignity of the individual and the collective is threatened and that they become vulnerable to multiple threats regarding their security, and that economic deprivation and marginalisation of the people communities and groups results in increased social conflict and instability.[100] Furthermore, it is worth noting that the implementation of economic, social and cultural rights in Africa requires taking into account the totality of the way of life and the positive cultural values of individuals and people in Africa to ensure the realisation of the dignity of all persons.[101] These Guidelines add to the impetus of the ACHPR to enforce human rights against MNCs.

Article 6 of the Principles and Guidelines provide that Africa is concerned about its deep conditions of poverty, inequality and insecurity that continue to prevail on the African continent and the many obstacles that exist to the full enjoyment of economic, social and cultural rights in Africa.[102] It is thus notable, that despite a range of initiatives to promote Africa's development, mechanisms to ensure the effective protection and full realisation of economic, social and cultural rights continue to be inadequate in many African countries.[103] This is as a direct result of colonialisation and its strong hold over Africa. The major problem with many AU initiatives including the present Principles and Guidelines specifically and the realisation of socio-economic rights generally in the Continent is that they are rooted in dependency on the Global North.[104] This is as a result of recognising that economic, social and cultural rights are justiciable and enforceable rights and that state parties to the African Charter have

[99] Preamble of the Principles and Guidelines on the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at http://www.achpr.org/instruments/and http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf. 5. (accessed March 2018).
[100] *Ibid* 5.
[101] *Ibid.*
[102] *Ibid* 6.
[103] *Ibid.*
[104] Ferraro V (2008) "Dependency Theory: An Introduction" in *the Development Economics Reader*, ed. Giorgio Secondi (London: Routledge,) 58-64. Dependency theory refers to [Dependency is] ...an historical condition which shapes a certain structure of the world economy such that it favours some countries to the detriment of others and limits the development possibilities of the subordinate economics a situation in which the economy of a certain group of countries is conditioned by the development and expansion of another economy, to which their own is subjected.

obligations to ensure that individuals and peoples' have access to enforceable administrative and/or judicial remedies for any violation of these rights.[105]

Notably the main goal of adopting the Principles and Guidelines is aimed at urging States that every effort is made to promoting these by governments, civil society organisations, national human rights institutions, judges, lawyers, academics and their professional associations so that they become generally known to everyone in Africa.[106] This mechanism may be effective with a thorough analysis of Global North because:[107]

> "MNCs are not enthusiastic to help in economic development of Africa. They have devised imperialistic means to solicit low-tax payments to host governments. By paying less tax, the profits accrued to MNCs are increased. Or sometimes they manipulate means to evade host governments' national taxation. These behaviors of MNCs are not in tune with their host African governments' national economic objectives".

The right to work is essential for the realisation of other economic, social and cultural rights,[108] as it forms not only an inseparable and inherent part of human dignity but also is integral to an individual's role within society.[109] Access to equitable and decent work which respects the fundamental rights of the human person and the rights of workers in terms of conditions, safety and remuneration, can also be critical for both survival and human development.[110] The right to work should not be understood as an absolute and unconditional right for the obtainment of employment.[111] On the contrary, the State has the obligation to facilitate employment through the creation of an environment conducive to the full employment of individuals within society under

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[105] The Principles and Guidelines (note 66 above) 7.
[106] *Ibid.*
[107] Udofia O E (1984) "Imperialism in Africa: A case of Multinational Corporations" *Journal of Black Studies* Vol. 14, No. 3, 358.
[108] Preamble of the Principles and Guidelines on the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at http://www.achpr.org/instruments/and http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf. 5. (accessed March 2018) 57.
[109] *Ibid*.
[110] *Ibid.*
[111] Id 58.

conditions that ensure the realisation of the dignity of the individual.[112] The right to work includes the right to freely and voluntarily choose what work to accept.[113] The artisanal mining in the DRC, the "zamazamas" (illegal artisanal mine workers) in South Africa and the Marikana massacre best illustrate the gap of regulating effectively the conduct of MNCs.

The above human rights abuses include dispossession of land and accompanying displacement of people in the areas of new discoveries of gas, oil and minerals, weak or poorly beneficial terms of concession, environmental degradation affecting the livelihood and health of people living adjacent to these areas, violation of labour rights, lack of transparency about and egregious abuse by national actors of revenues received from the extractive industries and evasion of taxes.[114] Similarly, as experiences from various parts of the continent show, the extractive industry has contributed to or otherwise prolonged or exacerbated internal armed conflicts.[115]

The Principles and Guidelines centre the state as the one tasked with creating a conducive environment for full employment. However, in the Global South, it is the MNCs who employ on the same level with state if not higher, which necessitates the MNCs to take responsibility for the promotion and protection of rights. The above will counter against MNCs arguing that their responsibility is the gaining of profits for the benefit for their shareholders, but no responsibilities towards employees or society as whole.[116]

The state must ensure the right to freedom of association, including the rights to collective bargaining, to strike and other related organisational and trade union rights.[117] These rights include the right to form and join a trade union of choice

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[112] *Ibid.*
[113] *Ibid.*
[114] African Commission on Human and Peoples' Rights: State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment, available at http://www.achpr.org/files/instruments/state-reporting-guidelines/state_reporting_guidelines_and_principles_on_articles_21_and_24_eng.pdf (accessed 22 July 2019) iv.
[115] *Ibid.*
[116] Cernic J L (2008) "Corporate Human Rights Obligations at the International Level" *Willamette J. Int'l L. & Dis. Res.* 139.
[117] Preamble of the Principles and Guidelines on the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at http://www.achpr.org/instruments/and

(including the right not to), the right of trade unions to join national and international federations and confederations and the right of trade unions to function freely without undue interference.[118] There is need to adequate protection against unfair or unjustified arbitrary and constructive dismissal, and other unfair labour practices.[119]

Given the colonialism of Africa where suppression and oppression of the majority obtains, it is important to ensure that the attempt at enforcement of rights standards against MNCs, is given the attention it deserves.[120] The state parties' needs to ensure equality and non-discrimination in accessing decent work, equal pay for work of equal value and promotion without discrimination of any kind and ensuring conditions of work to members of vulnerable and disadvantaged groups that are not inferior to those enjoyed by other employees.[121]

Furthermore, state parties must take special steps to ensure that women have equal opportunities to accept employment.[122] This may entail special education and training programmes to equip women, who often times have less access to education and will thus to seek decent work of their own choice.[123] There is need to enact and enforce laws and introduce implementing measures including means of redress and access to justice in cases of non-compliance against workplace harassment.[124] Harassment might amount to discrimination on account of race, colour, religion, national origin, age, sex/gender, sexual orientation, disability or other status. While all types of harassment ought to be prohibited, sexual harassment requires particular attention.[125] The experience of sexual harassment is an affront to a worker's dignity and prevents in particular women from making contributions which are commensurate with their

http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf. 5. (accessed on March 2018).

[118] Preamble of the Principles and Guidelines on the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at http://www.achpr.org/instruments/and http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf. 5. (accessed on March 2018).

[119] *Id* 59(c).

[120] *Ibid.*

[121] *Id* 59(i) 22.

[122] *Ibid.*

[123] *Id* 59(j).

[124] *Id* 59(k).

[125] *Ibid.*

abilities.[126] Child labour should be prevented through criminalisation of the worst forms.[127]

The problem with enforcement of human rights standards against the MNCs is exacerbated by the fact that in the course of reviewing state reports in terms of Article 62 of the ACHPR, a number of issues have been observed.[128] In the first place, while progress has been made in reviewing and monitoring human rights issues relating to both civil and political rights and to a lesser but increasing extent, socio-economic rights, very little, if any, progress has been made in reviewing and monitoring rights issues relating to peoples' rights.[129]

The state should undertake public education on the harmful effects of child labour.[130] Furthermore, the state should introduce and enforce minimum age regulations for paid or unpaid employment and conditions of employment in line with international standards, including hours of work and rest, prohibition or restriction of night work and penalties imposed for violations of such provisions.[131] Moreover, states must ensure, through the regulation of the conduct of employers and parents, that child employees, fully enjoy their right to education.[132] Human rights language has made some gains and there are ample human rights instruments in Africa which protect almost every right including the autonomy to work and be fairly remunerated.

Part of the problem of enforcement of human rights standards against MNCs is that they are also instrumental to economic growth to both the Global South and the Global North. However, the major difference between this economic groups is that in the Global South due to the legacy of colonialism is that "giant monopolistic corporations"

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[126] *Ibid.*
[127] *Ibid* 59(p) & 59(m) 23.
[128] African Commission on Human and Peoples' Rights: State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment, available at http://www.achpr.org/files/instruments/state-reporting-guidelines/state_reporting_guidelines_and_principles_on_articles_21_and_24_eng.pdf (accessed 22 July 2019) vi.
[129] *Ibid.*
[130] *Ibid.*
[131] *Id* 59(p) - 59(m) 23.
[132] *Ibid.*

are at the head of capitalism in Africa.[133] For instance MNCs produce and market Nigerian crude oil as well as refined products in different countries of Africa and the Global North.[134] This integrated production and marketing reinforce imperialistic central control of MNCs.[135]

Almost similar to John Ruggie's Guiding Principles on Business and Human Rights, the Principles and Guidelines of the African Charter on Human and Peoples' Rights is also based on obligations to respect, protect, promote and fulfil human rights. The Principles and Guidelines provide that all rights, including economic, social and cultural rights, impose a combination of negative and positive duties on States.[136] A useful framework for understanding the nature of the duties imposed by economic, social and cultural rights is the duty "to respect, protect, promote and fulfil" these rights.[137] No hierarchy is accorded to any of these duties and all should be protected through administrative and judicial remedies.[138]

3.2.3 Pretoria Declaration on Economic, Social and Cultural Rights in Africa

The Pretoria Declaration provides that state parties to the African Charter on Human and Peoples' Rights must undertake to respect, protect, promote and fulfil all the rights in the Charter including economic, social and cultural rights.[139] State parties are therefore, encouraged to address, with all appropriate measures, their obligations in relation to the full realisation of economic, social and cultural rights as well as tackling the following constraints:

(a) Lack of good governance and planning and failure to allocate sufficient resources for implementation of economic, social and cultural rights;
(b) Lack of political will; Corruption, misuse and misdirection of financial resources;

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[133] Udofia O E (1984) "Imperialism in Africa: A case of Multinational Corporations" *Journal of Black Studies* Vol. 14, No. 3, 354-355.
[134] *Ibid.*
[135] *Ibid.*
[136] Section 4 of the Principles and Guidelines (note 128 above) 11.
[137] *Ibid.*
[138] *Ibid.*
[139] Section 1 of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) 2.

(c) Poor utilisation of human resources and absence of effective measures to curtail brain drain;
(d) Failure to ensure equitable distribution of income from natural resources;
(e) Continued outflow and existence of refugees and internally displaced persons; Conditionality of aid and unserviceable debt burdens;
(f) Privatisation of essential services, and
(g) Cost recovery including access fees and charges for essential services.[140]

Lack of implementation of the obligations assumed under international law into national law have limited engagement with rights on the part of some judges.[141] Furthermore, lack of protection of African knowledge, failure to enforce some judicial decisions against the state and globalisation have contributed adversely to the perceived legitimacy of human rights language's justiciability.[142] This has resulted with MNCs free rain where many of the cases against the corporations end-up with fines if the victims are lucky and for most part the cases are dismissed due to lack of jurisdiction.

The right to property in article 14 of the ACHPR relating to land and housing entails, among other things, the following:

(a) protection from arbitrary deprivation of property;
(b) equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women;
(c) adequate compensation for public acquisition, nationalisation or expropriation;
(d) equitable and non-discriminatory access to affordable loans for the acquisition of property;
(e) equitable redistribution of land through due process of law to redress historical and gender injustices;

[140] *Ibid.*
[141] *Ibid.*
[142] *Id* section 3 and 2.

(f) recognition and protection of lands belonging to indigenous communities;
(g) peaceful enjoyment of property and protection from arbitrary eviction;
(h) equal access to housing and to acceptable living conditions in a healthy environment.[143]

Having highlighted the core contents of economic, social and cultural rights under the African Charter, member states make the following recommendations:

> "State parties should develop mechanisms to hold non-state actors especially MNCs and businesses accountable for violations of economic, social and cultural rights in such matters relating to child labour, industrial safety standards, protection against forced evictions and low wages, protection of the environment, including global warming and its impact on ecosystems, livelihood and food security".[144]

It is necessary to strengthen the capacity of state institutions to produce disaggregate data that would provide an accurate assessment of the implementation of economic, social and cultural rights;[145] The AU encourage member states that have not done so, to ratify the treaties, in particular the Protocol on the Rights of Women in Africa.[146] Notably, state parties must call upon the organs of the AU to encourage member states to uphold economic, social and cultural rights and to hold them accountable for violations of economic, social and cultural rights.[147] There is also a need to integrate the monitoring of economic, social and cultural rights into the work of relevant AU institutions as well as the CSSDCA, African Peer Review Mechanism (PRM) and New Partnership for Africa's Development (NEPAD) process.[148]

International and regional entities are encouraged to concentrate on African needs related to development and the realisation of economic, social and cultural rights.[149]

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[143] *Id* section 5, 3.
[144] *Id* section 11(a) (xii) 6.
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] *Id* section 11(b) (vii) 6.
[149] *Id* section 11(f) (i) 6.

The AU must strive for the cancellation of unserviceable debt burdens of African states and ensure that bilateral and multilateral trade and economic agreements conform to international treaty obligations relating to economic, social and cultural rights.[150] The international communities is also urged to play a role in the implementation of economic, social and cultural rights including through assistance and co-operation with African states.[151] The AU should also take measures to regulate trade in extractive industries (such as oil, mining) that are exploitative, corrupt and fuel conflicts in Africa.[152] Furthermore, co-operate with African countries in their efforts to repatriate money and cultural artefacts that have been unlawfully removed from African countries[153] and finally, ensure compliance with the principles of CSR.[154]

The CSR has not yielded any positive results for Africans but it has been utilised for the most part as tax avoidance and not a genuine concern by MNCs to empower the local communities nor to grow the Continent‘s economy. Therefore, one question remains, if the present legal framework is not protecting and benefiting Africans – what is the use of human rights language in relation to rights protection generally and holding MNCs accountable specifically?

3.2.4 State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines)

These Reporting Guidelines are adopted to give further guidance to state parties to the ACHPR in reporting pursuant to article 62 of the ACHPR on the implementation of their obligations to realise the enjoyment of economic, social and cultural rights under the Charter.[155] These guidelines are to be used in conjunction with the 1989 Guidelines for National Periodic Reports under the African Charter.[156] Further reference should be made to the Principles and Guidelines on the implementation of

[150] *Id* section 11(f) (iii) 6.
[151] *Id* section 11(f) (v) 6.
[152] *Id* section 11(f) (iv) 6.
[153] *Id* section 11(f) (v) 6.
[154] *Id* section 11(f) (vii) 6.
[155] Section 1 State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) 1.
[156] *Ibid.*

economic, social and cultural rights in the ACHPR, adopted on 26 May 2010 (Principles and Guidelines) which give a more detailed explanation of States Parties obligations under the Charter.[157]

The biggest problem with MNCs' special status as law unto themselves is that legal frameworks such as the present State Reporting Guidelines hardly ever investigate the role of MNCs in relation to the ACHPR. Therefore, there is little practical evaluation on how this reporting mechanism has assisted the continent except that it is merely a theoretical regurgitation of what ought to be.

In relation to the economic, social and cultural rights, the state party report should indicate whether the state party has adopted a national framework law, including policies and strategies for the implementation of each right. There is also a need to identify resources available for that purpose and the most cost-effective ways of using such resources.[158] Whether there are any mechanisms in place to monitor progress towards the full realisation of the rights, including identification of indicators and related national benchmarks in relation to each right remains a problem.[159] The incorporation and direct applicability of each right in the domestic legal order with reference to specific examples of relevant case law is imperative[160] and the judicial and other appropriate remedies in place enabling victims to obtain redress in cases where their rights have been violated[161] and structural or other significant obstacles arising from factors beyond the state party's control which impede the full realisation of the rights guaranteed in the African Charter.[162] The importance of the Reporting Guidelines is seen as baseline upon which MNCs may be encouraged to operate differently for the betterment of society.

The judgements issued by the Court are binding, contrary to the communications of the Commission and of the Committee.[163] State Parties commit themselves to the

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[157] *Ibid.*
[158] Section 2 (a) of the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) 1.
[159] *Id* section 2 (b) 1.
[160] *Id* section 2 (c) 1.
[161] *Id* section 2 (d) 1.
[162] *Id* section 2 (e) 1.
[163] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 133, available at

implementation of judgements rendered within the delays fixed by the Court.[164] However, the implementation of its decisions depends very often on the will of the States. Nevertheless, the fact that the Court makes its decisions public, and sends them to Member States of the AU and the Council of Ministers, is an important way to put pressure on the condemned States. Besides, the Council of Ministers of the African Union monitors the implementation of judgements.[165] It can pass directives or rulings that have binding force on reluctant States. However, the implementation of these measures will depend on the will of the Council of Ministers to exercise a thorough monitoring of the decisions of the Court. This still remains to be seen as many of the parties seem reluctant or unwilling to implement the court orders. The Court addresses the Conference of the Heads of State and Government in an annual report which must include the non-fulfilment of its decisions.[166]

State parties must provide statistics on the enjoyment of each right, disaggregated by age, gender, ethnic origin, urban/rural population and other relevant status, particularly with reference to groups identified as vulnerable or marginalised in the Principles and Guidelines on an annual comparative basis for a period spanning the past five years.[167] The provision of information on steps taken to make the reporting process enabled transparency and accountability, particularly regarding how the process was publicised and which members of civil society were involved in drafting the report.[168] Finally, the report must provide summaries of national plans, policies and indicate how these were developed, demonstrating public participation and how they were being implemented and what steps have been taken to monitor such implementation, including disaggregated statistics where appropriate.

https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).

[164] Article 30 Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998, available at: https://www.refworld.org/docid/3f4b19c14.html (accessed 24 July 2019).

[165] *Id* article 29(2).

[166] De Schutter (note 163 above); see also article 31 Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998, available at: https://www.refworld.org/docid/3f4b19c14.html (accessed 24 July 2019).

[167] Section 3, 1 of the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) 1.

[168] *Id* section 4, 2.

Conclusion

The African region as forming part of the Global South has demonstrated moderate gains in terms of utilisation of human rights language against MNCs. The adoption and ratification of UN instruments pertaining to human rights especially against MNCs (though not treaties but just mere norms) signals that the AU has taken the first step in the promotion and protection of human rights. In addition the AU has evidenced a second step in the creation of region specific human rights instruments such as the African Charter of Human and People' Rights that obliges African state to protect their citizens against MNCs that violates human rights.

The study has further demonstrated that despite all this human rights instruments the AU compared to other regions such as the EU (which has relative success in enforcing human rights standard against MNCs) has remained in absolute squalor on all aspects of life. This is so because though there are some countries such as Cote d'Ivore, Rwanda, Ghana, and Ethiopia which are the fastest growing economies in Africa and are beginning to realise the promotion of business and human rights relatively.[169] This chapter has also shown that it is not because of lack of sufficient human rights instruments to hold MNCs accountable but that the language of human rights obfuscate rights that must be afforded to all citizens irrespective of their power (vertical vs horizonal application of rights with respect to juristic and natural persons).

Therefore, the below finding demonstrate the proper context of analysis informed by the five theoretical framework about how the human rights language is not the most effective tool to enforce human rights standards against MNCs. This is informed by the fact that the Global South have always been aware of its recent history of the racial contract that permeates every facet of their lives especially through the operations of the MNCs. This so vivid in Africa particularly because in its preamble the ACHPR state that Africa has duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign

[169] The World Bank in Africa available at worldbank.org (accessed 14 November 2019).

military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex. language, religion or political opinions.[170]

This genuine struggle is no longer blatant and completely military, but has been spearheaded by Global North MNCs which at the same time are important to the economic growth in the region. This has created an accountability problems that the human rights language is yet to overcome, especially because of the colonial-imperialism-capitalism.

For, example:[171]

> "The laws of the home government of MNCs affect their subsidiaries in Africa; these cause conflict with African countries. This happened in Angola in 1974-1975 when this country was in civil war. The American government accused Angola of being backed by the communists. As a result, the Gulf Oil Company, with its Angolan investments of close to $200 million was ordered by the American government to stop payment of royalties to Angola".

The above example had little to do with protection of human rights and how the $200 million FDI would have promoted human rights but because of ideological differences, people may suffer because they do not conform to the mould of colonial-imperialist-capitalist. Therefore the African Human Rights system though quick to appropriate the liberalism of the UDHR, ICCPR and the ICESCR, the major issue has been the lack of capacity and the undermining and negating the ACHPR and the Guiding Principles that make the language of human rights with minute impact in the Global South.

More crucially is Africa's recognition on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should

[170] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html (accessed 24 July 2019).
[171] Udofia (note 133 above) 358.

necessarily guarantee human rights.[172] This foundational posture recognises the particularity of the African history and how human rights language would have to be cultural relevant to the Continent which by its nature would differ from radical universalism from the UN. The appropriation of radical universalism by the Global South has had the effect of achieving moderate gains in enforcing human rights standards against MNCs in its regional context and also had moderate impact on the liberation of Africans from the power of MNCs. Moreover, there is 71 finalised contentious cases at the African Court on Human and People's Rights but very few of them interrogate in great detail the enforcement of human rights against MNCs.[173]

The vulnerability of Africa apart from its debasement by colonisation is its under resourced regional human rights system. And MNCs have demonstrated little incentive to promote human rights especially in the Global North and therefore, despite the different ways for victims and NGOs to access the system, through the Commission, or its Rapporteurs, and the Court it would be prudent to keep in mind the very young history of the Court, and considering that only two States have so far granted individuals access to it, the Commission still remains the main channel for NGOs and individuals to access the African human rights system.[174]

3.3 EUROPEAN UNION'S LEGAL MEASURES ON BUSINESS AND HUMAN RIGHTS

The European Union (EU) regional rights system is relatively stronger as compared to the other two major regions which are the AU and OAS. This means that EU provides a fair amount of literature relating to MNCs. Therefore, to extrapolate this information this section will be centred around the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Convention for the Protection of Human Rights, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the

[172] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html (accessed 24 July 2019).
[173] African Court on Human and Peoples' Rights, available at http://en.african-court.org/index.php/cases/2016-10-17-16-18-21 (accessed 23 July 2019).
[174] De Schutter (note 163 above) 134.

Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility and most importantly a single document that has succinctly dealt with EU's business and rights, namely, Commission Staff Working on Implementing the UN Guiding Principles on Business and Human Rights – State of Play.

The European Court of Human Rights (ECHR) a regional court based in Strasbourg, France, was established by the European Convention for the Protection of Human Rights and Fundamental Freedoms (also called the European Convention on Human Rights).[175] The Court was established in 1959, the ECHR became permanent on 1 November 1998, following the entry into force of Protocol No. 11 to the Convention, which replaced the former enforcement mechanism - the European Commission of Human Rights (created in 1954).[176] On 1 June 2010 the Additional Protocol No. 14 "amending the control system of the Convention" entered into force.[177] The Russian Federation was the last State Party to ratify it. The deposit of the instrument of ratification was made on 18 February 2010. With this Protocol States Parties intend to reduce the workload on the Court by modifying the process before the ECHR. The ECHR exercises its jurisdiction over the territory of the 47 Member States of the Council of Europe that have ratified the Convention.[178]

The EU sets an example for how effective the legal framework can be in dealing with human rights and business. However, this development is helpful in a different way from how the Global South have dealt with MNCs because one can eliminate problems gamine to the Global South such as lack of resources, relative weak legal mechanism. Moreover, the human rights language still falls short especially with regard to cases emanating from the Global South. For example:

> "In *Vedanta Resources Plc and Another v Lungowe and Others,*[179] which was heard on the 15-16 January 2019 by the United Kingdom Supreme

[175] CoE, European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force on 3 September 1953.
[176] *Ibid.*

[178] CHR, "European Court of Human Rights: Questions and Answers", available at www.echr.coe.int/ECHR/EN/Header/
Applicants/Information+for+applicants/Frequently+asked+questions (accessed 20 June 2019).
[179] *Vedanta Resources Plc and Another v Lungowe and Others* UKSC 2017/0185. Available at https://www.supremecourt.uk/cases/uksc-2017-0185.html (accessed 24 March 2019).

> Court where Vedanta Resources Plc a UK MNCs and its subsidiary in Zambia, Konkola Copper Mines Plc (KCM) are being sued for polluting local water sources causing damage to their land and livelihoods.[180] However, what is revealing with this anecdotal case is the question before the court which is whether local people in Zambia can obtain justice and compensation from a mining company based in the UK".[181]

3.3.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms

The ECHR has forty-seven adhering states and it focuses only on civil and political rights and possesses an international judicial mechanism: the European Court.[182] The ECtHR has recognised that MNCs can enjoy some of the rights enshrined under the Convention and the ratification of Protocol No 11 gave individuals the right to bring their case(s) before the Court against Contracting States.[183] Article 4 of the Convention prohibits slavery and forced labour, it states that no one shall be held in slavery or servitude[184] and that no one shall be required to perform forced or compulsory labour.[185] For the purpose of article 4, the term "forced or compulsory labour" shall not include:

> "Any work required to be done in the ordinary course of detention imposed according to the provisions of article 5 of this Convention or during conditional release from such detention;[186] any service of a military character or, in case of conscientious objectors in countries where they are

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[180] *Ibid.*
[181] Rights and Accountability in Development (RAID) "UK Supreme Court Hears Landmark Case on Corporate Rights Violations" available at http://www.raid-uk.org/blog/uk-supreme-court-hears-landmark-case-corporate-rights-violations (accessed 24 March 2019).
[182] Khoury S (2010) "Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to accountability" *Sortuz. Oñati Journal of Emergent Socio-legal Studies*, Vol. 4, No. 1, 75.
[183] *Ibid.*
[184] Article 4 (1) of the Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html (accessed 16 February 2016) 7.
[185] *Id* article 4 (2).
[186] *Id* article 4 (3) (a).

recognised, service exacted instead of compulsory military service;[187] any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community;[188] and any work or service which forms part of normal civic obligations.[189] The Convention further provides that any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party".[190]

The Convention functions in accordance with the German legal concept, the "drittwirkung theory" which means that the Convention itself can apply to legal relations between individuals or private actors, not only between individuals and public authorities.[191] It can also be defined as the possibility for individuals to enforce their rights against another private party.[192]

In Strasbourg it is only possible to lodge a complaint against State authorities. However, the Court admitted indirectly the "drittwirkung theory", through a failure from the State to take appropriate measures in order to secure respect for rights and freedoms protected under the European Convention "even in the sphere of the relations of individuals between themselves".[193] It deals with the responsibility of the State and not with the responsibility of a private actor. As such, the ECHR can rule that a Member State(s) is in violation of the Convention if it fails to protect people under their jurisdiction from the violations of a third private party. This is called the horizontal effect of the Convention.[194]

When dealing with regions such as the EU, it is important to compare the behaviour of MNCs in their home countries and the host state. For example, the British company,

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[187] *Id* article 4 (3) (b).
[188] *Id* article 4 (3)(c)
[189] *Id* article 4 (3) (d).
[190] *Id* article 33.
[191] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 98.
[192] *Ibid*; see also Khoury S (2010) "Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to accountability" *Sortuz. Oñati Journal of Emergent Socio-legal Studies*, Vol. 4, No. 1, 75.
[193] *Ibid*; see also CHR, *X and Y v. Netherlands*, App. No. 8978/80, (1985) Serie A91, 7 EHHR 152, § 23.
[194] De Schutter (note 191 above) 98.

UK PR Bell Pottinger have instigated race tensions in South Africa in support of corrupt politicians and business executives.[195] Despite a relative activism for the enforcement of the ECHR the court is still battling to utilise the language of human rights as highlighted in this paragraph below:[196]

> "Drittwirkung. Conversely, under this provision the Court has consistently declined admissibility for cases against private parties considering that it lacks jurisdiction *ratione personae*. One respondent (R801) referred to the judgement of *Florin Mihailescu v. Romania* where the Court clearly identified its position, "the Court has no jurisdiction to consider applications directed against private individuals or businesses." Other significant features of the ECHR include its principle of evolutive interpretation or the dynamic approach. This leaves a possibility for judicial imagination and maneuvering."

In the cases related below, the European Court condemned Contracting Parties for their failure in regulating private industry. In doing so, the judges accept the applicability of the Convention to environmental issues despite the lack of an explicit right to a safe and clean environment in the text.[197]

Z Lopez Ostra v. Spain[198]

> In the town of Lorca, several tanneries belonging to a company called SACURSA had a waste-treatment plant, built with a State subsidy on municipal land twelve metres away from the applicant's home. The plant

[195] Cave A (2017) "Deal that undid Bell Pottinger: inside story of the South Africa scandal" *The Guardian* Tue 5 Sep 2017 19.59 BST available https://www.theguardian.com/media/2017/sep/05/bell-pottingersouth-africa-pr-firm (accessed 12 May 2018).
[196] Khoury S (2010) "Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to accountability" *Sortuz. Oñati Journal of Emergent Socio-legal Studies*, Vol. 4, No. 1, 76.
[197] De Schutter (note 191 above) 107. The ECHR has considered environmental issues in relation to different provisions of the European Convention: art.2 (right to life), art.3 (right not to be subjected to torture or to inhuman or degrading treatment or punishment), art.5 (right to liberty and security), art.6 (right to a fair trial), art.8 (right to respect for private and family life), art.11 (freedom of assembly and association) and art.1 of the Protocol No. 1 (protection of property).
[198] De Schutter (note 191 above) 107. ECHR, *Lopez Ostra v. Spain*, App. No. 16798/90, (1995) 20 EHRR 277; CHR, *Lopez Ostra v. Spain,* App. No. 16798/90, (1995) 20 EHRR 277.

caused nuisance and health problems to many local people. Mrs. Lopez Ostra lodged a complaint with the ECHR on the grounds of her right to respect for her home, under article 8 paragraph 1 and her right not to be subjected to degrading treatment under article 3.

The Court declared that "naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. [The Court acknowledged the State was not the actual polluter]. Admittedly, the Spanish authorities, and in particular the Lorca municipality, were theoretically not directly responsible for the emissions in question. However, as the Commission pointed out, the town allowed the plant to be built on its land and the state subsidized the plant's construction. [The Court recognized the State's responsibility] and needs only to establish whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life under Article 8. [At the end, the Court considered] that the State did not succeed in striking a fair balance between the interest of the town's economic wellbeing – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life".

Fadeyeva v. Russia[199]

On December 1999, Mrs. Fadeyeva lodged an application with the Court against the Russian Federation alleging that the operation of a steel plant (Severstal PLC) close to her home endangered her health and well-being. The "very strong combination of indirect evidence and presumptions" lead the Court to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel-plant. Russia did not directly interfere with the applicant's private life or home. However, the state did not offer any effective solution to help the

[199] ECHR, *Fadeyeva v. Russia,* App. No. 55723/00, 9 June 2005.

applicant to move from the dangerous area, nor did it reduce the industrial pollution to acceptable levels, despite the violation of domestic environmental standards by the company. The Court stated "that the state's responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant's complaints were considered in terms of a positive duty on the state to take reasonable and appropriate measures to secure the applicant's rights under Article 8 § 1 of the Convention". The Court concluded that the State had failed "to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life". Hence, the Court concluded there had been a violation of Article 8 of the Convention.[200]

The two cases demonstrate how the State has been held liable for failure "to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life". This case was not decided on human rights language but environmental rights without any reference to human rights jurisprudence. The point being that one can activate for a strong legal rights and remedy without reference to human rights language. In addition, the location of this dispute in the Global North also contributes demonstrates a strengthened legal system with resources to fully complement it as apposed to countries in the Global South. Moreover, this cases have set a precedent in relation to holding the state liable and not the MNCs.

The ECHR has provisions that allow the Court to recognise the corporation as a legal entity with rights, but the responsibility of corporations remains unclear.[201] Uncertainties persist regarding the most effective method of guaranteeing the enforcement of TNCs' human rights obligations, particularly whether these duties should be direct or indirect, which forum is best suited to deal with corporate violations, and whether the responsibility falls on the home-state or host-state to enforce the rules.[202]

[200] De Schutter (note 191 above)107.
[201] Khoury (note 196 above) 69.
[202] *Ibid.*

3.3.2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility

The European Commission has previously defined Corporate Social Responsibility (CSR) as "a concept whereby MNCs integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[203] CSR concerns actions by MNCs over and above their legal obligations towards society and the environment.[204] Certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility.[205]

A strategic approach to CSR is increasingly important to the competitiveness of MNCs.[206] It can bring benefits in terms of risk management, cost savings, access to capital, customer relationships, human resource management and innovation capacity.[207] Because CSR requires engagement with internal and external stakeholders, it enables enterprises to better anticipate and take advantage of fast changing societal expectations and operating conditions.[208] However:

> "Capitalism, has always relied on critiques of the status quo to alert it to any untrammeled development of its current forms and to discover the antidotes required to neutralize opposition to the system. In other words, attempts to tame MNCs power and efforts to subject corporations to novel regulatory regimes also trigger MNCs counter-efforts to evade, oppose, de-legitimize and co-opt such 'unwarranted' pressures. MNCs have begun to be actively involved in various displays of 'corporate responsibility'. Thus, at some point in the 2000 the UN begun to think about the ''social responsibilities of MNCs'' as a site of struggle over meaning, where public pressures and corporate response to such pressures assume a more or less definitive

[203] Section 1 of the European Convention for the Protection of Human Rights, Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, 3.
[204] *Id* section 1.
[205] *Id* section 1.
[206] *Id* section 1.1.
[207] *Ibid.*
[208] *Ibid.*

> structure, with ‘authorized’ agents who occupy certain ‘‘recognized’’ positions from which they assert ‘what is at stake’ and from which they try to control the definition and scope of the very notion of responsibility”.[209]

Notwithstanding, the conduct of MNCs above, it is still imagined that by addressing their social responsibility, MNCs can build long-term employee, consumer and citizen trust as a basis for sustainable business models.[210] Higher levels of trust in turn help to create an environment in which MNCs can innovate and grow.[211] Through CSR, enterprises can significantly contribute to the European Union’s treaty[212] objectives of sustainable development and a highly competitive social market economy.[213] CSR underpins the objectives of the Europe 2020[214] strategy for smart, sustainable and inclusive growth, including the 75% employment target.[215] Responsible business conduct is especially important when private sector operators provide public services.[216] Helping to mitigate the social effects of the current economic crisis, including job losses, is part of the social responsibility of enterprises.[217] CSR offers a set of values on which to build a more cohesive society and on which to base the transition to a sustainable economic system.[218]

There is a stark contrast between the needs in Africa where justice requires MNCs to pay employees fair remuneration and transfer skills. However, the so-called CSRs are only undertaken by building one hospital which is seen as emancipating the local communities, whilst exploiting the locals tenfold of the productivity unit. Therefore, as much as this is a good mechanism, it has only helped MNCs’ marketing strategy more than real eradication of poverty.

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[209] Shamir R (2004) “Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility” *law & society review,* 644.
[210] Section 1.1 of the European Convention.
[211] *Ibid.*
[212] European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at: http://www.refworld.org/docid/3ae6b39218.html (accessed 20 May 2018).
[213] *Id* section 1.2 of the European Convention.
[214] Europe 2020 Strategy: The Europe 2020 strategy is the EU's agenda for growth and jobs for the current decade. It emphasises smart, sustainable and inclusive growth as a way to overcome the structural weaknesses in Europe's economy, improve its competitiveness and productivity and underpin a sustainable social market economy.
[215] Section 1.2 of the European Convention.
[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid.*

3.3.3 Commission Staff Working on Implementing the UN Guiding Principles on Business and Human Rights – State of Play

On 16 June 2011, the United Nations Human Rights Council (UNHRC)[219] adopted unanimously by the United Nations Guiding Principles on Business and Human Rights (UNGPs).[220] The UNGPs is seen as the most comprehensive global framework, the UNGPs have played an significant role in addressing the risk of adverse impacts of business activity (MNCs) on rights.[221]

While MNCs have a broadly positive impact on the social and economic development of modern societies by creating wealth and jobs thus, adding value and providing services, their operations can also have a significant negative impact on civil and political rights, economic, social and cultural rights and labour rights.[222] The UNGPs provide a coherent framework for addressing such possible adverse MNCs impacts on rights, as well as provisions for the respect of international humanitarian law in situations of conflict.[223]

The European Union (EU) plays a leading role in the interrelation between business and human rights and recognises the UNGPs as "the authoritative policy framework" in addressing CSR.[224] Accordingly:[225]

> "The European Commission coordinates its approach to business and rights through its wider Strategy on Corporate Social Responsibility (CSR).

[219] UN Human Rights Council, UN Human Rights Council: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Intersections between Culture and Violence against Women, 17 January 2007, A/HRC/4/34, available at: http://www.refworld.org/docid/461e2c602.html (accessed 20 May 2018).
[220] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 2; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[221] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 2; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[222] *Ibid.*
[223] *Ibid.*
[224] *Ibid.*
[225] *Ibid.*

> Both the foundational method employed in the EU are rooted in volunteerism of the MNCs to take responsibility and account for their rights violations. In its 2011 Communication on CSR, the Commission referred to the importance of working towards the implementation of the UNGPs in the EU. It emphasised that effective implementation of the UNGPs would contribute to EU objectives some of which are enshrined in the treaties in relation to specific rights issues, such as child labour and forced prison labour as well as core labour standards which included gender equality, non-discrimination, freedom of association and the right to collective bargaining".

The Commission has also actively encouraged EU Member States to develop National Action Plans (NAPs)[226] in relation to UNGPs.[227] A public participation on the Commission's CSR Strategy in 2014 confirmed its support for the Commission's continued role in fostering the implementation of the UNGPs at the EU level, with 81 per cent of the respondents considering this as important or very important.[228] Broken down by stakeholder type, these figures show that 78 per cent of the support comes from industry representatives, 83 per cent the SMEs and 91 per cent is from civil society organisations.[229] In terms of successful implementation, over half of the respondents (54 per cent) believed that such actions had been well implemented to date whereas 13 per cent of these respondents believed that the Commission was not successful in promoting the UNGPs.[230]

This staff working document serves as a stocktaking exercise on where the EU stands in terms of implementing the UNGPs.[231] The report is a situational analysis of the

[226] Guidance on National Action Plans on Business and Human Rights. *UN Working Group on Business and Human Rights Version 1.0 I December 2014,* available at *http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf* (accessed 15 January 2018).
[227] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 2; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[228] *Ibid.*
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid.*

political, judicial and non-judicial framework conditions in the EU.[232] It is not a policy document, but a technical staff working document of a descriptive nature that aims to achieve the following:

> "To describe the status quo from the perspective of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy as regards the implementation of the UNGPs to explain the existing competencies of the EU *vis-à-vis*, the Member States for various activities required to implement the UNGPs; to provide an update on various activities by Commission services and the European External Action Service (EEAS) and to identify the potential gaps in the implementation of the UNGPs".[233]

This report aims to describe the EU's current regime relating to business and rights.[234] The main body of the document addresses the current implementation of the UN Guiding Principles and also further information regarding existing EU policy and law which support the UNGPs.[235] The report is structured around the three pillars of the UNGPs, taking into account the internal and the external dimensions of EU action.[236]

3.3.4 EU Competencies in the Field of Business and Human Rights

The EU's scope of action is governed by the principle of conferral enshrined in article 5 of the Treaty on the Functioning of the European Union (TFEU).[237] Therefore, in terms of article 5, the EU shall only act within the confines of the competences conferred upon it by the Member States in pursuance of the objectives set out in the

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[232] *Ibid.*
[233] Council Decision 2010/427/EU – establishing the organisation and functioning of the European External Action Service, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Arx0013 (accessed 20 May 2018).
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid.*
[237] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: http://www.refworld.org/docid/476258d32.html (accessed 20 May 2018).

Treaties.[238] Competences not conferred upon the Union by the Treaties, therefore, remain with the EU Member States.[239]

The Council of the European Union states that Business and “human rights” is not a stand-alone issue as it touches upon a wide range of different legal and political areas, including, but not limited to, “human rights” law, labour law, environmental law, anti-discrimination law, international humanitarian law, investment and trade law, consumer protection law, civil law, commercial law and corporate or penal law.[240] The EU's regulatory competence, and hence the Commission's ability to act, varies according to the scope of competence awarded to the EU in respect of each of those areas.[241]

“Human rights” are among the common values upon which the EU has been founded as stated in article 2 of the Treaty.[242] “These values include the respect for human dignity, freedom, democracy, equality, the rule of law, respect for “human rights”, rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men”.[243] The EU Charter of Fundamental Rights has come into force and legally binding on Member States since the entry of the Lisbon Treaty thus, ensuring a comprehensive framework for the duties to "respect, protect, promote" in line with the international “human rights” obligations that already bind the EU’s Member States.[244] The Charter applies to the European Union in all its actions and to Member States whenever they implement EU law.[245]

As such, it does not extend the EUs competencies but rather obliges the EU and its Member States to comply with rights standards whenever EU law is implemented.[246] Concerning the Union's external action, article 21 of TFEU states that “the EU shall

[238] Council of the European Union, “COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play” (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[239] *Ibid.*
[240] *Ibid.*
[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*
[246] *Ibid.*

define and pursue common policies and actions and shall work co-operatively in all fields of international relations, in order to consolidate and support democracy, the rule of law, “human rights” and the principles of international law”.[247]

3.3.5 The right to equality and non-discrimination

With regard to the right to equality and non-discrimination, article 10 of TFEU provides that in describing and implementing its policies and activities, the EU shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[248] This principle is reaffirmed in article 207(1) of TFEU, which confirms that the EU's trade relations and agreements form part of this framework stating that the common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action and in article 208(1) of the TFEU regarding EU development policy, which states that EU policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union’s external action.[249] The same is true for economic, financial and technical cooperation with third countries with reference to article 212 and for humanitarian aid with reference to article 214 TFEU.[250]

3.3.6 The rights of migrant workers in the EU

Regarding migrant workers' rights, the EU has already developed a substantial amount of legislative tools to protect third country nationals' labour rights.[251] This is the case of Directive 2003/109/EC[252] concerning the status of long-term residents or directives protecting specific categories of migrants, such as the Council Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes

[247] Article 21 of European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, available at: http://www.refworld.org/docid/476258d32.html (accessed 20 May 2018).
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.*
[251] *Ibid.*
[252] European Union: Council of the European Union, *Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents*, 23 January 2004, OJ L. 16-44; 23. 1. 2004, 2003/109/EC, available at: http://www.refworld.org/docid/4156e6bd4.html (accessed 20 May 2018).

of studies, pupil exchange, unremunerated training or voluntary service.[253] Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research.[254] These two Directives have been recast into a single proposal which is under discussion.[255]

Later on, Council Directive 2009/50/EC (Blue Card) was adopted setting standards on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment and granting them equal treatment as regards, for example, working conditions, social security, pensions, recognition of diplomas, education and vocational training and after 18 months of legal residence the possibility to move to another Member State to take up highly qualified employment.[256]

On the other hand, the framework Directive 2011/98/EU on a "single application procedure for a single permit for third-country nationals to reside and work in the territory of the Member States and on a common set of rights for third country workers legally residing in a Member State also grants a common set of rights and equal treatment to third country workers admitted under national schemes".[257] These rights include working conditions (pay, dismissal, health and safety); collective labour law (freedom of association and affiliation); education and vocational training, recognition of diplomas (Directive 2005/36/EC) and access to all branches of Social Security (as set out in Regulation No 883/2004) and payment of acquired pensions when moving to a third country.[258] One key aim of this Directive is to reduce the unfair competition between nationals and third country workers, resulting from the possible exploitation of the latter.[259]

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[253] European Union: Council of the European Union, *Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service*, 23 December 2004, OJ L. 375/12; 23.12.2004, 2004/114/EC, available at: http://www.refworld.org/docid/540da3174.html (accessed 20 May 2018).
[254] *Ibid.*
[255] European Union: Council of the European Union, *Council Directive 2005/71/EC of 12 October 2005 on a Specific Procedure for Admitting Third-Country Nationals for the Purposes of Scientific Research*, 23 November 2005, 2005/71/EC , available at: http://www.refworld.org/docid/43abfeaa4.html (accessed 20 May 2018).
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid.*
[259] *Ibid.*

First directive on circular migration for low-wage workers providing for equal treatment with national workers as regards terms of employment and working conditions was adopted: Directive 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.[260] Finally, Directive 2014/66/EU of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer creates an attractive EU scheme harmonising the conditions of entry, stay and intra-EU mobility for third-country workers (managers, specialists and trainee employees) being posted by a group of undertakings based outside the EU to an entity based on the EU territory.[261]

3.3.7 The implementation of the UNGP in the EU

The first pillar of the UNGPs designates the state duty to protect.[262] It should, therefore, be understood that the primary responsibility to protect rights lies with states. Thus, within the context of the European Union, the UNGPs bind the Member States.[263] It is notable, however, the EU shares that duty with areas of exclusive or shared competence - the EU has a role in protecting, promoting and furthering "human rights" and to support its Member States to effectively fulfil their obligations.[264] The foundational principles address the duty of the State at protecting "human" rights against abuses within their territory and jurisdiction by third parties and tis entails succinctly, outlining the State's expectations of business enterprises.[265]

The European Commission services primarily see their role as that one of facilitating the sharing of experience and good practice regarding business and rights between EU Member States.[266] The EU role here, is complementing the role of the UN Working

[260] *Ibid.*
[261] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32014L0066 (accessed 20 May 2018).
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.*
[265] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[266] *Ibid.*

Group or other existing mechanisms for sharing experience and good practice.[267] The main internal EU policy framework which addresses the implementation of the UNGPs is the 2011 Communication which sets out the European Strategy on CSR.[268] The 2011 Communication defines CSR as the "responsibility of enterprises for their impacts on society" and identifies "human rights" as one of the issues to be addressed by enterprises to meet that responsibility.[269] The CSR Strategy sets out an agenda for action, including:

> "Enhancing the visibility of CSR and disseminating good practices; Improving and tracking levels of trust in business; improving self- and co-regulation processes; enhancing market reward for CSR; Improving company disclosure of social and environmental information; further integrating CSR into education, training and research; emphasizing the importance of national and sub-national CSR policies and better aligning European and global approaches to CSR".[270]

3.3.8 The Commission's approach to Corporate Social Responsibility in the EU

The Commission's approach to CSR is premised on "a smart mix of voluntary policy measures and, where necessary, complementary regulation' as well as on the notion that 'the development of CSR should be led by enterprises themselves".[271] This approach proved efficient for the implementation of the UNGPs, notably the forthcoming revision of the EU CSR Strategy will retain these underlying principles, which were widely supported in a public consultation in mid-2014 and at a European Multi-Stakeholder Forum on CSR in February 2015.[272]

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[267] *Ibid.*
[268] *Ibid.*
[269] *Ibid;* see also Martinuzzi A, Krumay B and Pisano U (2011) Focus CSR: The New Communication of the EU Commission on CSR and National CSR Strategies and Action Plans, available at http://www.sd-network.eu/quarterly%20reports/report%20files/pdf/2011-December-The_New_Communication_of_the_EU_Commission_on_CSR_and_National_CSR_strategies.pdf (accessed 20 May 2018) 3.
[270] *Ibid.*
[271] *Ibid.*
[272] *Ibid.*

In its 2011 CSR Communication, the Commission invited member states to produce business and rights action plans and subsequently, it established a peer review process on CSR, to *inter alia,* assist member states to develop National Action Plans (NAPs).[273] Several governments have adopted the CSR statements or policies that mention human rights.[274] To date, six Member States (the United Kingdom, Netherlands, Italy, Denmark, Finland and Lithuania) have published their plans and at least seven more EU Member States are currently preparing national action plans on business and human rights.[275]

Furthermore, more than half of the EU Member States (15 according to a Compendium published by the Commission in June 2014 at the end of the peer review referred to in the previous paragraph) have adopted NAPs on CSR which incorporate human rights issues.[276] Several other Member States are also preparing national action plans on CSR, with final versions expected to be released in 2015 and 2016. [277] With regard to GP 2, the Commission's 2011 CSR strategy stipulates that all enterprises are expected to meet the corporate responsibility of respecting human rights in accordance with the UNGPs. The modern understanding of CSR presented in that Communication explicitly refers to the integration of human rights into business operations and strategy.[278]

In 2015, the EU took an active role in the G7 dialogue with specific reference to global supply chains and decent work - owing to the increasingly international position of both MNCs and SMEs in the EU, global supply chains can generate adverse effects.[279] The risks can be particularly higher when (European) MNCs outsource activities to local suppliers in countries with weak governance mechanisms that cannot actively address the working conditions and thus enforce occupational safety and health or struggle

[273] *Ibid.*
[274] *Ibid.*
[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.*
[278] *Ibid.*
[279] Group of Seven (G7) The leaders of the United States, Canada, Britain, France, Germany, Italy and Japan - countries collectively known as the Group of Seven (G7) - are meeting on Friday for a two-day summit in the resort town of Taormina, Italy. The bloc meets annually to discuss a wide range of issues, including global economy, security and energy.

with the rule of law.[280] The political negotiations provides a platform for sharing experience and address solutions towards mitigating risks in supply chains across sectors.[281]

3.3.9 Business and Human Rights approach in the EU

With regard to Business and Human Rights, National Action Plan for EU members (Action Plan) determined three distinct tasks and corresponding responsibilities in line with the Commission's business and human rights activities of its 2011 CSR strategy.[282] This sought to ensure implementation of the Commission's Communication on CSR, particularly by developing human rights guidance for three business sectors and also publish a report on EU priorities for the effective implementation of the UNGPs aimed at developing the Action Plan on the implementation of the UNGPs.[283]

With the Action Plan's validity now technically expired in December 2014, preparations for a new action plan for the period 2014-2019 are at an advanced stage and this was adopted by Member States in Council in summer 2015.[284] On 28 April 2015, the Commission published a Joint Communication with the EEAS on the Action Plan on Human Rights and Democracy (2015-2019), named; "Keeping human rights at the heart of the EU agenda".[285]

Regarding the implementation of the UNGPs, the Communication proposes future activities within focus, in particular, on further awareness-raising of the UNGPs in the EU's external action, strengthened capacity-development of tools and initiatives in relation to the implementation of the UNGPs, as well as a proactive engagement with business, civil society and public institutions.[286] The Communication also proposes to systematically including trade and investment agreements of references to

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[280] *Ibid.*
[281] *Ibid.*
[282] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[283] *Ibid.*
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*

internationally recognised principles and guidelines on Corporate Social Responsibility such as the OECD Guidelines for MNCs, the UN Global Compact, the UN Guiding principles on business and human rights (UNGPs), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and ISO 26000.[287]

As far as the EU development policy is concerned, a legal commitment to policy coherence for development flows from Article 208(1) TFUE which state that "The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries".[288] The Commission is moving towards a rights-based approach encompassing allhuman rights in the EU development cooperation including private sector development support.[289] The Communication on a stronger role of the private sector in achieving inclusive and sustainable growth in developing countries defines the future direction of the EU policy and support to private sector development in its partner countries and introduces private sector engagement as a new dimension into EU development cooperation.[290]

One of the twelve NAPs included in the Communication provides for the promotion of responsible business practices through EU development policy.[291] The Communication underlines that MNCs investing or operating in developing countries (Global South) should respect rights and should ensure that they have systems in place to assess risks and mitigate potential reverse impacts related to rights, labour, environmental protection and disaster-related aspects of their operations and value chains.[292] MNCs should confer with governments, social partners and NGOs in this regard.[293]

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[287] *Ibid.*
[288] *Ibid*; see also Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.
[289] *Ibid.*
[290] *Ibid.*
[291] *Ibid*; see also Commission of the European Communities Brussels, 2,7. 2002 COM (2002) 347 Final. Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, available at https://ec.europa.eu/europeaid/sites/devco/files/communication-corporate-social-responsibility-sustainable-development-com2002347-20020702_en.pdf (accessed 03 July 2018).
[292] *Ibid.*
[293] *Ibid.*

The Communication also proposes mechanisms on the implementation of public support to private sector development and public-private collaboration in development cooperation.[294] This includes a set of criteria on the provision of direct support to private sector actors to ensure that public support is complementary to what the private sector can do on its own.[295] This includes crowding in private sector resources for development while not distorting the market and leads to measurable development impact.[296] Within these criteria, adherence to social, environmental and fiscal standards, including respect for human rights, is cited as a precondition for EU support to private sector actors.[297]

As a result of the revision of existing Accounting Directives10 regarding the disclosure of non-financial and diversity information, MNCs and groups have been required, as of 2017, to disclose information on policies, risks and results as regards the respect for human rights, anti-corruption, bribery issues, environmental matters, social and employee-related aspects as well as the diversity on boards of Directors.[298] The UNGPs are specifically referred to as one of the international frameworks that companies may rely on when complying with this Directive.[299] The Commission is tasked to report back on the implementation of the Directive in EU Member States in 2018.[300] The Commission made a proposal for the revision of the Shareholders rights Directive in 2014 which aims at incentivizing institutional investors and asset managers to take non-financial information better into account in investment decisions and engage with companies on such issues.[301]

In 2013, the EU introduced a new reporting obligation for large extractive and logging MNCs on payments they make to governments (the "so-called" country-by-country

[294] *Ibid*; see also Engaging the Private Sector in the Post-2015 Agenda (2014**)** is jointly published by the United Nations Industrial Development Organization (UNIDO) and the United Nations Global Compact; e-mail: unido@unido.org // globalcompact@un.org.
[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid.*
[298] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0034 (accessed 18 May 2018).
[299] *Ibid.*
[300] *Ibid.*
[301] *Ibid.*

reporting: CBCR).[302] The new disclosure requirement will improve the transparency of payments made to governments all over the world and will subsequently provide civil society in resource-rich countries with the information needed to hold governments accountable for any income made through the exploitation of natural resources.[303] By requiring disclosure of payments at project level, local communities will have insight into the sums paid by EU MNCs to governments for exploiting local oil/gas fields, mineral deposits and forests.[304] This will also allow these communities to better hold governments accountable for how money has been spent locally and civil society will be in a position to question whether the contracts entered into between governments and extractive and logging companies have delivered adequate value to society and government.[305] Similarly, the EU aims to promote the adoption of the Extractive Industries Transparency Initiative (EITI) in these same countries.[306]

In March 2014, the European Commission High Representative backed the integrated EU approach to tackle the problem of the use of trade in certain minerals for the financing of armed groups in conflict and high-risk areas such as Africa's Great Lakes Region.[307] As a result, the Commission proposed a regulation12 setting up a voluntary system of supply chain due diligence for EU importers which is now in the ordinary legislative process.[308] This Regulation lays down the supply chain due diligence obligations of Union importers who choose to be self-certified as responsible importers of minerals or metals containing or consisting of tin, tantalum, tungsten and gold.[309]

Apart from the introduction of legislative measures, the Commission services have also encouraged non-binding private sector initiatives for responsible supply chain management. In 2011, they published a study which focused on three industrial

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[302] *Ibid.*
[303] *Ibid.*
[304] *Ibid.*
[305] *Ibid.*
[306] Papyrakis E, Rieger M and Gilbert E (2017) “Corruption and the Extractive Industries Transparency Initiative” *The Journal of Development Studies*, available at Vol. 53, No. 2, 295–309, http://dx.doi.org/10.1080/00220388.2016.1160065 (accessed 16 May 2018) 296-297.
[307] Council of the European Union, “COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play” (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[308] *Ibid.*
[309] *Ibid.*

sectors (cotton, sugar cane and mobile phones) and identified good practices and challenges for EU based MNCs.[310] The study made the following recommendations:

> "Increment of supply chain transparency; strengthening of responsible supply chain management in the revision of the OECD Guide-lines for Multinational Enterprises; enhance access to remedy for victims of supply chain abuse; addressing inter-state competition in relation to labour rights; ensuring due diligence in relation to high-risk sectors/MNCs and the promotion of responsible supply chain management through public procurement".[311]

The Commission services have supported the creation of three sectoral platforms for CSR for the fruit juice, social housing and machine tools sectors. These have brought together the main stakeholders to set out strategies that take into account the specific nature of the sectors and to propose actions and tools to assist companies.[312]The Commission services also published specific practical guidance on human rights for companies in 3 sectors (Employment and Recruitment Agencies, Information and Communication Technology, and Oil & Gas) in June 2013.[313] The aim was to help MNCs translate the UNGPs to their own systems and cultures in these sectors through practical steps without proposing a "one-size-fits-all" system or method.[314] The guidance was based on wide field research and consultations with business people, human rights organisations and experts and trade unions.[315]

The particular challenges for small and medium-sized enterprises (SMEs) in the implementation of the UNGPs led the Commission services to publish a guide for SMEs entitled "My Business and Human Rights" in several languages in the form of a handbook in March 2013 which included six basic steps expected of companies according to the UNGPs and questions to be posed in 15 different business situations

[310] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[311] *Ibid.*
[312] *Ibid.*
[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*

that might carry a risk of negative impacts on rights.[316] To formulate a list of "human rights" risks and brief examples of how enterprises could have a negative impact if they are not careful.[317]

Furthermore, in 2013, the Commission services published five case studies with the objective of "De-mystifying Human Rights for Small and Medium-sized Enterprises".[318] Guidance is also available for non-EU citizens who wish to migrate to the European Union in the form of an EU Immigration Portal launched by the Commission in 2011.[319] This contains up-to-date web-based information on EU and national immigration procedures and policies as well as the rights of migrants in the EU.[320] The information explains how to enter EU borders legally and describes the risks related to irregular migration.[321] Thus, workers, researchers, students and those looking to join their families already in the EU can find information adapted to their needs.[322]

An EU-funded project has been developed in 2014 by Euratex (the European Apparel and Textile Confederation) and Industry-All (European Trade Union).[323] The tool is designed for the textiles sector and assists firms particularly SMMEs assess human and environmental risks before engaging in business with suppliers.[324] The tool is designed according to algorithms with the support of detailed indicators and assessment against criteria such as the ISO 26000 Standard on Social

[316] Small and medium-sized enterprises (SMEs) are non-subsidiary, independent firms which employ fewer than a given number of employees. This number varies across countries. The most frequent upper limit designating an SME is 250 employees, as in the European Union. However, some countries set the limit at 200 employees, while the United States considers SMEs to include firms with fewer than 500 employees, available at https://stats.oecd.org/glossary/detail.asp?ID=3123 (accessed 20 May 2018).
[317] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[318] *Ibid.*
[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*
[322] *Ibid.*
[323] EURATEX is the European Apparel and Textile Confederation representing the interests of the European textile and clothing industry at the level of the EU institutions. As the voice of the European industry, EURATEX aims to create favourable environment within the European Union for manufacturing of textile and clothing products, available at: http://euratex.eu/about-euratex/who-we-are/ (accessed 20 May 2018).
[324] *Ibid.*

Responsibility.[325] Thus, allowing MNCs to obtain a country by country snapshot of various risks.[326] The tool will continue to be refined through 2016 with the aim of having it disseminated as an online instrument.[327]

3.3.10 EU support in Developing Countries

The European Commission is also increasingly supporting responsible business practices among European MNCs in the Global South and responsible management of supply chains.[328] Many EU programmes support partnerships between businesses and Civil Society Organisations (CSOs) to promote sustainable production patterns and decent work.[329] For example, the SWITCH-Asia programme promotes sustainable production and consumption patterns in Asia, through an improved understanding and strengthened cooperation between Europe and Asia, and within Asia.[330] Notably, this is to be achieved by supporting SMEs in adopting Sustainable Consumption and Production.[331] In this framework, a strong emphasis falls on the implementation of the Occupational Health and Safety Regulations.[332]

Similar models adapted to each region were created for the Mediterranean region through SWITCH-Med, Eastern Partnership with EAP Green, and Africa regions with SWITCH Africa Green. Such partnerships are also targeted by the Thematic Programme "Civil Society Organisations and Local Authorities" under the Development Cooperation Instrument 2014-2020, through which a variety of CSOs,

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[325] Business and organizations do not operate in a vacuum. Their relationship to the society and environment in which they operate is a critical factor in their ability to continue to operate effectively. It is also increasingly being used as a measure of their overall performance. ISO 26000 provides guidance on how businesses and organizations can operate in a socially responsible way. This means acting in an ethical and transparent way that contributes to the health and welfare of society.

[326] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).

[327] *Ibid.*

[328] *Ibid.*

[329] *Ibid.*

[330] Switch-Asia available at http://www.switch-asia.eu/programme/facts-and-figures/ (accessed 21 May 2018).

[331] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).

[332] *Ibid.*

including Cooperatives, are supported to contribute to the improvement of the business environment and practices and the quality of the economic services.[333] This also involves highlighting governance and corporate social responsibility by stimulating informed demand and structuring feedback mechanisms, using Information and Communication Technologies.[334]

Moreover, the EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan aims to close the EU market to illegal timber products.[335] While principally an environmental initiative, under the bilateral agreements between the EU and timber exporting countries (Voluntary Partnership Agreements), only timber and timber products that have been harvested and produced in compliance with the laws and regulations of the partner country can obtain a FLEGT Licence to enter the EU market.[336] Information can be traced back through the whole supply chain.[337] The EU Timber Regulation prohibits the sale of illegally harvested timber and derived products in the EU and thus requires operators to exercise “due diligence” in order to minimise the risk of illegal timber in their supply chain.[338]

Following the Rana Plaza tragedy, the EU partnered with the ILO, Bangladesh and the United States to launch the "Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh”."[339] The objective of the Compact is to improve labour, health and safety conditions for workers as well as to encourage responsible behaviour by businesses in the ready-made garment industry in Bangladesh.[340] Two years on, improvements have been made as some laws have been changed and factory inspections are carried out with buyers taking actions together with trade unions to

[333] *Ibid.*
[334] *Ibid.*
[335] Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52003DC0251 (accessed 21 May 2018).
[336] *Ibid.*
[337] *Ibid.*
[338] *Ibid.*
[339] Aftermath of the Rana Plaza Tragedy: Social and Health Issues Emerge Amid Struggle for Workers’ Rights, available at http://lawatthemargins.com/aftermath-of-the-rana-plaza-tragedy-social-and-health-issues-emerge-amid-struggle-for-workers-rights/ (accessed 21 May 2018).
[340] *Ibid.*

improve working conditions in the country and this is coupled with private, public, national, international stakeholders cooperating with each other.[341]

The EU together with the Governments of Myanmar/Burma, the United States of America, Japan, Denmark and the ILO launched an Initiative to "Promote Fundamental Labour Rights and Practices in Myanmar/Burma".[342] This initiative focuses on labour law reforms, institutional capacity building as well as full involvement of the stakeholders, including business, employers' and workers' organizations.[343] The Commission's proposal to be part of the initiative was endorsed by the Council on 07 May 2015.[344]

In February 2014, the EU completed a major overhaul of its public procurement rules. The new provisions include critical modifications to facilitate the use of social and environmental criteria in public procurement processes.[345] In the future, public authorities will be able to take social, labour and environmental concerns into account with the aim of contributing to the implementation of environmental and social policies.[346]

For this purpose, the new rules include a cross-cutting social clauses, under which:

(a) Based on respecting applicable environmental, social or labour law obligations under EU and national rules, collective agreements or international law, Member States and public authorities must ensure compliance with the obligations in force at the place where the work is carried out or the service is provided; This includes the fundamental ILO Conventions on Freedom of Association and Protection of the Right to

[341] *Ibid.*
[342] Bilchitz D (2013) "Human Rights Accountability in Domestic Courts: Does Kiobel Increase the Global Governance Gap?" *Journal of South African Law* 794-805, ISSN 0257-7747, Social Sciences Citation Index (ISI).
[343] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[344] *Ibid.*
[345] *Ibid.*
[346] *Ibid.*

Organ-ise (N. 87), Right to Organise and Collective Bargaining (N 98), Abolition of Forced Labour (N. 105), Minimum Age (N. 138), Discrimination (Employment and Occupation) (N 111), Equal Remuneration (N. 100) and Worst Forms of Child Labour (N 182);

(b) Any MNCs failing to comply with the relevant obligations may be excluded from public procurement procedures;

(c) Public authorities will be required to exclude any abnormally low tenders if these result from the failure to comply with the environmental, social or labour law obligations under EU or national rules, collective agreements or international law.

Until the new rules are transposed and enter into force in 2016, existing guidance relating to the social and environmental criteria for public procurement remains available and valid.[347]

Building on the experience of the Kimberley process, the Extractive Industries Transparency Initiative (EITI), the Forest Law Enforcement, Governance and Trade (FLEGT) and the EU Timber Regulation, the Commission supports initiatives to further transparency throughout the supply chain, including aspects of due diligence in different sectors.[348] The Commission encourages the use of the OECD Guidelines for Multinational Enterprises and OECD's due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas.[349]

In March 2014, the Commission proposed "a comprehensive EU supply chain initiative for the responsible sourcing of minerals originating in conflict-affected and high-risk areas."[350] This aims to stop profits from trading minerals being used to fund armed conflicts and support responsible sourcing by promoting transparent supply chains of minerals (namely tin, tantalum, tungsten and gold) originating from conflict-affected and high-risk areas.[351] This should also improve the ability of EU operators

[347] *Ibid.*
[348] *Ibid.*
[349] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27 June 2000, available at: http://www.refworld.org/docid/425bd34c4.html (accessed 21 May 2018).
[350] *Ibid.*
[351] *Ibid.*

to comply with existing frameworks and the livelihood of local communities dependent on mining activities.[352]

A draft Regulation 18 sets out an EU system of self-certification for importers of tin, tantalum, tungsten and gold which choose to import responsibly into the Union.[353] The system is based on the five steps of OECD Due Diligence Guidance.[354] "To increase public accountability of smelters and refiners, enhance supply chain transparency and facilitate responsible mineral sourcing, it is also proposed that an annual list of EU and global responsible smelters and refiners be published."[355]

The proposed Regulation is accompanied by a joint Communication presenting the overall integrated foreign policy approach on how to tackle the link between conflict and the trade of minerals extracted in affected areas.[356] The initiative also proposes many incentives to encourage supply chain due diligence by EU companies, such as:[357]

(a) Public procurement incentives for companies selling products such as mobile phones, printers and computers containing tin, tantalum, tungsten and gold;
(b) Financial support targeting Small and Medium sized Enterprises (SMEs) to carry out due diligence and for the OECD for capacity building and outreach activities;
(c) Visible recognition for the efforts of EU companies who source responsibly from conflict-affected countries or areas;
(d) Policy dialogues and diplomatic outreach with governments in extraction, processing and consuming countries to encourage a broader use of due diligence;
(e) Raw materials diplomacy including in the context of multi-stakeholder due diligence initiatives;

[352] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[353] *Ibid.*
[354] *Ibid.*
[355] *Ibid.*
[356] *Ibid.*
[357] *Ibid.*

(f) Development cooperation with the countries concerned;
(g) Support by EU Member States through their own policies and instruments.

In parallel, the EU continues to cooperate with and provide support to developing country partners on sustainable mining, geological knowledge and good governance in natural resources management.[358] Financial support is also foreseen for the 'EU Resource Transparency Initiative' within the Development Cooperation Instrument of 2014-2020 in the Global Public Goods and Challenges Programme.[359]

As noted above, article 21 TFEU states that "the Union shall define and pursue common policies and actions and shall work for a high degree of co-operation in all fields of international relations, to consolidate and support democracy, the rule of law, human rights and the principles of international law".[360] The Action Plans on Human Rights and Democracy constitute the main framework of reference for the implementation of external policy activities in the area of "human rights" and aims to provide for improved coherence and consistency between internal and external policies of the EU.[361]

The Commission's Communication on "Trade, Growth and Development which tailors trade and investment policy for those countries most in need" (January 2012) sets out explicitly to ensure coherence between trade and investment and development policies.[362] Thus, it encourages responsible business conduct and promotes CSR instruments and has been welcomed by Member States.[363]

All recent Free Trade Agreements (FTAs) concluded by the EU with third countries (for example, Korea, Colombia/Peru, Central America, Georgia, Moldova, Singapore; the EU-Caribbean Economic Partnership Agreement - EPA) include provisions on the promotion of CSR and these have been addressed as part of their implementation as

[358] *Ibid.*
[359] *Ibid.*
[360] *Ibid.*
[361] *Ibid.*
[362] *Ibid.*
[363] *Ibid.*

in other trade-related meetings such as the EC-Turkey sub-committee on Industry and Trade and the EU-Chile Association Committee meeting.[364]

The Generalised Scheme of Preferences Plus (GSP+) is a key EU trade policy instrument promoting human rights, labour rights, environmental protection and good governance in vulnerable developing countries.[365] It provides unilateral, generous market access to vulnerable developing countries that commit themselves to ratify and effectively implement 27 core international conventions (among which 7 UN Human Rights Conventions and the 8 ILO fundamental Conventions are also classified as human rights).[366]

The EU ensures that GSP+ beneficiaries comply with their legal obligations under the GSP+ framework by a stringent and systematic GSP+ monitoring mechanism.[367] The monitoring is built on two inter-related tools:

> "The "*scorecard*" which summarises the list of most salient issues identified by the monitoring bodies (or any other accurate and reliable source) under the 27 Conventions and the "*GSP+ dialogue*", engaging with authorities in an open discussion on actions (prioritisation and timing) to deal with those shortcomings. The objective is to build a relationship of cooperation with the GSP+ countries and in the process raise their awareness of the shortcomings to in the implementation of those conventions and discuss not only difficulties but also promote and recognise progress.[368]

[364] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, available at http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=7407 (accessed 21 May 2018); see also establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, available at http://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF (accessed 21 May 2018).
[365] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[366] *Ibid.*
[367] *Ibid.*
[368] *Ibid.*

Regarding the EU development policy, the EU has a legal commitment to Policy Coherence for Development stemming from article 208(1) of the Treaty on the Functioning of the European Union which states that "The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries".[369] This is more specific than overall coherence among all policies as it implies avoiding that other policies undermine the primary development objective of poverty eradication and creates synergies between other policies and the objectives of development policy.[370]

The EU moved in 2014 towards a rights-based approach for its development policy on the basis of the Commission Staff Working Document designing a tool-box to this purpose ("A rights based approach, encompassing all human rights for EU development cooperation") endorsed by the Council Conclusions of May 2014.[371]
It represents also a major EU input to the post-Millennium Development Goals (MDG) debate and a concrete step forward to further improve delivery and results on development.[372]

3.3.11 Measures taken by the European Instruments for Democracy and Human Rights

Notably, the European Instrument for Democracy and Human Rights (EIDHR) entails the specific commitment both in its legal basis and its objectives for 2014-2020 to promote and protect (Article 2(xii) and 2(xiii)) economic, social and cultural rights, including the right to an adequate standard of living and core labour standards and CSR, in particular, through the implementation of the UN Guiding Principles on Business and Human Rights.[373] This work is supported in third countries by a comprehensive network of EIDHR and Human Rights Focal Points in Delegations helping to transfer this commitment into realities on the ground.[374]

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[369] *Ibid.*
[370] *Ibid.*
[371] *Ibid.*
[372] United Nations, *The Millennium Development Goals Report 2013*, 1 July 2013, ISBN 978-92-1-101284-2,available at: http://www.refworld.org/docid/51f8fff34.html (accessed 21 May 2018).
[373] *Ibid.*
[374] European Instrument for Democracy and Human Rights (EIDHR); In 2014, the European Parliament and the Council adopted Regulation (EU) No 235/2014 establishing a financing instrument for

EU Member States in the European Council have called on the Commission to ensure that social protection is included in policy dialogues with developing countries and is underpinned by principles of universality and inclusiveness with particular attention paid to the most vulnerable, excluded and disadvantaged people, for example, women, children, persons with disabilities and victims of HIV-AIDS.[375] The Communication on *"a stronger role of the private sector in achieving inclusive and sustainable growth in developing countries"* promotes private sector engagement and responsible business practices through EU development policy.[376]

The Communication recalls that each country needs an effective legislative and regulatory framework to achieve policy objectives which included the provision of fair and predictable legal frameworks that promote and protect human rights.[377] The Communication also underlines the need to mobilise the private sector as a key actor to achieve sustainable development and poverty eradication. It recalls EU efforts to facilitate private sector engagement, encourage responsible investment and production in developing countries as well as sustainable consumption and to enhance market reward for CSR which includes promoting the uptake of internationally agreed principles and guidelines such as the UNGPs.[378] It recommends in its annex that the private sector should further improve its contribution in the protecting of rights including addressing labour conditions, health and safety at work, access to social protection, voice, empowerment and gender-related issues.[379]

3.3.12 The EU partnership with the Global South

democracy and human rights worldwide for the period 2014-20, replacing and building upon the EIDHR (2007-2013) and the European Initiative for Democracy and Human Rights (2000-2006). Available at https://ec.europa.eu/europeaid/how/finance/eidhr_en.htm_en (accessed 21 May 2018).

[375] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).

[376] *Ibid*; Its action 10 recommends the promotion of international CSR guidelines and principles through policy dialogue and development cooperation with partner countries and enhancing market reward for CSR in public procurement and through promotion of sustainable consumption and production.

[377] *Ibid.*

[378] *Ibid.*

[379] *Ibid.*

The European Commission and European External Action Service (EEAS) also conducts regular human rights and other dialogues with third countries.[380] In an increasing number of cases, the topic of business and human rights has been included for discussion and exchanges of experiences particularly with countries in Latin America (Mexico, Brazil, Peru, Colombia and Ecuador), Asia (China, Indonesia) and Africa (South Africa).[381] The EU Special Representative for Human Rights prioritises the exchanges of views and the sharing practices on business and human rights during his meetings with key partner countries.[382]

The EU promotes a dialogue on business and rights with regional organisations such as the African Union (AU) Dialogue which has also recently begun with the Association of Southeast Asian Nations (ASEAN).[383] Following up on the November 2013 EU-African Union human rights dialogue, the two sides agreed to organise a joint EU-AU event on business and human rights.[384] This event took place in Addis Ababa in the margins of the regional UN conference on business and human rights in September 2014.[385] A similar approach of regional cooperation is currently fostered with the Community of Latin American and Caribbean States (CELAC) following the I EU-CELAC Summit which took place in Santiago, Chile, in January 2013.[386]

The Heads of States and Government expressed commitments in the Summit Declaration and also in their bi-regional Action Plan to enhance cooperation on CSR between the EU and CELAC regions including developing national action plans on CSR.[387] Since the Santiago Declaration, two seminars of senior officials have taken

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[380] European Commission and European External Action Service, available at https://www.google.com/search?client=safari&channel=mac_bm&ei=hi8DW5eRMaXXgAbUkK_wBA&q=European+Commission+and+European+External+Action+Service%2C+citation&oq=European+Commission+and+European+External+Action+Service%2C+citation&gs_l=psy-ab.3...3216.21386.0.105332.47.26.0.0.0.0.826.4251.2-6j3j2j0j1.13.0....0...1.1j2.64.psy-ab..38.5.2144.6..0j35i39k1j0i67k1j0i131k1j0i22i30k1j33i160k1.284.4iq7EZ2KSbA (accessed 21 May 2018).
[381] *Ibid.*
[382] *Ibid.*
[383] Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012, available at: http://www.refworld.org/docid/50c9fea82.html (accessed 21 May 2018).
[384] *Ibid.*
[385] *Ibid.*
[386] The Community of Latin American and Caribbean States (CELAC) and the Joint Research Centre (JRC). (June 2015), available at https://ec.europa.eu/jrc/en/publication/brochures-leaflets/community-latin-american-and-caribbean-states-celac-and-joint-research-centre-jrc (accessed 21 May 2018).
[387] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see

place in Brussels, in October 2013 and in September 2014 to exchange best practices and ways of cooperation to move the CSR agenda forward.[388] A further senior officials meeting took place in Costa Rica in November 2014 with the view of accelerating the development of CSR national action plans in CELAC countries and preparing for the II EU-CELAC Summit in June 2015.[389]

EU Delegations in the Global South are increasingly called on to advice MNCs seeking to do business in the countries in which they are situated.[390] Training activities on business and rights are organised for the benefit of officials working in the network of EU delegations throughout the world.[391] The EU is actively engaged in supporting the UN tracks to foster the implementation of the UNGPs.[392] The EU has participated at high level in all annual Forums on Business and Human Rights in Geneva.[393] Thus, the EU is supportive of the "Accountability and remedy" project initiated by the UN Office of the High Commissioner for Human Rights which aims to deliver credible workable guidance to States to enable a more consistent implementation of the Guiding Principles in the area of access to remedy.[394]

The second pillar of the UNGPs contends with the corporate responsibility to protect and address rights through their activities.[395] Owing to the fact that the private sector is the leading actor behind the second pillar, the role of the European Union is limited in terms of implementation.[396] Nonetheless, as demonstrated in both the first and third pillars, the EEAS has been proactive in supporting activities that can facilitate the progress of responsible business conduct among enterprises registered in the EU.[397]

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availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).

[388] *Ibid.*

[389] *Ibid.*

[390] *Ibid.*

[391] *Ibid.*

[392] *Ibid.*

[393] *Ibid.*

[394] *Ibid.*

[395] *Ibid.*

[396] UN Human Rights Council, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5, available at: http://www.refworld.org/docid/484d2d5f2.html (accessed 21 May 2018).

[397] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).

In its 2011 Communication on CSR, the EU defined CSR as “the responsibility of enterprises towards their impact on society”.[398] Within this context, the EU understands that enterprises can have both positive and negative impacts on society.[399] Any adverse effects must be properly understood and any measures mitigated appropriately.[400] While it fully endorses the UN Guiding Principles on Business and Human Rights, the European Union's policy on CSR also recognises several other internationally recognised frameworks and guidelines which can assist firms in mitigating human and environmental risks through their core business activities and concurrently implement Pillar II of the UNGPs.[401]

The EU recognises the UN Global Compact, ISO 26000 Standard on Social Responsibility, the ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) and the OECD, Guidelines for Multinational Enterprises as tools which can mobilise responsibility in the core business activities of enterprises.[402] While diverse, the fundamental bases of these tools/initiatives are meant to boost responsible and sustainable business conduct as the EU views these tools as support for businesses in addressing the UNGPs.[403]

The EU will continue to make efforts towards strengthening actions which European enterprises can deploy in their efforts of tackling Pillar II of the UN Guiding Principles on Business and Human Rights.[404] As regards the EU policy on access to justice, the establishment of a comprehensive EU Justice Policy has played a major role in enforcing the common value with specific reference to the fundamental rights, equality and the rule of law upon which the EU is founded and in underpinning economic growth.[405] It has promoted the adoption of rules facilitating the life of citizens and

[398] UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5, available at: http://www.refworld.org/docid/484d2d5f2.html (accessed 21 May 2018).
[399] *Ibid.*
[400] *Ibid.*
[401] *Ibid.*
[402] *Ibid.*
[403] *Ibid.*
[404] *Ibid.*
[405] *Ibid.*

ensuring that all people are confident that their rights will be protected throughout the EU.[406]

The State's duty to protect is weakened if appropriate means are not available to investigate, punish and redress business-related human rights when abuses do occur.[407] The third pillar of the UNGPs specifies that the state is responsible for ensuring access to remedy through judicial, non-judicial, administrative and legislative means as well as the corporate responsibility to prevent and remediate any infringement of rights that they contribute to.[408]

The European Commission and the EU Member States are significant players in the development of a comprehensive system designed to ensure effective remedy for business-related rights abuses across the EU.[409] In line with article 47 of the EU Charter of Fundamental Rights and consistent with articles 81 and 82 TFEU, the Commission supports the establishment of an EU policy in the area of access to justice where the aim is to build a consistent body of law which includes rules governing issues of jurisdiction and the recognition and enforcement of judicial decisions in civil and commercial matters, the applicable law, as well as judicial assistance in cross-border situations.[410] Outside of these areas the EU Member States remain competent in ensuring effective remedies for victims of corporate-related human rights harm.[411]

3.3.13 Brussels Regulation of jurisdiction of cross-border human rights violation

In line with the UNGPs, the EU has focused its recent efforts on ensuring that EU's judicial systems are made simpler and more effective for the protection of human

[406] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[407] *Ibid.*
[408] *Ibid.*
[409] *Ibid.*
[410] *Ibid.*
[411] *Ibid.*

rights, with the view of fostering the right to an effective remedy before a court.[412] The Communication "A Global Partnership for Poverty Eradication and Sustainable Development after 2015" notes that "simple, transparent and stable rules and institutions, backed up by functioning justice and dispute-resolution systems are crucial elements for an inclusive and conducive business environment and to promote sustainable investments".[413]

When it comes to fostering access to judicial remedies in civil and commercial matters, the EU has developed a functioning system of mutual recognition between EU Member States and the EU's legal framework lays down clear rules on the recognition and enforcement of judgments between EU Member States.[414] This legal framework is backed up with rules which allocate jurisdiction as well as applicable law between EU Member States and which set certain mandatory standards of procedural law to be applied across the EU.[415]

The Brussels I Regulation establishes rules regulating the allocation of jurisdiction in civil or commercial disputes of cross border nature, including civil liability disputes concerning the violation of rights.[416] The Regulation ensures that judgements are recognised and enforced among the EU Member States.[417] According to the Regulation, a person domiciled in an EU Member State can generally be sued in the courts of that Member State (article. 4).[418] This means that MNCs, if they commit rights violations, can be sued before the courts of the EU Member State where the company has its seat, central administration or principal place of business (article 63 defines the domicile of companies) and this would even entail violations of human rights

[412] Meeran R (2013) "Access to remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations, in Bilchitz D and Deva S *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press, Cambridge) 378.
[413] The Global Partnership for Sustainable Development Data is multi-stakeholder network of more than 150 data champions harnessing the data revolution for sustainable development. Its members represent the full range of data producers and users, including governments, companies, civil society groups, international organizations, academic institutions, foundations, statistics agencies and data communities. The Global Partnership serves as an invaluable convener, connector and catalyst, building trust and encouraging collaboration among stakeholders to fill critical data gaps and ensure data is accessible and usable to end extreme poverty, address climate change and pave a road to dignity for all by 2030.
[414] *Ibid.*
[415] *Ibid.*
[416] *Ibid.*
[417] *Ibid.*
[418] *Ibid.*

committed outside the EU.[419] The definition of the domicile of the company in Article 63 is quite extensive and this gives thus giving broad possibilities to sue companies before the European courts.[420] This would apply, for example in a situation where the company's seat is not located in an EU Member State but the company, nevertheless, has its central administration is within an EU Member State.[421]

Alternatively, a claim against an EU domiciled MNCs could be brought:

(a) For in disputes relating to tort or non-contractual obligations before the national courts of a Member State of the place where the harmful event occurred; or
(b) For in disputes related to contractual obligations before the courts of the place of performance of the contractual obligation in question.

The Brussels I Regulation prevents (within its scope of application) national courts from applying the *forum non conveniens* doctrine.[422] "In fact, the European Court of Justice clarified that article 4 of the Brussels I Regulation precludes a national court of a Member State from declining the jurisdiction conferred on it on the ground that a court of a third State would be a more appropriate forum for the trial of the action.[423] This is so even if the jurisdiction of no other Member State is in issue or the proceedings have no connecting factors to any other Member State."[424]

Thus, the Brussels I Regulation ensures access to the courts of EU Member States in actions against (parent) MNCs domiciled in the Union, the below paragraph display how the Brussels function:

> "The Regulation does not regulate international jurisdiction of national courts of the Member States over defendants domiciled in third states (for

[419] *Ibid.*
[420] *Ibid.*
[421] *Ibid.*
[422] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32001R0044 (accessed 21 May 2018).
[423] *Ibid.*
[424] *Ibid.*

example, third state subsidiaries of Union companies) except for limited exceptions concerning claims brought by consumers and employees and some other claims where the domicile of the defendant is irrelevant (for example, claims falling under exclusive jurisdiction). Jurisdiction in such cases is determined by the domestic law of the Member States. Most EU Member States provide for jurisdiction of their courts over third state defendants when some connection to the Member State concerned exists. For instance, when the defendant company has assets within that Member State or on the basis of *forum necessitatis* rules".[425]

The extension of jurisdictional rules of the Brussels I regulation to third State defendants was recently discussed in the Union within the framework of the recast of the former Brussels I Regulation (that Regulation 44/2001).[426] In fact, in its proposal of 2010 for a recast of the Brussels I Regulation, the Commission proposed first to unify all international jurisdiction rules in the Member States (as a result, access to the European courts would have been ensured in civil and commercial disputes even if the defendant is domiciled in a third State), insofar as there is a link with the EU and, second, to establish a necessity forum (*forum necessitatis*) which would allow claims to be brought before the courts of the Member States in situations where there would be a risk of denial of justice if no access to court was foreseen in the EU.[427]

The Commission also proposed an additional jurisdiction rule for disputes involving third State defendants, namely, the jurisdiction based on the presence of the defendant's assets in the Union subject to certain conditions.[428] This proposal was not supported by the Council and the European Parliament.[429] Regulation 1215/2012, therefore does not contain a fully harmonised jurisdictional regime (except for the

[425] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[426] *Ibid.*
[427] *Ibid.*
[428] *Ibid.*
[429] *Ibid.*

benefit of consumers and employees) nor does it contain a necessity forum as proposed by the Commission.[430]

When a court in a Member State has jurisdiction in a case with a cross-border element, it has to determine which country's law is applicable to the dispute.[431] The respective rules have been harmonised at the EU level by the Rome I Regulation for contractual obligations and by the Rome II Regulation for non-contractual obligations (also referred to as torts or delicts) as demonstrated below:[432]

> "The Rome I Regulation can be relevant whenever corporate human rights violations occur *vis-à-vis* parties with whom a European parent corporation or a third country subsidiary has a contractual relationship, for example, its suppliers. The Regulation generally allows the parties to choose the applicable law. In the absence of choice, it prescribes the applicable law of the country where the party required to effect specific performance under the contract has its habitual residence. This can be the law of a third country. Irrespective of the applicable law in a given dispute, the court will be able to apply the overriding mandatory provisions of the law of the forum. Special rules also exist to protect employees under the Regulation".[433]

With regard to tort, according to the general rules of the Rome II Regulation, the applicable law is that of the country where the damage occurred.[434] In the case of corporate human rights violations this rule could lead to the application of the substantive laws of the third State which would then govern the establishment of liability, damages, the limitation periods, etc.[435] The Rome II Regulation builds in

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[430] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215 (accessed 21 May 2018).
[431] *Ibid.*
[432] *Ibid.*
[433] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R0864 (accessed 21 May 2018).
[434] *Ibid.*
[435] *Ibid.*

certain safeguards which allow exceptions to the obligation to apply foreign law when it is necessary to take into account considerations of public interest.[436] Under the Regulation courts can refuse to apply a provision of a foreign law on the grounds that the result of such application would be incompatible with their public policy.[437] This may be the case, for example, if the foreign law legitimises manifest breaches of human rights which is aptly elucidated below:[438]

> "The ECJ has already developed clear guidelines on the concept of public policy under the EU civil justice instrument, particularly in the framework of the Brussels I Regulation. The Rome II Regulation also allows not applying foreign law when certain provisions in the forum State are of an overriding mandatory nature which means that the forum State will apply such provisions irrespective of the law otherwise applicable to the non-contractual obligations at issue. The above instruments are limited to determining which law applies. They do not regulate the content of the applicable law. As a result, the legal liability of parent companies for the actions of a subsidiary company is an issue of substantive liability laws, which is not governed by EU but by national laws."[439]

In this context, it should be noted that whereas on the one hand Lithuania, France, Belgium and the United Kingdom have recently adopted new legislation in the field of collective redress, the Netherlands on the other hand, is considering introducing judicial compensatory collective redress in its national system.[440] The Commission will carefully assess Member States' measures to ensure that the objectives of the Recommendation are fully met and thus determine by July 2017, if any further action, including legislative measures is needed.[441]

As regards the costs involved in cross border disputes, Directive 2003/8/EC on legal aid ensures that persons who lack sufficient resources are granted legal aid where

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[436] *Ibid.*
[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*
[440] *Ibid.*
[441] *Ibid.*

this is necessary for them to pursue their claim and ensure their access to justice.[442] The Directive applies to persons domiciled or habitually resident in a Member State irrespective of whether they are an EU citizen or third country national.[443] It does not apply to third country residents which may, however, be covered by other international instruments.[444] Legal aid in the sense of the Directive includes pre-litigation advice and legal assistance and representation in court as well as an exemption from the cost of proceedings. It notably covers costs related to the cross-border nature of the dispute.[445]

The Victims' Directive does not harmonise national rules on remedies or appeals. Nevertheless, it provides for a right to victims to have a decision not to prosecute reviewed in case the criminal proceedings take place in the Union.[446] In certain policy areas as well as sector-specific policies, the Commission adopted far reaching measures to ensure that victims of corporate-related harm have access to judicial remedies, for instance, in terms of trafficking in human beings, an important legal provision in relation to the responsibility of businesses is Article 5 in the anti-trafficking Directive (2011/36/EU) which clearly stipulates that Member States shall take the necessary measures to ensure that legal persons are held liable for the offense of trafficking in human beings.[447]

The Employer Sanction Directive 50 forbids the employment of irregularly staying third-country nationals and establishes minimum standards across the EU on financial and criminal sanctions and measures against employers who violate this prohibition.[448] Under the Directive, before recruiting a third-country national,

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[442] Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such dispute, available at https://publications.europa.eu/en/publication-detail/-/publication/4b090f95-d97f-47f6-9b5c-6f68bd3c87c3/language-en (accessed 21 May 2018).
[443] *Ibid.*
[444] *Ibid.*
[445] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2017).
[446] European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 14 November 2012, L 315/57, available at: http://www.refworld.org/docid/52eb66354.html (accessed 22 May 2018).
[447] *Ibid.*
[448] *Ibid.*

employers are required not only to check if they are authorised to stay but also to notify the relevant national authority at the start of a working relationship, employers who comply with these obligations in good faith cannot be held liable if it turns out that a third-country national produced a forged document and was not entitled to stay and work in the EU.[449] As many irregularly-staying migrants work in private households, the Directive also applies to private individuals in the same way as it applies to employers.[450]

The Employers Sanction Directive also provides:

> "For criminal sanctions for the employers of illegal third country nationals who use work or services from these persons with the knowledge that they are victims of trafficking. The Employers' Sanctions Directive grants some rights to and facilitates access to justice for irregular migrants -member States who have to ensure that employers who hire irregular migrants are liable to pay any outstanding remuneration to them, even after they have left the EU. Moreover, Member States are bound to establish an effective mechanism which allows irregular migrants to lodge complaints against employers, either directly or through third parties, such as trade unions or other relevant associations."[451]

This report cannot provide an overview of the state of play in respect of operational levels and collaborative initiatives as these are not within the remit of the European institutions. However, some initiatives are relevant in relation to state-based non-judicial mechanisms and state support for access to non-State-based grievance mechanisms.[452] The EU law promotes the use of mediation in cross-border disputes by obliging EU Member States to grant the parties certain procedural guarantees and to ensure that the agreement resulting from mediation can be made enforceable. While this obligation is limited to disputes involving both parties domiciled in different

[449] *Ibid.*
[450] *Ibid.*
[451] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009L0050* (accessed 21 May 2018).
[452] *Ibid.*

Member States, some Member States have transposed part of the rules in a broader way thus covering cases involving parties from third countries.[453]

To ensure that all NCPs operate in a comparable way, the concept of "functional equivalence" is used and as a result NCPs report to the OECD Investment Committee and regularly meet to share their experiences.[454] The Guidelines are the only government-backed international instrument on responsible business conduct with a built-in grievance mechanism in specific instances.[455] Under this mechanism, NCPs are tasked with the provision a platform for discussion and assistance of stakeholders to help find a resolution for issues arising from the alleged non-observance of the Guidelines.[456] While the European Commission does not have an operational NCP function and leaves action in this area to the competence of the Member States (including on specific instances, parallel proceedings and related aspects), it encourages coordination among their NCPs, including their working practices and monitoring as a way of further strengthening the efficiency of the implementation of the guidelines.[457]

The European Commission co-funds the organisation of a series of events dedicated to Access to Justice in Business and Human Rights through its civil justice programme with the events having taken place in Paris, London, Berlin and Brussels between June and November 2014.[458] The aim is to raise awareness of the issue and to gain an understanding of the legal and institutional frameworks pertaining to civil justice in business and rights.[459] However it is evident that "the UN Guiding Principles on Business and Human Rights remain the most practical, widely-endorsed and wide-ranging approach in preventing and redressing business-related rights abuses. The

[453] *Ibid.*
[454]OECD Investment Committee, available at http://www.oecd.org/daf/inv/oecdinvestmentcommittee.htm (accessed 21 May 2018).
[455] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[456] *Ibid.*
[457] *Ibid.*
[458] *Ibid.*
[459] *Ibid.*

UNGPs reflect decades of steady progress and development and efforts undertaken since June 2011 to implement them demonstrate that the process is advancing."[460]

As far as the external dimension of the EU activities is concerned, attention to the issue of business and rights has grown considerably since the adoption of the Action Plan on Human Rights and Democracy in 2012 which has been central in promoting and better coordinating actions taken in this field.[461] Issues in relation to business and human rights have been increasingly raised many third parties in the context of EU human rights dialogues, focusing on the exchange of good practices and a new regulation for comprehensive supply chain management in minerals sourcing is currently being drafted.[462] Other initiatives taken include the introduction of respect for human rights as a precondition for EU support for the private sector, enhanced disclosure and reporting obligations for MNCs, private sector partnerships between businesses and NGOs as well as the inclusion of CSR clauses and impact assessments in trade and investment negotiations.[463]

The first analysis shows the existence of some practical problems with access to justice in cases of business related human rights abuses and to identify remedies.[464] The current framework of judicial means for access to remedies is comprehensive and even allows, within certain parameters, extra-territorial access to remedies for victims of corporate-related harm.[465] However, there remains a certain dichotomy between actions against MNCs with a seat domiciled in the EU (for which jurisdiction is regulated at EU level) and actions against companies with domicile outside the EU

[460] Osuntogun A J (2015) *Global Commerce and Human Rights: Towards an African Legal Framework for Corporate Human Rights Responsibility and Accountability* (PhD Thesis at the School of Law at the University of the Witwatersrand) 158.
[461] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[462] *Ibid.*
[463] *Ibid.*
[464] *Ibid.*
[465] *Ibid.*

(for which jurisdiction is regulated at national level).[466] Any changes to this legal framework will require a willingness from the co-legislators to take this forward.[467]

EU Member States can prosecute perpetrators registered in the EU face prosecution even if they commit their crimes outside the Union (for example, business-related human rights abuse).[468] In such cases Member States can recur to available national and international instruments (including bilateral or multilateral treaties on extradition, mutual assistance or a transfer of the proceedings), cooperation with third countries and international organisations with the view of combating this abuse.[469] In EU development cooperation work, strengthening judicial systems for access to remedies can also play a role.[470]

As regards the EU's external policy, increased efforts need to be undertaken in the future as the proposed new Action Plan on Human Rights and Democracy attributes increasing importance to the issue of business and human rights.[471] It suggests future actions to raise further awareness of the UNGPs in the EU's external action and to strengthen the role and expertise of EU delegation with respect to business and human rights.[472]

The EU needs to continue its engagement within the UN framework in order to promote and support the proper implementation of the UNGPs and in this respect should encourage all parties involved to step up or maintain their current efforts and engagement.[473] The UN Working Group on Human Rights and Transnational Corporations and other Enterprises is currently setting up a network of best practice sharing between prosecutors working on gross “human rights” violations through

[466] Meeran R (2013) “Access to remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations, in Bilchitz D and Deva S *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press, Cambridge) 378.
[467] Council of the European Union, “COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play” (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[468] *Ibid.*
[469] *Ibid.*
[470] *Ibid.*
[471] *Ibid.*
[472] *Ibid.*
[473] *Ibid.*

companies.[474] This could be a very practical and effective way of raising awareness and thus promote expertise in applying existing law.[475]

There are ways of increasing non-judicial access to remedies, for example, by promoting company-based grievance mechanisms or providing a mediation role in conflicts.[476] More generally there is scope for mutual learning on effective approaches to non-judicial remedies in line with the criteria set out in UNGP 31.[477] Through its work, the European Commission promote, strengthen and implement the UNGPs through its reach on both business and human rights and responsible business conduct in line with the European CSR Strategy.[478]

The primary difficulty with filing a complaint regarding MNCs human rights abuses before the ECHR is the question of jurisdiction:[479]

> "The Court may only hear cases of violations by Member States within their jurisdiction, which usually means within their territory or within a territory under control. Applications regarding the failure of a European state to control the actions of a corporation abroad are likely to fail because the Court is would most probably be reluctant to find the actions of the MNCs abroad to have been within the jurisdiction of the State. Furthermore, the Court is also currently struggling with a very heavy workload. At the end of 2009, there were 119 300 cases pending before the Court, and the Court receives far more cases each year than it can process. It can take between 4 and 6 years for a case to be examined. This is a major impediment to the effectiveness of this legal recourse mechanism".[480]

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[474] Working Group on the issue of human rights and transnational corporations and other business enterprises available at http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx (accessed 21 May 2018).
[475] Council of the European Union, "COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play" (Brussels, 14.7.2015) 3; see availability on http://business-humanrights.org/en/european-union-state-of-play-on-implementing-un-guiding-principles (accessed 17 February 2018).
[476] *Ibid.*
[477] *Ibid.*
[478] *Ibid.*
[479] De Schutter (note 191 above) 109.
[480] *Ibid.*

3.4 ORGANISATION OF AMERICAN STATES

The Organisation of American States (OAS) is the oldest regional system dating back from October 1889 to April 1890.[481] It was however formalised and established in 1948 by bringing together the nations of North, Central and South America and the Caribbean, with the objectives of strengthening cooperation on democratic values and defending common interests.[482] It is made up of 35 Member States. The Inter-American system for the promotion and protection of human rights is part of the OAS structure and is composed of two bodies, namely: the Inter-American Commission on Human Rights (IACHR), based in Washington, D.C., USA, and the Inter-American Court of Human Rights, located in San José, Costa Rica. Notwithstanding, its old status the United States' MNCs in particular by virtue of their economic dominance (imperialism) in the world has attracted the most claims of human rights violations emanating from the actions of the MNCs based in the Americas. Thus, an analysis of the basic structure of its regional rights system may shed some light into its human rights language in its attempts in safeguarding people against MNCs.

3.4.1 American Declaration on the Rights and Duties of Man

Not all Member States have ratified the American Convention on Human Rights.[483] Those who have not are therefore only bound by the American Declaration on the

[481] Organisation of American States, available at www.oas.org (accessed 25 July 2019); The Organization of American States is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. That meeting approved the establishment of the International Union of American Republics, and the stage was set for the weaving of a web of provisions and institutions that came to be known as the inter-American system, the oldest international institutional system.

[482] De Schutter (note 191 above) 146.

[483] The American Declaration of the Rights and Duties of Man (American Declaration) is a non-binding declaration on the fundamental human rights to an individual. It outlines the economic, social and cultural rights, as well as equality under the law. The American Declaration has a preamble and two chapters. The focus is on the principle of human equality in dignity. Human rights and the duties of man are complementary, and spiritual and cultural development is the fundamental objective of human beings. The American Declaration was adopted at the Ninth International Conference of American States on 2 May 1948 in Bogota, Colombia which was also when the Organization of American States (OAS) was created. While it is not legally binding, it is considered precedent to the more elaborate treaty American Convention of Human Rights which was created in 1960. These two instruments are

Rights and Duties of Man which is not binding on member states.[484] Although the Declaration was not drafted to be a binding document, the Court confirmed that the Declaration is "a source of international obligations for the Member States of the OAS". It should be noted though that some states, such as the United States, continue to reject the Inter-American system's view that the American Declaration has binding force.[485] The position of some of the OAS member to reject of the "international obligations" because when the American Declaration was created, it was not meant to be legally binding to the participating states - rather it was considered an effort to integrate modern human rights perspectives into the region without losing OAS members.[486]

The American Declaration provides that every person has the right to work under proper conditions and to follow his vocation freely insofar as existing conditions of employment permit.[487] Everyone who works has the right to receive such remuneration in proportion to his capacity and skill, so as to provide him or her a standard of living suitable for himself/herself and for his/her family.[488] Furthermore, everyone has the right to be recognized everywhere as a person having rights and obligations and to enjoy the basic civil rights.[489]

With the advent of egalitarianism, the disparity between the conduct of US MNCs in the USA jurisdiction and foreign States makes a mockery of human rights language. However, it is worth noting that human rights violations perpetrated by MNCs are not mistakes but patterns of colonialism that thrive on weak legal systems and political instabilities in the Global south. Further, the fact that many of the international human rights pertaining to business and rights are declarations including the American

considered to have established the Inter-American System for Human Rights, available at http://humanrightscommitments.ca/wp-content/uploads/2018/10/American-Declaration-of-the-Rights-and-Duties-of-Man.pdf (accessed on 26 July 2019).

[484] Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St Kitts & Nevis, St Lucie, St Vincent & Grenadines, USA.

[485] De Schutter (note 191 above) 149.

[486] The American Declaration of the Rights and Duties of Man, available http://humanrightscommitments.ca/wp-content/uploads/2018/10/American-Declaration-of-the-Rights-and-Duties-of-Man.pdf (accessed 26 July 2019).

[487] Article xiv of the Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: http://www.refworld.org/docid/3ae6b3710.html (accessed 18 February 2017).

[488] *Ibid.*

[489] *Id* article xvii.

Declaration means that MNCs do not have to account to anyone other than making profit.

3.4.2 American Convention on Human Rights "Pact of San Jose, Costa Rica"

The Inter-American Court of Human Rights was created by the American Convention on Human Rights and started its operations in 1979.[490] The Court, based in the city of San José in Costa Rica, is an autonomous judicial institution of the OAS, whose objective is the application and interpretation of the American Convention on Human Rights and other relevant treaties.[491]

The American Convention provides that no one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.[492] Furthermore, that no one shall be required to perform forced or compulsory labour.[493] This provision shall not be interpreted to mean that in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited.[494] Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.[495]

In terms of remedial measures, the American Convention provides that everyone has the right to simple and prompt response, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[496]

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[490] De Schutter (note 191 above) 159.
[491] *Ibid.*
[492] Article 6(1) American Convention on Human Rights "Pact of San Jose, Costa Rica, 1969.
[493] *Id* article 6(2)
[494] *Ibid.*
[495] *Ibid.*
[496] *Id* article 25(1)

Moreover, the state parties must ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state,[497] to develop the possibilities of judicial remedy[498] and to ensure that the competent authorities shall enforce such remedies when granted.[499] Irresponsible activities by MNCs have severely affected human rights of persons worldwide and the peoples of the Americas have not been the exception.[500] The Inter-American System has received information revealing this pressing problem mostly through the negative effects of extractive activities performed by MNCs and the contribution of corporate actors to criminal activities.[501] To this point, there have been cases where the issue of enforcements human rights have been adjudicated upon within the OAS.

Saramaka People v. Suriname[502]

> Between 1997 and 2004, the State of Suriname issued logging and mining concessions within territory traditionally owned by the Saramaka people, without properly involving its members or completing environmental and social impact assessments. In 2006, the Inter-American Commission on Human Rights submitted an application to the Court against the State of Suriname, alleging violations committed against members of the Saramaka People regarding their rights to the use and enjoyment of their traditionally owned territory (art. 21) and their right to judicial protection.(art. 25).
>
> The Court addressed eight issues including - "fifth, whether and to what extent the State may grant concessions for the exploitation and extraction of natural resources found on and within alleged Saramaka territory; sixth, whether the concessions already issued by the State comply with the safeguards established under international law; and finally, whether there are adequate and effective legal remedies available in Suriname to protect

[497] *Id* article 25(2)(a)
[498] *Id* article 25(2)(b)
[499] *Id* article 25(2)(c)
[500] Orozco-Henriquez J (2016) "Corporate Accountability and the Inter-American Human Rights System" *Vol 57 Online Symposium* 48.
[501] *Ibid.*
[502] I/A Court H.R., *Saramaka People v. Suriname*, Preliminary objections, Merits, Reparations and Costs, 28 November 2007, Series C No. 172.

members of the Saramaka people against acts that violate their alleged right to the use and enjoyment of communal property."

The Court ruled that with regards to the exploitation activities within indigenous and tribal territories, "the state must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory. Second, the State must guarantee that the Saramaka will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that non concession will be issued within Saramaka territory unless, and until, independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment."

With regard to logging concessions, the Court declared that the State of Suriname did violate Article 21 of the Convention: "the State failed to carry out or supervise environmental and social impact assessments, and failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concession would not cause major damage to Saramaka territory and communities. Furthermore, the state did not allow the effective participation of the Saramakas in the decision-making process regarding those logging concessions, in conformity with their traditions and customs, nor did the members of the Saramakas people receive any benefit from the logging in their territory". The Court came to the same conclusions regarding the gold mining concessions.

In 2007, the government ended logging and mining operations in 9000 square kilometres of Saramaka territory. This case is considered a ground breaking case, as it recognized land rights for all tribal and indigenous people in Suriname, and the need to obtain prior, free and informed consent from indigenous peoples before undertaking development projects that affect them. The judgement also highlights the State's failure to exercise due diligence. It should also be noted that the Court did not only consider the environmental costs of the projects, but also social costs and requested

reparations including measures of redress (measures of satisfaction and guarantees of non-repetition) and measures of compensation (pecuniary and non-pecuniary). On March 17, 2008, the State filed an application seeking an interpretation of the judgement, requesting interpretation on several issues such as "with whom must the State consult to establish the mechanism that will guarantee the – effective participation' of the Saramaka people; to whom shall a "just compensation" be given; to whom and for which development and investment activities affecting the Saramaka territory may the State grant concessions; under what circumstances may the State execute a development and investment plan in Saramaka territory, particularly in relation to environmental and social impact assessments". The Court delivered its interpretation on August 12, 2008.

Baena-Ricardo et al. v. Panama[503]

The case originated before the Commission in 1998, in a complaint against the State of Panama for having arbitrarily laid off 270 public officials and union leaders, who had protested against the administration's policies to defend their labour rights. For its first case of violations of labour rights, the Court concluded in its judgement, of February 2001, that Panama had violated the rights of freedom of association, judicial guarantees and judicial protection. It stated that the guarantees provided by Article 8 of the Convention had to be observed in this situation, implying that the state must protect against unlawful dismissal in all type of enterprises, including public companies: " There is no doubt that, in applying a sanction with such serious consequences, the State should have ensured to the workers a due process with the guarantees provided for in the American Convention".

The Court decided that the State had to reassign the workers to their previous positions and to pay them for unpaid salaries. As of November 7, 2005, the State of Panama had only partially complied with the Court's

[503] I/A Court H.R., *Baena-Ricardo et al. v. Panama*, 2 February 2001, Series C No. 72, § 134.

orders. In 2007, workers started a hunger strike to protest against the inaction of the State. In 2007 and 2008, in collaboration with its member organisation in Panama (Centro de Capacitacion Social), and many others in the region, FIDH signed open letters calling on the government of Panama to comply with the Court decisions.

Claude Reyes et al. v. Chile[504]

This case refers to the State of Chile's alleged refusal to provide Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero with all the information they requested from the Foreign Investment Committee on the forestry company Trillium and the Río Condor Project, a deforestation project to be executed in Chile's Region XII. In 2005, the Commission submitted an application for the Court to examine the allegation of a violation of the right to access information, as provided by Article 13 of the Convention, regarding a foreign investment project.

The Court ruled that Chile did violate this right, considering that when a company's activities affect public interest, the state-held information should be publicly accessible. The Court thus decided that Chile had six months to provide the information requested, or adopt a justified decision in this respect.

Kichwa indigenous community of Sarayaku v. Ecuador[505]

The case originated in a contract signed in 1996 between the State of Ecuador and ARCO oil company for the exploitation of 65% of Sarayaku's ancestral territory. Since then, the exploration activities have been carried out by ARCO (US), Burlington Resources (US) and now by a private company called Argentinean Oil General Company (Compania General de Combustible- CGC). The petitioners complained about health issues

[504] I/A Court H.R., *Claude Reyes et al. v. Chile*, 19 September 2006, Series C, § 151.
[505] I/A Court H.R., *Kichwa Peoples of the Sarayaku community and its members v. Ecuador*, Report 64/04, 13 October 2004.

related to the company's activities, as well as harassment by military and police forces. There were also allegations regarding the use of explosive materials by the company to intimidate the Sarayaku people.

On June 2004, and due to the failure of the State to comply with its precautionary measures, the Commission submitted to the Court a request seeking the adoption of provisional measures on behalf of the members of the Kichwa indigenous community of Sarayaku, to protect their lives, integrity of person, freedom of movement and the special relationship they have to their ancestral land. This request was made in connection with a petition that the Asociación del Pueblo Kichwa de Sarayaku, the Center for Justice and International Law (CEJIL) and the Centre for Economic and Social Rights (CDES), filed with the Inter-American Commission in 2003.

On July 6, 2004, the Court ordered provisional measures asking the State of Ecuador to guarantee the life and personal integrity of the Sarayaku people. The Court again ordered provisional measures in 2005. So far, those measures have only been partially upheld. For instance, only part of the explosives – apparently relatively small – have been removed. In addition, the government is showing signs that it will re-initiate oil activities in the region.

On the 3rd of February 2010, the Inter-American Court held an audience to analyse how far Ecuador had complied with the provisional measures. In a subsequent resolution, the Court once again urged Ecuador to confiscate all explosive materials that the company left on the territory, in the Amazonian forest. The Court gave Ecuador two months to report on measures taken to confiscate the explosives, and to report on its plans for the oil exploration and exploitation in the concessions.

On 26 April 2010, the Inter-American Commission filed an application to send the case against Ecuador to the Court for having authorised oil exploration and exploitation on the territory of the Kichwa people of Sarayuku, without prior consultation of the community. It is hoped that this

case will encourage the Court to develop clear standards on indigenous peoples' rights in the case of projects related to the extraction of natural resources.

Mayagna (Sumo) Awas Tingni Community v. Nicaragua[506]

In this case the Court concluded that Nicaragua had violated the right to judicial protection and to property. The case relates to the Mayagna Awas (Sumo) Tingni Community who lives in the Atlantic coast of Nicaragua. They had lodged a petition before the Commission alleging the State's failure to demarcate communal land, to protect the indigenous people's right to own their ancestral land and natural resources, and to guarantee access to effective remedy regarding the then imminent concession of 62,000 hectares of tropical forest to be exploited by Sol del Caribe, S.A. (SOLCARSA) on communal lands.

The Commission concluded that "the State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community." In addition, the Commission recommended the state "suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous communities, [has been] resolved, or a specific agreement [has been] reached between the State and the Awas Tingni Community". The Commission subsequently decided to submit the case to the Court on May 28, 1998.

[506] I/A Court H.R., *Mayagna (Sumo) Awas Tingni community v. Nicaragua*, 31August 2001, Series C No. 70.

The Court noted that the right to property enshrined in the Convention protected the indigenous people's property rights originated in indigenous tradition and, therefore, the State had no right to grant concessions to third parties on their land. It should be noted that the Court decided that the State had to adopt the necessary measures to create an effective mechanism for demarcation and titling of the indigenous communities' territory, in accordance with their customary law, values and customs. The Court also decided that, until such mechanism was created, the State had to guarantee the use and enjoyment of the lands where the members of the indigenous community live and carry out their activities.

Finally, the Court asked the State to report every six months on measures taken to ensure compliance with their judgement. In January 2003, the community filed an amparo action (protection of constitutional rights) against President Bolaños, and ten other high ranking government officials, because the decision had not been enforced. This action has not been resolved yet. In January 2003, the Nicaraguan National Assembly passed a new law aimed at demarcating indigenous land. Awas Tingni could be the first community to obtain land titles under the new law. On Sunday 14 December 2008, "the government of Nicaragua gave the Awas Tingni Community the property title to 73,000 hectares of its territory, located on the country's Atlantic Coast." In this case the Inter-American Court, for the first time, issued a judgement in favour of the rights of indigenous peoples to their ancestral land. It is a key precedent for defending indigenous rights in Latin America.

The above cases demonstrates a progressive usage of the language of human rights in few instances with the protection of indigenous peoples of the Global South in the Americas being explicit. All the cases highlighted took place in Latin America. This shows a pattern of extreme exploitation by the MNCs much as in Africa which is fuelled by colonial history and its pervasive stronghold even after the decolonisation of the Global South.

3.4.3 The Alien Tort Claims Act in the United States of America

The United States of America took a proactive step in an attempt to hold MNCs accountable through the enactment of the US Alien Tort Claims Act (ATCA) which gives almost every individual aggrieved by MNCs to lodge a claim in US courts for remedial action. The vision that MNCs can violate international law has been central to an interesting string of cases before the US courts under a piece of US legislation known as the Alien Tort Claims Act 1987 (also known as the Alien Tort Statute).[507] Clapham asserts that the origins of this piece of legislation are misty and have been the subject of conjecture as legal scholars have applied their imaginations to events over 200 years ago.[508] In 2004, the Supreme Court stated that one can draw the following inference from history.[509]

> "Congress intended the ATCA to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors violations of safe conduct were probably understood to be actionable and individual actions out of prize captures and piracy may well have also been contemplated."[510]

The ATCA on the face of it provides an excellent solution to the holding MNCs accountable however, the disadvantage is that MNCs are set up precisely to avoid domestic jurisdiction over their activities abroad notwithstanding the ATCA.[511] This 200 year-old statute, which was resuscitated to prosecute tyrants like Ferdinand Marcos and Radovan Karadzic has now been adapted to redress from MNCs that violate customary international law.[512] The ATCA was largely dormant for almost this 200

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[507] Clapham A (2010) *Human Rights Obligations of Non-State Actors* (Oxford University Press, New York) 252.
[508] *Ibid.*
[509] *Ibid.*
[510] *Ibid.*
[511] Kamminga M T and Zia-Zarifi S (2000) *Liability of Multinational Corporations under International Law* (Kluwer Law International, the Hague/London/Boston) 10-11.
[512] *Ibid.*

years and the said resuscitation took place in a lawsuit by the family of a young man tortured to death in Paraguay, Joel Filartiga.[513]

Notwithstanding, the effects of the ATCA still remain important as MNCs find themselves in the role of defendants facing multimillion dollar lawsuits.[514] The provisions of the ATCA confer upon the Federal District Courts original jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations.[515] A number of claims are currently pending or on appeal in relation to various oil MNCs accused of, among other things, forced labour, torture and rape.[516] Numerous other claims relate to detention facilities run by MNCs with regard to immigration centres and most recently, claims against the private contractors responsible for the Abu Ghraib prison in Iraq.[517]

The application of this statute to the activities of MNCs abroad is not without its critics.[518] This is because of the doctrine of *forum non conveniens* grants the judge the discretion to dismiss a case if an adequate alternative forum exists, and if, after considering a list of public and private interests, it appears that the trial in another country would be more appropriate.[519] Indeed, the US and other Governments have filed objections in the Federal Courts objecting to the exercise of such jurisdiction.[520] However, developing law on the application of the ATCA is affecting not only the cases before the courts but also the sense of the parameters of legal liability for MNCs which are not restricted to the ATCA.[521] Other jurisdiction statutes include the Torture Victims Protection Act and the Racketeer Influenced and Corrupt Organisations Act.[522] Both of these Acts are being used in the US courts against MNCs accused of participating in rights violations outside the United States.[523]

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[513] Stephens B (2000) "Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts) 209 in Kamminga (note 511 above) 226.
[514] Clapham (note 507 above).
[515] *Ibid.*
[516] *Ibid.*
[517] *Ibid.*
[518] *Ibid.*
[519] Stephens (note 513 above) 226.
[520] *Ibid.*
[521] *Ibid.*
[522] *Id* 253.
[523] *Ibid.*

The application of the ATCA for violations of international human rights law is the culmination of a long process of evolution.[524] Initially, the ATCA applied only in situations involving human rights violations committed by persons acting under colour of law as public officials.[525] The ATCA's scope was subsequently extended to cover violations committed by individuals acting outside any official capacity.[526] The application of the ATCA to tort actions brought in the US against multinational corporations for violations of human rights committed abroad is more recent.[527] Only after *Sosa v Alvarez-Machain* did it become possible to file suit for international law violations by private actors, including those committed by MNCs.[528]

The *Unocal*[529] case, serves as a seminal case in an endeavour to understand the developing judicial determination of the scope of MNCs' complicity in violations of international law.[530] In simple situations where MNCs' activities actually constitute genocide or slavery, the issue is clear.[531] The MNCs are said to have violated international criminal law and can, at present, apparently be held accountable in the US courts under the ATCA.[532] The US courts have been gradually refining the list of violations of the "law of nations" that directly attach in this way to non-state actors as such.[533] Accordingly, recent rulings have determined that genocide, slave trading, slavery, forced labour and war crimes are actionable even in the absence of any connection to state action.[534]

Doe v. Unocal (Doe I)[535]

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[524] De Schutter (note 191 above) 174.
[525] *Filartiga v. Pena-Irala*, *Court of Appeals, Second Circuit,* 30 June 1980.
[526] *Kadic v. Karadzic* 70 F. 3d at 232 (2nd Cir. 1995).
[527] De Schutter (note 524 above) 174.
[528] *Sosa v. Alvarez-Machain* 542 US 692 (US SC 2004); see also De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 176.
[529] Holzmeyer C (2009) "Human Rights in an Era of Neoliberal Globalization: The Alien Tort Act and Grassroots Mobilisation in Law & Society Review, Vol. 43, No. 2.; see also *Doe v Unocal : Doe, et al., v. Unocal Co. (1997, 2000)* 271-304.
[530] Clapham (note 507 above).
[531] *Ibid.*
[532] *Ibid.*
[533] *Ibid.*
[534] *Ibid.*
[535] Information on this case is pulled in part from papers published by EarthRights International. Also on this subject, see the documentary Total Denial (2006) by Milena Kaneva, Oxford Pro Bono Publico, op.cit., p 303; Doe v. Unocal Corp., op.cit., 1997; National Coalition Government of the Union of Burma v. Unocal, Inc, op.cit., 1997; Doe v. Unocal, 27 F. Supp. 2D 1174, 1184 (C.D. Cal. 1998), Doe v. Unocal,

This case is the second suit filed in October 1996 in the dispute pitting the consortium of oil MNCs comprised of Unocal, Total, the MOGE and the SLORC against Burmese victims whose rights were violated during the construction of the Yadana pipeline in Burma (for a detailed description of the facts, see Roe I above). The suit also targets two Unocal executives. The allegations are based on the ATCA. Seeking redress for harm to the population, eighteen Burmese villagers brought the class action suit in US federal court on behalf of all the inhabitants affected by the project.

According to the plaintiffs, SLORC soldiers in charge of securing the pipeline route violated the rights of the local populations. The plaintiffs said they were victims of a variety of abuses, including forced displacement, the confiscation and destruction of homes, fields, food stocks and other assets, the use of forced labour, threats and beatings, the torture of those who refused to cooperate, and in some cases, rape and sexual abuse. The plaintiffs said that Unocal and Total knew or should have known that the SLORC was accustomed to such practices. The oil companies thus benefited directly from these abuses, particularly the forced labour and displacement.

Despite information the MNCs had or should have had in their possession, they paid the SLORC for its security services. In 1995, prior to being legally pursued, the corporations compensated 463 villagers who were victims of forced labour, demonstrating that the corporations had been aware of the abuses since 1995. The plaintiffs considered the corporations liable for the atrocities the Burmese military committed during the Yadana project. In 1997 a US federal court in Los Angeles ruled that the suit against Unocal and Total was admissible.

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op.cit., 2001; Doe I v. Unocal Corp., op.cit., 2000; Doe v. Unocal, op.cit., 2002; Doe v. Unocal, Brief of the United States of America as amicus curiae, op.cit., 2003. See also L. Bowersett, “Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments”, The Transnational Lawyer, 1998, 11, p. 361; S.M. Hall, op.cit., 2002, p. 402; R.A. Tyz, op.cit., 2003, p. 559.

The US court's personal jurisdiction over Total: the concept of minimum contacts in 1998, the US court had to determine its personal jurisdiction over Total, a French company with several subsidiaries on US soil. To do so, the court had to rule on contacts between the subsidiaries and the parent company. It was held that the mere existence of a relationship between the various legal entities was insufficient to establish the presence of one via the presence of the other and thus recognize jurisdiction over the MNC. On their own, the identity of the entities' directors or the parent company's normal direct involvement as an investor are unlikely to call into question the general principles of separation under entity law.

However, the existence of an alter ego relationship (establishing that the entities are not legally separate) or agency relationship (determining that one entity acted on behalf of the other, under the supervision of one, with the mutual consent of both) was entered into evidence, helping to establish the court's jurisdiction over the foreign corporation due to the activities of its US subsidiaries. In establishing Unocal's liability, the evidence at trial led to the conclusion that Unocal was aware of and benefited from forced labour. Testimony demonstrated that the plaintiffs were victims of violence. The trial court dismissed the case, however, due to insufficient evidence of Unocal's active participation in the use of forced labour.

It was not established that the company itself desired the military's violations of international human rights norms, and as a result, Unocal could not be held liable. The district court's decision was similar in *Roe I* and on appeal, the two cases were combined. A California Court of Appeals reversed the trial court's decision on 18 September 2002, setting a precedent by agreeing to hear cases in which MNCs are charged for human rights violations committed abroad. The court acknowledged that Unocal exercised a degree of control over the Burmese army tasked with securing the pipeline and evidence indicated that Unocal was aware of both the risk and the actual use of forced labour by the Burmese military before and during the project. The court held that sufficient physical evidence existed

> to determine whether Unocal was complicit in the human rights violations committed by the Burmese army.
>
> A hearing on the limited charges of murder, rape and forced labour was set for June 2005. In March 2005, however, the parties reached a settlement whereby Unocal formally denied any complicity and the corporation compensated the plaintiffs, established funds to improve living conditions, care, education, and to protect the rights of the populations living near the project, in return for the relinquishment of legal proceedings. Although the terms of the agreement remain confidential, the damages totaled some U.S.D. 30 million.

Another important decision was that in *Kadic v Karadzic*[536]*,* the US courts, where rape, torture, and summary execution are committed (even in isolation), these crimes are actionable under the ATCA without regard to state action, to the extent they were committed in pursuit of genocide or war crimes.[537] According to *Kadic v Karadzic,* an alien can sue in tort before the US Federal Courts under the ATCA with regard to any of these international crimes.[538] It was further held by the court that more crimes should be added because international criminal law continues to develop.[539]

Unfortunately, cases of MNCs being sued under the ATCA in the US courts concern situations where MNCs are alleged to have aided and abetted a state in governmental violations of international criminal law.[540] Said differently, the cases turn on accomplice liability or complicity.[541] The ATCA commences by stating that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[542]

There are three requirements under the ATCA that an alien must comply with:[543]

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[536] *Kadic v. Karadzic* 70 F. 3d at 232 (2nd Cir. 1995).
[537] *Kadic v. Karadzic* 70 F. 3d at 232 (2nd Cir. 1995).
[538] Clapham (note 507 above).
[539] *Ibid.*
[540] *Ibid.*
[541] *Ibid.*
[542] Allan & Overy "The Alien Tort Claims Act of 1789" available at www.a4id.org (accessed 02 February 2017).
[543] *Ibid.*

(a) the claim must be made by an alien;
(b) for a tort and
(c) the tort must be in violation of the law of nations or a treaty of the United States.

Thus, under the ATCA, a non-U.S. citizen may file a civil claim in a U.S. district court for a tort committed in violation of either international law or a U.S. treaty.[544] There are additional legal hurdles that one must clear before successfully instituting a claim, which are discussed in detail below:[545]

> "Claims under the ATCA involve allegations of international human rights violations. International human rights law is generally considered to be inclusive of certain values and standards established by governing bodies such as the UN, governing international agreements such as the Geneva Convention and other bodies of law such as the maritime and international criminal law.[546] Thus, a claim under the ATCA must involve a violation of an internationally agreed (treaties[547]) upon and recognized right".

The ATCA was enacted in the United States during the first session of Congress in 1789.[548] It is believed that it was created for two primary purposes, namely:[549]

(a) to provide legal protections for foreign ambassadors residing in the U.S. and
(b) to allow for suits against pirates who travelled from country to country making it difficult for anyone to hold them accountable for their crimes.

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[544] *Ibid.*
[545] *Ibid.*
[546] *Ibid.*
[547] Treaties are international contracts between individual countries and/or international organizations.
[548] Allan & Overy (note 542 above).
[549] *Ibid.*

However, few civil actions were filed under the Act until 1979 and subsequent actions have been largely unsuccessful in obtaining federal jurisdiction.[550] Cases brought under the ATCA involve two types of defendants:[551]

(a) state actors (for example, foreign governments and their officials) and
(b) non-state actors (for example, private individuals and MNCs).

The ATCA has become an important tool for individuals who have been victimised by foreign governments, government officials, private persons and MNCs.[552] The first step in bringing an ATCA claim is to demonstrate to the district court that jurisdiction is proper such that the court is able to hear the case.[553] There are certain elements that must be present for a U.S. federal court to exercise jurisdiction over a claim and these are that:[554]

(a) "The federal court must have the authority to hear a claim relating to the particular subject of the claim. This is known as "subject matter jurisdiction". The ATCA must expressly confer subject matter jurisdiction on U.S. federal courts for alien torts committed in violation of the law of nations or a U.S. treaty.
(b) The federal court must be able to exercise its authority over the defendant. This is known as "personal jurisdiction". This element can usually be satisfied through service of process upon the defendant while he is within the state in which the court sits.
(c) As a technical matter, the claimant must also seek monetary damages of at least $75,000. In the U.S. federal court system, there are three levels of courts, organized geographically. The first level, often referred to as the court of first instance, is comprised of the district courts. District courts are trial courts. There are 94 district courts, with at least one in every state and territory. Plaintiffs usually file claims with the district court closest to where either they or the defendant resides. Selecting a

[550] Allan (note 542 above).
[551] *Ibid.*
[552] Holzmeyer (note 529 above) 271.
[553] Allen (note 542 above).
[554] *Ibid.*

court at random, the location of which may be inconvenient to either party, may result in the case being dismissed or moved to a more appropriate court".

In terms of the Foreign Sovereign Immunities Act (FSIA) under international law, foreign countries are generally not subject to the jurisdiction of another country's courts.[555] However, this status is not limitless.[556] FSIA gives the judicial branch of the U.S. government the authority to determine whether a foreign country should be granted immunity when it is sued in U.S. Courts.[557] The Act also delineates specific exceptions to immunity which typically consist of commercial activities ancillary to purely state functions. In particular, the Act provides that immunity does not apply when:[558]

(a) property taken in violation of international law is at issue;

(b) monetary damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the U.S and caused by the tortious act or omission of that foreign state;

(c) monetary damages are sought against a foreign state for personal injury or death that was by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act, if the foreign state is designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App 2405(j)) or Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371); or

(d) an act in connection with a commercial activity of a foreign state elsewhere that causes a direct effect in the United States is at issue. Therefore, a

[555] Simmons K P (1977) "The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court" 46 *Fordham L. Rev*. 543 (1977). Available at: http://ir.lawnet.fordham.edu/flr/vol46/iss3/7 (accessed 25 May 2018) 543-544.
[556] Allen (note 542 above).
[557] *Ibid.*
[558] *Ibid.*

> plaintiff must ensure that any claim against a foreign country fits within one of these exemptions to immunity or such plaintiff risks having his claim dismissed completely. The FSIA also prescribes specific methods that the plaintiff must follow for giving notice of a claim to a foreign country.

In terms of the Political Question Doctrine a court may elect not to hear a case when it feels that the issue presented should be resolved by one of the other branches of the government.[559] A broader reading of the doctrine would also allow a court to refrain from hearing a case when it believes that applicable judicial standards are insufficient to decide the case or that it simply ought not to interfere.[560] The doctrine is controversial because no clear standard exists for determining its applicability to a case.[561] Therefore, it is up to the court's discretion whether to dismiss a case on political grounds.[562] An ATCA plaintiff should familiarize himself or herself with court cases that address the political question doctrine so that he will be prepared to defend against challenges to his claim based on it.[563]

The Act of State Doctrine prevents a U.S. court from inquiring into the acts of a foreign country committed within that country's own borders.[564] Whilst an explicit recognition of national sovereignty, the doctrine is more grounded in the concept of separation of powers.[565] In the U.S. Constitution, foreign relations authority is delegated to the executive branch of government and it is important to note that this doctrine can only apply to official acts of foreign governments.[566] ATCA plaintiffs may overcome challenges to their claims based on this doctrine by focusing on specific acts conducted by individuals affiliated with the government rather than the foreign

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[559] Barkow R E (2002) "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy" *Columbia Law Review*, Vol. 102, No. 2.
[560] *Ibid.*
[561] Endicott A (2010) "The Judicial Answer: Treatment of the Political Question Doctrine in Alien Tort Claims, 28 *Berkeley J. Int'l Law.* Available at: http://scholarship.law.berkeley.edu/bjil/vol28/iss2/8 (accessed 25 May 2018) 537.
[562] Bazyler M (1986) "Abolishing the Act of State Doctrine" *University of Pennsylvania Law Review* Vol. 134: 328.
[563] Allen (note 542 above).
[564] *Ibid.*
[565] *Ibid.*
[566] *Ibid.*

government as a whole. In some cases, courts have dismissed claims against governments but allowed claims against individuals.[567]

International Comity is a doctrine of mutual respect between nations, under it, a court can recognize or give deference to foreign actions and judgments to preserve international cooperation and goodwill.[568] An alien who has already sued in his home country could therefore, be barred from bringing a case under the ATCA in the U.S.[569] Under *forum non conveniens*, a case can also be dismissed if there is a foreign court that is more suitable to adjudicate the case.[570] The foreign court would need to have proper jurisdiction over the issue and must not refuse to hear the case, as a matter of public policy for the case to be dismissed under *forum non conveniens*.[571] The U.S. court dismissing under *forum non conveniens* must weigh the competing interests of the parties in determining the most suitable court.[572] ATCA plaintiffs should be aware of the legal options available to them in foreign courts and if possible, pursue such options before or concurrently with filing their claims in the U.S.[573]

Once a claimant has won the right to have his case heard in the appropriate U.S. court, the substantive merits of most ATCA cases turn on the following three issues:[574]

(a) what constitutes the "law of nations,"
(b) whether a defendant acted in an official capacity (that is a state actor), and

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[567] *Ibid.*
[568] Childress III D E (2010) "Comity as Conflict: Resituating International Comity as Conflict of Laws" University of California, Davis Vol 44, No. 11,13-14.
[569] Allen (note 542 above).
[570] *Ibid.*
[571] *Ibid.*
[572] *Ibid*; see also De Schutter (note 191 above) 8; Indeed, perhaps the most spectacular example of the role of victims in bringing life into the mechanisms that would otherwise only exist as paper rules is the revival since 1980 of the Alien Tort Claims Act (ATCA) in the United States. The Alien Tort Claims Act, a part of the First Judiciary Act 1789, provides that the U.S. federal courts shall be competent to adjudicate civil actions filed by any alien for torts committed "in violation of the law of nations or a treaty of the United States" (28 U.S.C. §1350). For almost two centuries, this clause remained confined to relatively marginal situations. It was first revived in 1980, in the case of *Filartiga v. Peña-Irala*. The ATCA has since been relied upon in a large number of cases related to human rights claims, including over the past couple of decades some cases concerning MNCs having sufficiently close links to the U.S. This is by all means a spectacular development.
[573] *Ibid.*
[574] *Ibid.*

(c) whether a defendant has assisted in the commission of the alleged acts (usually applied to non-state actors).

The law of nations provides the basis for claims under the ATCA.[575] It is comprised of certain values and standards established by governing bodies such as the United Nations.[576] Many courts and scholars find recourse to the International Court of Justice (the ICJ or World Court) which is the court that hears disputes between member countries of the UN for guidance in determining what qualifies as international law.[577] The ICJ Statute which is the constitution regulating the Court enumerates accepted sources of international law as:[578]

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations; and
(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

Although not directly applicable, many courts find recourse to 1983 of the U.S. Civil Rights Act to determine whether a person is acting in an official capacity or under "colour of law".[579] It is thus worth noting that:

(a) mere state regulation of the conduct in question, even if extensive, is insufficient to support a finding of state action.
(b) state authorization of private conduct does not make the private party a state actor; to find state action, the state must *participate in*, *coerce*, or *significantly encourage* the contested activity.
(c) State assistance to a private party, even if substantial, will not support a finding of state action, whether that assistance is in the form of direct

[575] De Schutter (note 191 above) 8.
[576] *Ibid.*
[577] *Ibid.*
[578] *Ibid.*
[579] *Ibid.*

financial aid, tax exemptions, monopoly power, government mortgage insurance, or the grant of a license.

(d) The mere importance of the function carried out by the private sector is an insufficient basis upon which to find state action; for state action to be found, the function must be historically, traditionally, and exclusively governmental.

The Rome Statute of the International Criminal Court (Rome Statute) is an international treaty establishing the International Criminal Court (ICC).[580] The ICC hears international cases involving serious international crimes such as genocide.[581] Although the U.S. has not ratified the treaty, it provides guidance on when a person can be responsible for the acts of another.[582] This is relevant to ATCA cases because often violations of international law occur through the action and inaction of multiple persons.[583] For example, an MNCs may hire security detail it knows has a history of "human rights" violations and ignore reports of such violations.[584] The Rome Statute provides guidance on how an MNCs can be held responsible for security detail which results in rights violations, that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC if that person:[585]

(a) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; or

(b) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(c) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

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[580] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html (accessed 25 May 2018).
[581] *Ibid.*
[582] *Ibid.*
[583] *Ibid.*
[584] *Ibid.*
[585] *Ibid.*

(d) be made in the knowledge of the intention of the group to commit the crime.

The deployment of 'procedural' issues to exempt powerful MNCs from accountability for human rights abuses committed beyond a state's recognised jurisdiction - a use made especially prominent by the 2013 US Supreme Court[586] holding in pursuant to which, by most interpretations, foreign MNCs have largely if not completely accorded immunity from US pursuit of human rights violations against foreign nationals in foreign countries.[587] In so ruling, it seems to many, the Court closed down, prima facie at least, a much favoured strategy of international human rights litigation aimed at establishing extraterritorial human rights accountability.[588]

In two successive judgments, the U.S. Supreme Court significantly reduced the potential reliance on the ATCA to file civil claims against companies for human rights violations:

> "First, in 2004, when it was provided a first opportunity to influence this development and to examine the exact scope of the powers conferred upon US federal courts by the Alien Tort Claims Act, the Supreme Court took the view that, when confronted with such suits, federal courts should "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [violation of safe conducts, infringement of the rights of ambassadors, and piracy]" which Congress had in mind when adopting the First Judiciary Act 1789 (*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). This was a first significant narrowing down of the potential of the ATCA, which, as a result

[586] *Kiobel v Royal Dutch Petroleum Co*., 569 U.S. 108 (2013) para16.
[587] Grear A, Weston B H (2015) "The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape" *Human Rights Law Review* Vol 15, 24. 21-44.
[588] *Ibid*; Whether they rely on international mechanisms, on domestic courts, on voluntary commitments, or on incentives such as conditions imposed by export credit agencies or shareholder activism, none of the tools that have evolved over the years in order to strengthen the protection of victims of human rights violations by companies would be effective without the victims or their representatives making use of them. It is by mobilizing rights into action that we are provided with opportunities to improve our understanding both of the MNCs' obligation to respect human rights, and of the States' duty to protect them.

of Sosa, could only provide a potential remedy to victims of the most serious violations of human rights".[589]

"The second limitation resulted from the *Kiobel* litigation. Residents of the Ogoni Region of Nigeria alleged that the defendant companies – the Royal Dutch Petroleum Company and Shell Transport and Trading Company plc, incorporated respectively in the Netherlands and in the United Kingdom, and acting through a Nigerian subsidiary named Shell Petroleum Development Company of Nigeria, Ltd. – aided and abetted the Nigerian government in committing various human rights abuses in 1993-1994. The Supreme Court however took the view that, in the absence of any clear indication to the contrary, a statute does not apply to situations outside the territory of the United States, and that there was nothing in the ATCA to rebut that presumption (*Kiobel, et al. v. Royal Dutch Petroleum Co*., et al., 133 S.Ct. 1659 (2013))".[590]

Yanomami indigenous people v Brazil[591]

The Yanomami case involved the construction of the trans-Amazonian highway, BR 210 (Rodovia Perimentral Norte), and its impact on the Yanamomi indigenous peoples. This state run project allegedly violated their rights to land contained in article XXIII of the American Declaration, as well as their right to cultural identity (art. XXVI). The Commission ruled that the reported violations had "their origin in:

(a) The failure to establish the Yanomami Park for the protection of the cultural heritage of this Indian group;
(b) In the authorization to exploit the resources of the subsoil of the Indian territories;
(c) In permitting the massive penetration of outsiders carrying various contagious diseases into the Indians' territory, that has caused many

[589] De Schutter (note 191 above) 8.
[590] *Ibid.*
[591] *Yanomami vs Brazil,* Case No.7615, Resolution No. 12/85 of March 5, 1985.

victims within the Indian community, and in not providing the essential medical care to the persons affected; and

(d) In proceeding to displace the Indians from their ancestral lands, with all the negative consequences for their culture, traditions, and costumes".[592]

Mercedes Julia Huenteao Beroiza et al v. Chile[593]

On December 5, 1993, the state-owned company Empresa Nacional de Electricidad S.A. (ENDESA) received approval for a project to build a hydroelectric plant in Ralco, where the members of the Mapuche Pehuenche people of the Upper Bio Bio sector in Chile live. The community opposed the project but the construction of the dam started in 1993. In 2002, the Mapuche submitted a petition before the Commission alleging violations of their rights to life (art. 4 of the American Convention), personal integrity (art. 5), judicial guarantees (art. 8), freedom of religion (art. 12), protection of their family (art. 17), property (art. 21) and right to judicial protection (art. 25) by the implementation of the state run plant project by ENDESA. The petitioners also made a request for precautionary measures "to prevent the company from flooding the lands of the alleged victims". The Mapuche and representatives of Chile agreed to a friendly settlement agreement and transmitted the final document to the Commission on October 17, 2003, which included:

(a) Measures to improve the legal institutions protecting the rights of indigenous peoples and their communities: constitutional recognition of the indigenous peoples that exist in Chile and ratification by Chile of ILO Convention 169;

[592] *Yanomami vs Brazil,* Case No.7615, Resolution No. 12/85 of March 5, 1985; see also De Schutter (note 191 above) 8, The Commission recognized the violation of the following rights enshrined in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (art. I), the right to residence and movement (art.VIII)) and the right to the preservation of health and to well-being (art. XI). The Commission issued recommendations to the Government of Brazil, including preventive and curative health measures to protect the lives and health of Indians, as well as the consultation of the Yanomami in all matters of their interest.

[593] IACHR, *Mercedes Julia Huenteao Beroiza et al. v. Chile*, Case No. 4617/02, Report 30/04, March 2004, 1-2.

(b) Measures to foster development and environmental conservation in the Upper Bio Bio Sector;
(c) Measures to satisfy the private demands of the Mapuche Pehuenche families concerned with respect to lands, financial compensation, and educational need.

Ngöbe Indigenous Communities et al.,v. Panama[594]

On June 18, 2009, the IACHR granted precautionary measures for members of the indigenous communities of the Ngöbe people, who live along the Changuinola River in the province of Bocas del Toro, Panama.

The request for precautionary measures details how, in May 2007, a 20-year concession was approved for a company to build hydroelectric dams along the Teribe-Changuinola River, in a 6,215-hectare area within the Palo Seco protected forest. It adds that one of the dams has authorization to be built is the Chan-75, which has been under construction since January 2008, and is set to flood the area in which four Ngöbe indigenous communities have been established—Charco la Pava, Valle del Rey, Guayabal, and Changuinola Arriba. These four communities have a combined population of approximately 1,000 people. Another 4,000 Ngöbe people would also be affected by the construction of the dam. They allege that the lands affected by the dam are part of their ancestral territory, and are used to carry out their traditional hunting and fishing activities.

The Commission called on the government of Panama to suspend construction until a final decision regarding the petition 286/08 has been adopted, as well as to guarantee the personal integrity and freedom of movement of the Ngöbe inhabitants in the area. On June 29, 2009, the government of Panama informed the Commission that it does not intend to comply with its request.[595]

[594] IACHR, *Ngöbe Indigenous Community et al. v. Panama,* Precautionary Measures 56/08, 2009.
[595] De Schutter (note 191 above) 157.

3.5 Conclusion

Although the Organisation of American State rights system like the AU has plethora of human rights instruments both general and specific within the context of business and human rights – the enforcement of this instruments against MNCs still remains a challenge. The Inter-American system face numerous challenges, and is under-resourced and understaffed, it is recognized for its audacity as one of the regional mechanisms that has gone farther in addressing States' responsibilities regarding violations committed by corporations.[596]

De Schutter aptly describe the crises of enforcing human rights standards against MNCs by stating that:

> Unfortunately, and although the Court's decisions are binding, too many judgements are not enforced. There is currently an urgent necessity for civil society and victims to widely disseminate the Court's decisions in order to ensure greater likelihood of their implementation. The inter-American system offers numerous opportunities for victims to actively participate in the vindication of their rights, and in raising awareness around the impacts of corporate activities on human rights within the system. These opportunities should be seized.[597]

The cases analysed in the OAS reveal an important jurisprudence with respect to holding MNCs accountable and because of the ATCA cases emanating at the United States and the Inter-American Court which also has made considerable contributions on human rights language. Beginning with the cases dealt with utilising the ATCA, the cases such as *Saramaka v Surimane* demonstrate the usefulness of the system, and its willingness to intervene over conflicts involving corporate activities. The interpretative judgement issued upon request of the State also shows how the Court can contribute to the practical implementation of the judgement, and to the prevention

[596] De Schutter (note 191 above)167.
[597] *Ibid.*

of similar dilemmas often observed in development projects affecting indigenous peoples.

In contrast to the *Saramaka* case the *Ngöbe Indigenous Communities et al v Panama* case displayed a clear disregard to human rights language by the state of Panama after being informed by the American Commission “to suspend construction until a final decision regarding the petition 286/08 has been adopted, as well as to guarantee the personal integrity and freedom of movement of the Ngöbe inhabitants in the area”. The government of Panama communicated to the Commission that it does not intent to heed the request of the Commission.

Finally, in *Doe v. Unocal* the matter was brought to the US courts through the ATCA which “Unocal formally denied any complicity and the corporation compensated the plaintiffs, established funds to improve living conditions, care, education, and to protect the rights of the populations living near the project, in return for the relinquishment of legal proceedings. Although the terms of the agreement remain confidential, the damages totaled some U.S.D. 30 million.”

The chapter has in the main demonstrated that the human rights language remains ineffective with regard to enforcing human rights standard against MNCs, furthermore, similar to all the regions, the court cases end up with an out of court settlement after a very protracted litigation. In addition, cases of MNCs violations of human rights in the in the Global South such as Chile or Nicaragua also demonstrate the same pattern in the AU where a settled out of court without establishing legal precedent on how to hold MNCs responsible for human rights violations.

3.6 Overall chapter conclusion

All the three regional systems interrogated in this chapter have taken steps to have some measure of enforcing human rights standards against MNCs. The first regional human rights namely the AU, still remains the region most devastated by institutions and structures of colonialism through the agency of MNCs. The over three hundred and fifty thousand years of colonial pillage of Africa by the Global North’s MNCs supported by their state machinery has made the legal analysis of accountability of MNC difficult. The first difficulty is the legal culture that was superimposed upon the

Global South which if one takes the extreme case of colonial apartheid in South Africa - which formed the racialised law that legalised slavery, labour exploitation and most importantly the deliberate disregard of human rights by the MNCs for maximisation of profit for the building of empires both in monopolies and state.

Furthermore, stands of the World War II victors professing Global North liberal ideas of human rights has failed to find traction in implementation in the Global South despite their very high rate of ratification. Linked to the fact of colonialism is the particularity or relativeness of human rights which most of the Global North have universalised to fit all context permeating deep into the regional human rights systems of the North. The last issue which is most pertinent in Africa but common to all the Global South is the political, economic, and military dependency on the Global North and their MNCs which delegitimise the language of human rights because of the sustained inequality between the two divides.

The European Union have demonstrated effective utilisation of the human rights language in the enforcement of human rights standards against MNCs through the European Convention on Human Rights. However, with the focus on the TWAIL, observers in the Global North state that there is an identifiable gap between home-State laws and the supra- national/international law, where even when home-States enact laws, the principles of legal personality and corporate personhood enable TNCs to apply double standards in developing countries and evade responsibility for violations at home. Consequently, there is a gap in human rights law concerning the responsibility of MNCs.[598] Moreover, like in the Global South though less blatant is the inefficiencies' of human rights language that is secondary for the sake of economic benefit in the Global North despite its relatively strong human rights capacity.

The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility and Commission Staff Working on Implementing the UN Guiding Principles on Business and Human Rights – State of

[598] Khoury S (2010) "Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to accountability" *Sortuz. Oñati Journal of Emergent Socio-legal Studies*, Vol. 4, No. 1, 69.

Play, has put into perspective the gains that the European Union has made. This is exemplary, however, like many other "good" laws on paper they fail to translate into reality, and this is demonstrated by the following conduct of the largest food company in the world from Europe:[599]

> "The first instance which they came on the stage for human rights violations was in 1970s, where they introduced an infant formula for 'developing countries'. Nestle promoted their infant formula in poor countries as a supplementary food to be given for infants along with breast milk. Nestle advertised their product in a compelling way, which made the mothers of the poor countries to believe that, they must give the infant formula for their infants. However, the formula needed to be mixed with clean water, which was the biggest lack in the poor countries such as Africa, where Nestle focused as their main markets. Due to lack of clean water and due to illiteracy of the mothers in poor countries, infant formula was mixed with water which was not clean and the babies who consumed the formula had to go through serious health issues, which sometimes caused even death. It was reported that, Nestle knew the illiteracy and the lack of clean water in African countries, yet, Nestle did not alarm it, as it might minimize their market and they might lose profits."

De Schutter surmises the position in the Organisation of American State in this articulate fashion by stating that:

> "Although the inter-American system for the protection of human rights still face numerous challenges, and is under-resourced and understaffed, it is recognized for its audacity as one of the regional mechanisms that has gone farther in addressing States' responsibilities regarding violations committed by MNCs. Unfortunately, and although the Court's decisions are binding, too many judgements are not enforced. There is currently an

[599] Wijesinghe P (2018) "Human Rights Violations by Multinational Corporations: Nestle as the Culprit" available at https://ssrn.com/abstract=3136321 (accessed 25 July 2019) 4.

> urgent necessity for civil society and victims to widely disseminate the Court's decisions in order to ensure greater likelihood of their implementation. The inter-American system offers numerous opportunities for victims to actively participate in the vindication of their rights, and in raising awareness around the impacts of corporate activities on human rights within the system. These opportunities should be seized."[600]

It is contended in this thesis that the problem of human rights language as a grand narrative to regulate MNCs is that it negates complexities of Global South problems. The enforcement of human rights standards in the main the revolves around three issues which are interdependent, interrelated and in sync to one another. Therefore, TWAIL has demonstrated that human rights language approach is steep in the contest of global control over economy, law and politics.

[600] De Schutter (note 191 above) 167.

CHAPTER FOUR

INTEGRATED SYSTEMS THAT AFFECT THE ENFORCEMENT OF HUMAN RIGHTS STANDARD AGAINST MNCs

4.1 Introduction

The economic power of MNCs is undoubted and they are the driving agents of the global economy, exercising dominant control over global trade, investments, and technology transfers.[1] Flowing directly from such positions of economic influence, MNCs also manage to exercise considerable political leverage in both domestic and international spheres.[2] Moreover, MNCs' activity takes place in a milieu mostly shaped by politics - the implication or intervention of the state is almost omnipresent, irrespective of the domain where affairs are developed.[3] In some areas, the countries encourage the free rivalry, and they self-restrict their intervention over the market - in other regions, the states become business entities themselves, and they forbid competition.[4]

It is evident that the language of human rights with respect to MNCs is far more complex than just an attempt to find legal certainty (treaty) which is currently lacking at the UN. Therefore, TWAIL reveals that the gradual progression of colonialism occurred by "biting away at bits and pieces of the African continent under the guise of commerce, religion and a need to 'enable the savages to see the light".[5] In the 1870s, this gave way to direct political control.[6] The economic gains seemed to be the most pressing motivation for the Europeans to secure political control, as the potential for extracting raw materials and agricultural produce from Africa was realised in connection with the industrial revolution in Europe.[7]

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[1] Kinley D & Tadaki J (2004) "From the Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" *Virginia Journal of International Law* Vol 44, No. 4, 932.
[2] *Ibid.*
[3] Kicsi R & Buta S (2012) "Multinational Corporation in the Architecture of Global Economy" *The USV Annals of Economics and Administration* Vol. 12, Issue 2(16), 141.
[4] *Ibid.*
[5] Ayittey G B N (2009) *Indigenous African Institutions* (University of Pretoria) 36, available at https://repository.up.ac.za/bitstream/handle/2263/28459/02chapter2.pdf?sequence=3&isAllowed=y (accessed 10 June 2019).
[6] *Ibid.*
[7] *Ibid.*

Most significantly, this enabled the sovereign Global South states to use international law and sovereignty doctrines to further their own interests and to articulate their own views of international law in that:[8]

> "The new states were especially intent on protecting their recently won sovereignty and negating the enduring effects of colonialism. Thus, they sought to establish a set of principles that outlawed conquest and aggression, and prevented intervention in Global South affairs. Further, the new states used their numbers in the General Assembly to pass a number of resolutions directed at creating a 'New International Economic Order'. This initiative was especially important, as the new states realised that political sovereignty would be meaningless without corresponding economic independence. Thus, the new states sought to regain control over their natural resources through the nationalisation of foreign entities that had acquired rights over these resources during the colonial period".

The year 1960 is conventionally used as the "stylised date" of independence, because it saw the end of colonial rule in most of the French colonies south of the Sahara as well as in the most populous British and Belgian ones (Nigeria and Congo respectively).[9] Half a century is a reasonable period over which to review the impact of colonial legacies on the African economy because it allows one to consider the issue of human rights in the context of different phases of post-colonial policy and performance.[10] Moreover, an analysis of this history explain the inherent defect of global universalism of human rights language especially its ability to hold MNCs accountable. Globalisation though seemingly a "good evolutionary progress of the human kind", for example, works only when Global North economic hegemony (WTO, GATTS and IMF) are adhered to irrespective of the impact such precepts on the Global South (inequality and human rights violations).[11] Furthermore, international trade

[8] Anghie A (2006) "The Evolution of International Law: Colonial and Postcolonial Realities" Third World Quarterly Vol. 27, No. 5, 748.
[9] Austin G (2010) "African Economic Development and Colonial Legacies" *International Development Policy* I *Revue internationale de politique de development*, Vol. 1, 11.
[10] *Ibid.*
[11] Consumerism is the theory that an increasing in consumption of goods is economically desirable or preoccupation with and inclination towards the buying of consumer goods; available on https://www.merriam-webster.com/dictionary/consumerism (accessed on 12 December 2017).

regimes have had little impact on the economic growth of Africa and in turn on the realisation of human rights ideals such as the capacity to hold MNCs accountable.[12]

Osuagwu and Obumneke argue that "during the era of colonial exploitation of Africa and other Global South countries, Europe featured prominently.[13] Europe exploited African countries directly by way of its physical presence in the form of civil administration while America exploited them indirectly through the activities of their MNCs".[14] Furthermore, Bakan contends that MNCs "do not owe allegiance to any nation, community or locality" and, for this reason, they cannot be trusted since they do not work well with the governments of the host countries and communities.[15] Moreover, these MNCs, according to Otusanya,[16] do not necessarily share the goals of many African governments which seek to eradicate poverty, promoting education, health care and in short the totality of the realisation of human rights.[17]

Moreover, Anderson asserts that the "large MNCs may have more economic power than that of small countries and one-half of the world's largest economies belong not to nations but to MNCs. In addition, seventy percent of global trade is controlled by only 500 MNCs and their strength can make them quasi-governmental in nature and as powerful as some nation-states. It would be difficult to imagine a single type of entity that has had a greater impact on American society and economics than the modem MNCs. At the same time, however, MNCs are sometimes considered the largest violators of environmental and labour rights".[18]

The above prologue follows the discourse in chapter two and three which dealt with the human rights language and its lack of effectiveness to hold MNCs accountable especially in the Global South and the negative impact of colonial-imperial-capitalist

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[12] Poverty and Development in Africa available on https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html (accessed on 12 December 2017).
[13] Osuagwu G O & Obumneke E (2013) "Multinational Corporations and the Nigerian Economy" *International Journal of Academic Research in Business and Social Sciences* Vol 3, No 4. 363.
[14] *Ibid.*
[15] Bakan J (2004) *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable and Robinson Ltd).
[16] Otusanya O J, Lauwo S & Adeyeye G B (2012) "A Critical Examination of the Multinational Companies' Anti-Corruption Policy in Nigeria" *Accountancy Business and the Public Interest.*
[17] *Ibid.*
[18] Anderson J C (2000) Respecting Human Rights: Multinational Corporations Strike Out" U. Pa. Journal Of Labor And Employment Law Vol. 2, No.3, 506.

binary structures between the Global North and Global South. The literature suggest that it is in the colonial-imperialist-capitalist structuring by the Global North that has shaped the discourse of business and human rights hence its weak oppositional stands to MNCs. This binary relationship is fundamental to the integrated systems that affect the enforcement of human rights standards against MNCs.

It is in this vein that colonial-imperial-capitalist machinery has always been the number one priority at the expense of enforcing human rights standards against MNCs. Therefore, chapter four answers questions one and two of the study by demonstrating how the colonial structures and systems still operate within the colonial dependency syndrome between the Global South and Global North which impacts on the enforceability of human rights standards against the MNCs and simultaneously demonstrate how the human rights language becomes part of the “manoeuvring” in furthering human rights abuse by MNCs under the guise of economic development of the Global South. The concepts or phenomenon to be discussed below include globalisation, corporate governance, international trade, politics, and foreign direct investments which are assessed with due regard to their impact on human rights obligations by MNCs.

Moreover, this discourse is informed by the fact that it takes sustained economic growth in any state especially in the Global South to realise human rights – therefore, this concept serving as a necessary evil for both the Global North and the Global South has perfectly fallen into the historical continuum of the developed exploiting the underdeveloped despite a plethora of legal and non-legal framework both at the UN, regional and domestic level. Therefore, this chapter offers an explanation of why and how human rights language is ineffective to hold MNCs accountable and also why and how the colonial-imperial-capitalist structure is still a major obstacle in enforcing human rights standards against MNCs.

4.2 The Impact of Globalisation on the Protection and Promotion of Rights in relation to MNCs

Globalisation is an imprecisely defined term which is subject to multiple interpretations.[19] Typically, it signifies an expansion of cross-border economic interaction, though the word also embodies less precise, albeit though important, non-economic connotations relating to the erosion of local control, autonomy and identity in the organisation of political, social and cultural life.[20] At the popular level, these meanings are sometimes conflated with anti-capitalism, anti-Western or anti-American impulses.[21] Moreover, it is a system of an evolutionary phenomena of human interconnectedness.[22] This cross-border interaction are spearheaded by MNCs which through European colonial expansion have been at the centre of business and human rights.

The carriage and usage of capital by MNCs in their globalisation is aptly articulated by Bond when he states that the financial component of capital's uneven historical and contemporary expansion into Africa during periods of capitalist 'crisis' - the role of financiers in the process of primitive accumulation, not just in the slave and colonial eras but as a permanent aspect of global capitalism and the importance of financial power to the extraction of surpluses in both historical and contemporary times.[23]

The earlier 19th-Century "Golden Age" of globalisation was built by a combination of technological innovations, such as the telegraph and the steamship which drove down transaction costs, together with supportive institutions, including the gold standards, Pax Britannica, and European colonialism, which facilitated the global diffusion of

[19] Noland M (2010) "The Twilight of Globalization" in Gaston N and Khalid A M *Globalization and Economic Integration: Winners and Losers in the Asia-Pacific* (Edward Elgar Publishing, United Kingdom) 25.
[20] *Ibid.*
[21] *Ibid;* Globalization means different things to different people. Some say it is the movement of people, language, ideas, and products around the world. Others see it as the dominance of MNCs and the destruction of cultural identities. Extracting from the "Globalization website", globalization broadly refers to the expansion of global linkages, the organization of social life on a global scale, and the growth of a global consciousness, hence to the consolidation of world society.
[22] Friedman T & Ramonet I (1999) Duelling globalizations: a debate between Thomas Friedman and Ignacio Ramonet. *Foreign Policy*, Fall. Available at: www.sunysb.edu/sociology/faculty/Levy/Friedman%20and%20Ramonet.pdf (accessed on 20 March 2017).
[23] Bond P (2004) "Bankrupt Africa: Imperialism, Sub-Imperialism and the Politics of Finance" *Historical Materialism* Vol. 12, No. 4, 146.

those technological innovations.[24] Of course, this Golden Age was more golden for the Global North than the Global South at the levels of both individual and the nation-state.[25]

Moreover, globalisation refers to a system of economic, political, social and cultural relations across international boundaries.[26] Globalisation is in the main a transcendental homogenisation of political and socio-economic theory across the globe.[27] Moreover, it is also aimed at "making global being present worldwide at the world stage or global arena".[28] Said differently, Ohuabunwa, asserts that "globalisation can be seen as an evolution which is systematically restructuring interactive phases among nations by breaking down barriers in the areas of culture, commerce, communication and several other fields of endeavour".[29]

More importantly for this discourse in illustrating the ineffectiveness of human rights language is the perspective on Globalisation which can be analysed from an institutional perspective as the spread of capitalism.[30] Beyond this simplistic analysis of globalisation in terms of capital inflows and trade investment, it is worth stating that the consequences to the governments and people of the African continent have been disastrous.[31] It is thus notable that very critical to the understanding of globalisation is the dire need to use it as a synonym for liberalisation and greater openness.[32] It is

[24] Noland (note 19 above) 25.
[25] *Ibid.*
[26] Ibrahim A A (2013) "The Impact of Globalization on Africa" *International Journal of Humanities and Social Science* Vol. 3, No. 15, 85.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid*, simply put, globalization is the term used to describe the changes in societies and the world economy that result from dramatically increased international trade and cultural exchange. Similarly Cerry "conceives of globalization as describing the increase of trade and investment due to the falling of barriers and the interdependence of countries. In specific economic contexts, the term refers almost exclusively to the effects of trade, particularly trade liberalization or 'free trade.' Banjo, insists that the process of globalization is impelled by the series of cumulative and conjectural crisis in the international division not only of labour and global distribution of economic and political power but also of global finance and the functioning of national states.
[30] *Ibid.*
[31] Globalisation is the broadening and deepening of linkages of national economies into a worldwide market for goods and services, especially capital. It furthermore, it seeks to remove all national barriers to the free movement of international capital and this process is accelerated and facilitated by the supersonic transformation in information technology.
[32] *Id* 86.

within this preview that one can argue that globalisation is mainly a phenomenon of capital mobility. Its two prongs are:[33]

(a) foreign direct investment and
(b) international portfolio flows

The concept of globalisation is global and dominant in the world today.[34] It was created by the Global North to serve its specific interests.[35] Ibrahim states that:

> "Simultaneously, these specific interests gave themselves a new ideological name namely the "international community" to signify the idea of globalisation. Globalisation has turned the world into a big village. Despite the ambiguities of the concept, the essential nature of globalisation is the compression of space and time. As a result, the world becomes one with the interactions among diverse people beginning to look like those within a village.[36] Hence, terms such as "one world" and "villagisation" have been".[37]

Globalisation, saw its growth during the 'unification of Germany by Otto von Bismarck in 1871 to the beginning of World War I in 1914 which greatly influenced and supported the European expansionist agenda as it directly contributed to the acquisition of colonies in Africa through their MNCs.[38] This period, therefore, corresponded with the Scramble for Colonies in Africa or the partition of Africa between 1880– 1900.'[39] Furthermore, in the context of the post-Second World War (East – West divide), the non-communist world, now under the leadership of the United States, began to reassemble the pieces of a liberal trading order which is characterised below:

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[33] *Ibid.*
[34] Singh N and Nandy D (2009) "Making Transnational Corporations Accountable for Human Rights Violations" 2 *NUJS L. Rev.* 76.
[35] Ibrahim (note 26 above) 86.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] Mackenzie J M (2005) *The Partition of Africa 1880 – 1900 and European Imperialism in the Nineteenth Century* (Methuen • London and New York).

> "A key currency system based on the US dollar and supportive multilateral institutions, including the General Agreement Tariffs and Trade (GATT) and its eventual successor, the World Trade Organisation (WTO), as well as other multilateral institutions such as the World Bank and the International Monetary Fund (IMF) in the financial sphere.[40]

It is notable that although the globalisation theorist, Robinson who focuses on economics, has nonetheless, conceives of globalisation as the spread of capitalism throughout the world.[41] In Robinson's view, before globalisation was relevant, power was battled in conflicts through militaries and physical strength.[42] Similarly, Giddens construes globalisation as a global economy which is dominated by MNCs and financial institutions which operate independently.[43] Thus, viewed in relation to Nations, boundaries and domestic economic considerations, the term globalisation implies two processes namely; capitalist production and trade replacing protectionist economies through specialisation and Globalisation of the process of production and an integrated market.[44]

One of the realities of globalisation in the Global South is that the MNCs have not been "honest" with the host country and this is more pronounced during the conclusion of the contractual agreement.[45] Robinson assets that:

> "The transfer of the surpluses is also made possible by the weak bargaining position of the host countries ordinarily in the Global South which compels them to provide a number of concessions to the MNCs which encourage the increased imports of the items assembled abroad. Within this framework, increased liberalisation of trade or increased capital movements can only lead to the aggravation of the gap between the Global North and the Global South, as the latter will not be able to retain their 'fair'

[40] Noland (note 19 above) 27.
[41] *Ibid.*
[42] *Id* 87; see also Hendricks C and Lushaba L (2005) "Southern Africa: Continuities and Disjunctures in the Disciurse and Practices" in From National Liberation to Democratic Renaissance in Southern Africa (*CODESRIA*) 5.
[43] *Ibid.*
[44] Ibrahim (note 26 above) 86.
[45] Osuagwu (note 13 above).

> share of the surplus generated. In all these, it can be asserted with certainty that absolute exploitation is intrinsic in the nature of the multinational corporations. Hence, they devise any possible means to sustain this objective."[46]

Capitalist-globalisation creates winners and losers and begets social tensions that must be managed at both the national and international levels.[47] At the nation-state level, the major concern is that international institutions, such as the IMF and the WTO, do not adequately reflect the interests of the Global South.[48] An important character of globalisation is the immense financial influence and power of MNCs.[49] The phenomenon is a direct result of the democratisation of the global economic space championed by neo-liberal economics.[50] The disproportionate growth of MNCs in recent times stems from economic democracy.[51] MNCs ought to be, even if only from the moral point of view, in the vanguard of human rights protection given their inextricable ties to democracy.[52] Thus, the flagrant neglect of economic, social and cultural rights by MNCs is somewhat of an irony.[53]

MNCs constitute some of, if not the main, actors in this new economic equation.[54] The new international economic order promoted by the Bretton Woods institutions[55], has led to MNCs accumulating so many resources that have resulted in their mega-actors in the international economic, social and political scene.[56] In more than a few cases, the presence of MNCs "has often removed decision making from the national sphere and state control."[57] This is because after the end of World War II, Bretton Woods

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[46] *Ibid.*
[47] *Id* 28.
[48] *Ibid.*
[49] Yusuf H O (2008) "Oil on troubled waters: Multi-national corporations and realising human rights in the developing world, with specific references to Nigeria" *African Human Rights Law Journal,* Vol. 8, No 1, 96.
[50] *Ibid.*
[51] *Ibid.*
[52] Stilgitz J E (2007) " 2007 Grotius Lecture, Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in A Globalised World Balancing Rights with Responsibilities" *American University International Law Review* Vol. 3, No 3,557.
[53] Yusuf (note 49 above) 96.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*

Institutions[58] transformed the global economic market in favour of the USA.[59] The Bretton Woods system became another form of Global North supremacy as its primary currency was the dollar.[60] This dominance is further evidenced by the fact that the headquarters of the two main institutions of finance (the IMF and the World Bank) are situated in Washington D.C. This system is, therefore, dominated by the USA and functioned only to ensure Global North survival and not the Global South assistance.[61]

The Bretton Woods Institutions which was addressed earlier in the thesis "were set up at a meeting of 43 countries in Bretton Woods, New Hampshire, USA in July 1944.[62] Their aims were to help rebuild the shattered post-war economy and to promote international economic cooperation as well as development in the Global South.[63] The original Bretton Woods' agreement also included plans for an International Trade Organisation (ITO) but these lay dormant until the World Trade Organisation (WTO) was created in the early 1990s".[64]

The creation of the World Bank and the IMF came at the end of the Second World War.[65] They were based on the ideas of a trio of key experts –U.S Treasury Secretary Henry Morganthau, his chief economic advisor Harry Dexter White, and British economist John Maynard Keynes.[66] They wanted to establish a post-war economic order based on notions of consensual decision-making and cooperation in the realm of trade and economic relations.[67] It was felt by the leaders of the Allied countries (Global North), particularly the US and Britain, that a multilateral framework was

[58] Bretton Woods system is a monetary and exchange rate management established in 1944, the rules for commercial and financial relations among United States, Canada Western Europe, Australia, and Japan. It was developed at the United Nations Monetary and Financial Conference held in Bretton Woods, New Hampshire, from July 1 to July 22, 1944; see also available at http://www.brettonwoodsproject.org/2005/08/art-320747/ (accessed 22 February 2017).
[59] Dammasch S "The system of Bretton Woods: A less from History" available at http://www.ww.uni-magdeburg.de/fwwdeka/student/arbeiten/006.pdf (accessed 15 August 2017).
[60] *Ibid.*
[61] Cheru F and Obi C (2010) *The Rise of China and India in Africa: Challenges, Opportunities and Critical Interventions* (Nordiska Afrikainstitutet, Zed Books, London /New York) 1.
[62] Bretton Woods Institutions (note 58 above).
[63] *Ibid.*
[64]Institutions that were formed at Bretton woods, available at http://www.brettonwoodsproject.org/2005/08/art-320747/ (accessed 22 February 2017).
[65] *Ibid.*
[66] *Ibid.*
[67] Bretton Woods Institutions (note 58 above).

needed to overcome the destabilising effects of the previous global economic depression and trade battles.[68]

In his opening speech at the Bretton Woods conference, Henry Morganthau "asserted that the 'bewilderment and bitterness' resulting from the Depression[69] became the breeders of fascism and finally of war".[70] Proponents of the new institutions felt that global economic interaction was necessary to maintain international peace and security.[71] It was thus argued that these institutions would facilitate, in Morganthau's words, "[the] creation of a dynamic world community in which the peoples of every nation will be able to realise their potentialities in peace".[72] However, the results of the Bretton Woods had the opposite effect on the Global South than it was "envisaged" above because these institutions were not created to foster the economic independence of the Global South. They however facilitated the historical continuum of the dependency syndrome that is still conducive to neo-liberal economic theory.

Moreover, the major influence of MNCs has resulted in "a clear loss of sovereignty on the part of the state and a greater globalisation of the decisions affecting the world's population".[73] General Motors, an MNC, has "a larger economy than all but seven nations," and considered in relation to the Global South, MNCs, particularly in the extractive industry, wield immense power in many developing countries.[74] The privileged position of MNCs as key players on the national and international scene ought to go with some responsibility.[75] While MNCs are typically driven by the capitalist economic philosophy of profit maximisation, it must also be conceded that the primary responsibility in international human rights law lies with States.[76]

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[68] Bretton Woods Institutions (note 58 above).
[69] *Ibid.*
[70] *Ibid.*
[71] Salazar C T (2004) "Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act" *St. John's Journal of Legal Commentary* Vol. 19, No.1: 113-116.
[72] *Ibid.*
[73] Yusuf (note 49 above).
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*

In its 21st century form, globalisation is driven by various of forces such as the financial flow and economic resources with particular reference to the flow of goods, services, labour, technology, transport, communications and information technology accompanied by the spread of culture from one corner of the world to the other and global diffusion of religious ideas as well as ideologies.[77]

Consequently, the below paragraph explains the position of global economy properly as it states that;

> "The global economy continued to experience some fundamental changes with notable ramifications which included among other things even the language of global discourse. This trend is currently being pursued with vigour by the now acclaimed instruments of globalisation. Thus given the historical relationship between Global South and the Global North it is ironic that the latter today preaches the virtues of freedom to the Africans. Former colonisers and ex-slave owners have made a virtue of championing political and economic liberalisation. 'Yesterday's oppressors appear to be today's liberators, fighting for democracy, "human rights" and free market economies throughout the world".[78]

Globalisation has largely been driven and sustained with its inherent defects by the interests and needs of the Global North[79] and has as a consequence turned the world into a big village.[80] This in turn has led to intense electronic corporate commercial war waged to receive the attention and nod of the customer globally.[81] This war for survival can only get more intense in the new millennium - ask whether the world prepared to face the realities of this global phenomenon, which has the potential of wiping out industrial enterprise in Africa[82] The separation of globalisation from its colonial-

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[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid*; see also Grieco and Holmes, 1999.
[80] Bieler A and Morton A D (2003) "Globalisation, the State and Class Struggle: A "Critical Economy" Engagement with Open Marxism" *British Journal of Politics and International Relations*, Vol.5 No 4: 16.
[81] Ibrahim (note 12 above) 86; see also Wang O and Lee A (2018) "US, China Deliver on Threats as 'Biggest Trade War in Economic History' Starts at High Noon" *South China Morning Post,* available at https://www.scmp.com/news/china/diplomacy-defence/article/2154153/us-china-deliver-threats-biggest-trade-war-economic (accessed 05 August 2018).
[82] *Ibid.*

imperial-capitalist has resulted with the fragmentation of business and human rights. Moreover, without a stable political economy there effects of globalisation herein articulated would as evident undermine the language of human rights.

The above development has resulted with the integration of domestic economies especially in the Global South.[83] Thus, uniformity is achieved in terms of the 'New Economic World Order'.[84] The Cold War which was born out of the process of globalisation has had significant consequences for Africa.[85] During its height in the 1960s and 1970s, the Cold War witnessed the emergence of authoritarian regimes in the form of one-party or military regimes.[86] This was largely a result of the support of the two blocks to keep African countries in their respective camps.[87] This has in turn, substantially reduced Africa's international negotiating power and its ability to manoeuvre in the international system.[88] Simply put, the cold war and its demise has worked against democracy and economic development in Africa.[89]

The specific impacts of globalisation on the Global South and Africa specifically, were identified according to the political sphere with the most important consequence being the erosion of sovereignty, especially on the economic and financial matters.[90] This is as a result of the imposition of models, strategies and policies of development on African countries by the IMF, the World Bank and the WTO.[91] Of the utmost importance is the fact that globalisation for the most part does not facilitate the establishment of the economic conditions necessary for genuine democracy and good governance to take solid roots and thrive.[92]

Nsibambi rightly argues that economically, globalisation has on the whole reinforced the economic marginalisation of African economies and their dependence on a few

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[83] *Ibid.*
[84] Fanon F (2008) *Black Skin White Masks* translated by Markmann C L (Pluto Press, London) xvi.
[85] Ibrahim (note 26 above) 86.
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] Ezeudu M (2011) "Revisiting Corporate Violations of Human Rights in Nigeria" Niger Delta Region: Canvassing the potential role of the International Criminal Court" *African Human Rights Law Journal* 24.
[91] Ibrahim (note 26 above).
[92] *Ibid.*

primary goods for which demand and prices are externally determined.[93] Consequently, accentuated poverty and economic inequality as well as the ability of the vast number of Africans to participate meaningfully in the social and political life of their countries.[94] Human rights language professes to uphold the dignity of all individuals and peoples which means that globalisation as engendered by MNCs is a major obstacle to the realisation of human rights and in actual fact perpetuate the weaknesses within business and human rights discourse. Moreover, globalisation has resulted with cultural domination from the Global North to the Global South which is inherent with globalisation.[95] African countries are rapidly losing their cultural identity and therefore their ability to interact with other cultures on an equal and autonomous basis as they borrowing from other cultures only those aspects that meet their requirements and needs.[96] In short the effects of globalisation has been the non-fulfilment of human rights language.

The scientific and technological forces unleashed by globalisation have thus facilitated the extinction of African development of technology and have distorted the patterns of production in Africa.[97] Globalisation on the whole impacts negatively on the development and consolidation of democratic governance especially in the Global South.[98] One form of this is the reduction of the capacity of governments to determine and control events in their countries and thus compromised their accountability and responsiveness to the need of their people, given the fact that the context, institutions and processes by which these decisions are taken are far from being democratic.[99] The above appropriately exposes why enforcement of human standards against MNCs under the onslaught of globalisation in the Global South is moderate – this is because the very same MNCs are the ones the Global South "needs" for the realisation of economic growth, and consequently human rights but regrettably globalisation is

[93] Nsibambi A (2001) " The Effects of Globalisation on the State in Africa: Harnessing the Benefits and Minimising the Costs" United Nations General Assembly, Second Committee: Panel Discussion on Globalisation and the State 2 November, 2.
[94] Ibrahim (note 26 above).
[95] *Ibid.*
[96] *Id* 88.
[97] *Ibid.*
[98] *Ibid.*
[99] Eze R C and Nkwede J (2012) "The Effect of Globalisation on African Countries: An Overview of Nigeria" *International Journal of Asian Social Sciences* Vol. 2, No. 4, 395.

capitalistic and capitalism thrives best under weak legal regimes endemic in the Global South.

Additionally, globalisation introduces anti-developmentalism by declaring the state irrelevant or marginal to the developmental effort.[100] Development strategies and policies that focus on stabilisation and privatisation, rather than growth, development and poverty eradication, are pushed by external donors and this leads to greater poverty and inequality and thus undermines the ability of the people to participate effectively in the political and social processes in their countries.[101] Welfare and other programs intended to meet the basic needs of the majority of the population are transferred from governments to non-governmental organisations that begin to replace governments by depriving them of even the little authority and legitimacy they have.[102]

The imposition of economic specialisation based on the needs and interests of external forces and transforming the economies of African countries into series of enslaved economies linked to the outside but with very little linkages among them, democracy, with its emphasis on tolerance and compromise, can hardly thrive in such an environment.[103] Furthermore, the economic specialisation imposed on African countries makes rapid and sustainable growth and development impossible and conflicts over the distribution of the limited gains realised from globalisation becomes more acute and politicized.[104] Vulnerable groups, such as women, the youth and rural inhabitants, fare very badly in this contest and are discriminated against.[105] This further erodes the national ethos of solidarity and reciprocity that are essential to successful democracies.[106]

Globalisation's insistence on the Global South to open their economies to foreign goods and entrepreneurs, limits the ability of specifically African governments to take proactive and conscious measures to facilitate the emergence of an indigenous

[100] *Ibid.*
[101] Ibrahim (note 26 above) 88.
[102] *Ibid.*
[103] *Ibid.*
[104] Pare T U (2016) "The Impact Of Globalization in Africa" *Culminating Projects in Economics.* (Masters thesis St Cloud State University) 8.
[105] Ibrahim (note 26 above) 88.
[106] *Ibid.*

entrepreneurial class.[107] Globalisation has encouraged illicit trade in drugs, prostitution, pornography, human smuggling, dumping of dangerous waste and depletion of the environment by unscrupulous entrepreneur and has freed labour across boundaries and facilitated brain drain.[108]

As Global North exert its unlawful pressure upon African governments to open up more and more to maximize foreign investments and capital inflows and as MNCs and local enterprises utilise this environment to cater for their interests, the government is having less and less room to pay attention to the abject poverty amongst the poor and rich both in and between countries.[109] Thus, African State will have to be encouraged to pay more attention to the plight of its poor populace than to strive to be a big global actors.[110] The big global actors (Global North MNCs) can talk for themselves with little consequences if any in relation to infringements of rights especially in the Global South.[111] The question is, who will talk for the poor? (Global South)[112]

In pragmatic terms, therefore, globalisation does not explain many unrelated events that also shaped that era which include among other things the expansion of MNCs, the development of air transportation, the worldwide extension of the United Nations, the decolonization of Africa with apartheid in South Africa as the case in point.[113] Furthermore, globalisation also saw the advancement of environmentalism or the development of computers and high-tech industries such as genetic engineering.[114]

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[107] Ouattara A D (1997) "Challenges of Globilisation for Africa" (Deputy Managing Director of the International Monetary Fund at the Southern Africa Economic Summit Sponsored by the World Economic Forum, Harare) available at https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp052197 (accessed 02 June 2018).

[108] Peerapeng S, Chaitip P, Chaiboonsri C, Kovacs S and Balogh P (2014) "Impact of Economic Globalisation on Human Trafficking in the Greater Mekong Sub-Region Countries" *Journal of Computing* 53-55. *Applied Studies in Agribusiness and Commerce (Agrionform Publishing House, Budapest)* 125 available at https://ageconsearch.umn.edu/bitstream/147426/2/20_Suk-Rutai_Impact_Apstract.pdf (accessed 1 June 2018). See also Malik A (2017) "Selling Souls: An Empirical Analysis of Human Trafficking and Globalisation" *Pakistan Journal of Commerce and Social Sciences* Vol 11(1) 454.

[109] Ibrahim (note 26 above) 90.

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*

[113] Apartheid was a time in South Africa between 1948 and 1994 when the government made laws to discriminate against black people. The National Party ruled Africa during that time and made the laws. Everything, including medical care, education, and even the country's beaches were segregated by race. Apartheid did not end until Nelson Mandela was elected president. Available at http://www.softschools.com/timelines/apartheid_timeline/44/ (accessed 03 June 2018).

[114] Ibrahim (note 26 above) 90.

Unfortunately, globalisation has little to do with people or progress and everything that has to do with money.[115] Dazzled by the glimmer of fast profits, the champions of globalisation are incapable of taking stock of the future their anticipation of the needs of humanity and the environment as they plan for the expansion of cities or slowly reduce inequalities and heal social fractures.[116] Friedman, proposes a solution by stating that:

> "All of these problems will be resolved by the "invisible hand of the market" and by macroeconomic growth and so goes the strange and insidious logic of what in France is called the *pensée* unique.[117] The *pensée* unique, or "single thought," represents the interests of a group of economic forces and more specifically the in free-flowing international capital.[118] The arrogance of the *pensée* unique has reached such an extreme peak that one can without being unduly exaggerative, call it modern dogmatism. Like cancer, this vicious doctrine imperceptibly surrounds any rebellious logic by inhibiting it, disturbing it, paralyzing it, and finally killing it. This doctrine, this *pensée* unique, is the only ideology authorized by the invisible and omnipresent opinion police.[119]

4.3 Corporate Governance

Corporate law must be seen as essentially concerned with making available the corporate form for two primary purposes.[120] In the first place, the purpose is to facilitate and regulate the process of raising capital for the company's business operations (corporate finance) and the second is to impose controls on persons whose power derives from the finance that use of the corporate has put at their disposal (that is

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[115] *Ibid.*
[116] *Ibid.*
[117] "Invisible Hand" it is defined as unobservable market force that helps the demand and supply of goods in a free market to reach equilibrium automatically is the invisible hand. Available at https://economictimes.indiatimes.com/definition/invisible-hand (accessed 01 June 2018).
[118] Ibrahim (note 12 above) 90.
[119] *Ibid.*
[120] Mongalo T (2003) *Corporate Law and Corporate Governance: A Global Picture of Business Undertakings in South Africa* (New Africa Books, South Africa) 151.

regulating those organs concerned with the governance of company-corporate governance).[121]

The latter purpose of imposing controls ought to be aimed at conscious management of the MNCs' conduct in relation to the State, communities and the employees it serves. However, this has not been the case since, these controls are largely concerned with exploitative practices for the maximisation of profit. It is this backdrop, therefore that corporate governance seldom achieves the requisite harness of the recklessness of MNCs as demonstrated by the slave wages that plagues the Global South.[122]

Corporate governance is generally understood as the way or systems by which MNCs are directed and controlled.[123] The systems of corporate governance exist for the purpose of effectively restricting and monitoring the powers vested in the decision-makers.[124] What this means is that when dealing with corporate governance, the emphasis is on those organs which play a vital role in corporate decision-making.[125]

The concern over MNCs accountability and disclosure has many diverse sources.[126] Apart from the traditional recipients of corporate information namely, its finance providers (the shareholders, bankers, lenders, and creditors) and those interested in disclosure and accountability there is now the inclusion of employees, trade unions, consumers, governments and the general public.[127] This has resulted in calls for a wider conception of disclosure than that needed by the financiers of the MNCs.[128] Responding to such demands, international organisations have made recommendations that widen the elements which might have to be included in MNC's

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[121] *Ibid.*
[122] Curtis M (2008) "Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa" *Actionaid* 4.
[123] Mongalo T (2003) *Corporate Law and Corporate Governance: A Global Picture of Business Undertakings in South Africa* (New Africa Books, South Africa) 151.
[124] *Ibid.*
[125] *Ibid.*
[126] Muchlinski T P (2010) *Multinational Enterprises & The Law* 2nd ed (Oxford University Press, New York) 337.
[127] *Id* 338.
[128] *Ibid.*

annual report and in supplementary statements.[129] This type of initiative is geared towards broader responsiveness to rights abuses by MNCs.

4.3.1 OECD Principles of Corporate Governance

The OECD Principles of Corporate Governance have a proven record as the international reference point and as an effective tool for implementation and the following tools encompass the mechanisms that might ensure efficient corporate governance.[130] This mechanism have been adopted as the Financial Stability Board's (FSB) Key Standards for Sound Financial Systems serving FSB, G20 and OECD members.[131] Furthermore, they have also been used by the World Bank Group in more than 60 country reviews worldwide,[132] and finally, they serve as the basis for the Guidelines on corporate governance of banks issued by the Basel Committee on Banking Supervision, the OECD Guidelines on Insurer and Pension Fund Governance and as a reference for reform in individual countries.[133]

The corporate governance framework should protect and facilitate the exercise of shareholders' rights and ensure equitable treatment of all the shareholders, including

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[129] *Ibid.*

[130] The updated G20/OECD Principles of Corporate Governance (OECD Report to G20 Finance Ministers and Central Bank Governors September 2015) available on http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf (accessed 23 February 2017) 3.

[131] The FSB was established in April 2009 as the successor to the Financial Stability Forum (FSF). At the Pittsburgh Summit, the Heads of State and Government of the Group of Twenty endorsed the FSB's original Charter of 25 September 2009 which set out the FSB's objectives and mandate, and organisational structure The FSB has assumed a key role in promoting the reform of international financial regulation. Available at http://www.fsb.org/about/history/ (accessed on 02 June 2018).

[132] Founded in 1944, the International Bank for Reconstruction and Development—soon called the World Bank—has expanded to a closely associated group of five development institutions. Originally, its loans helped rebuild countries devastated by World War II. In time, the focus shifted from reconstruction to development, with a heavy emphasis on infrastructure such as dams, electrical grids, irrigation systems, and roads. With the founding of the International Finance Corporation in 1956, the institution became able to lend to private companies and financial institutions in developing countries. And the founding of the International Development Association in 1960 put greater emphasis on the poorest countries, part of a steady shift toward the eradication of poverty becoming the Bank Group's primary goal. The subsequent launch of the International Centre for Settlement of Investment Disputes and the Multilateral Investment Guarantee Agency further rounded out the Bank Group's ability to connect global financial resources to the needs of developing countries. Available at http://www.worldbank.org/en/about/history (accessed on 02 June 2018).

[133] The updated G20/OECD Principles of Corporate Governance (OECD Report to G20 Finance Ministers and Central Bank Governors September 2015) available on http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf (accessed 23 February 2017) 3.

minority and foreign shareholders.[134] All the shareholders should have the opportunity to obtain effective redress for violation of their rights.[135] This can be achieved through basic shareholder rights which should include the right to:

> "Secure methods of ownership registration; convey or transfer shares; to obtain relevant and material information on the corporation on a timely and regular basis; to participate and vote in general shareholder meetings; to elect and remove members of the board and share in the profits of the corporation".[136]

The role of the stakeholders in corporate governance should recognise the rights of the stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and the stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises as demonstrated below:[137]

> "A key aspect of corporate governance is concerned with ensuring the flow of external capital to companies both in the form of equity and credit. Corporate governance is also concerned with finding ways encouraging the various stakeholders in the firm to undertake economically optimal levels of investment in firm-specific human and physical capital. The competitiveness and ultimate success of the MNCs is the result of teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors, customers, suppliers and other stakeholders. MNCs should recognise that the contributions of the stakeholders constitute a valuable resource for building competitive and profitable companies. It is, therefore, in the long-term interest of corporations to foster wealth-creating co-operations among the stakeholders. The governance framework should recognise the interests of

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[134] The updated G20/OECD Principles of Corporate Governance (OECD Report to G20 Finance Ministers and Central Bank Governors September 2015) available on http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf (accessed 23 February 2017) 3.
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*

the stakeholders and their contribution to the long-term success of the MNCs".[138]

4.3.2 The importance of disclosure and transparency for corporate governance

The concept of disclosure and transparency entail that MNCs should ensure that timely and accurate disclosure is made on all material matters regarding the MNCs, including the financial situation, performance, ownership, and governance of the MNCs.[139] An effective disclosure regime that promotes real transparency is an important feature of the market-based monitoring of companies and is central to the shareholders' ability to exercise their shareholder rights on an informed basis.[140] Research shows that disclosure can also be a powerful tool in influencing the behaviour of MNCs and for protecting investors.[141]

Thus, an adequate disclosure regime can help to attract capital and maintain confidence in the capital markets.[142] By contrast, weak disclosure and non-transparent practices can contribute to not only unethical behaviour but also and to a loss of market integrity at great cost and not just to the company and its shareholders but also to the economy as a whole.[143] Shareholders and potential investors require access to regular, reliable and comparable detailed information for them to assess the stewardship of management and thus make informed decisions about the valuation, ownership and voting of shares. Insufficient or unclear information might hamper the ability of the markets to function, increase the cost of capital and thus result in poor allocation of resources.[144] This is well articulated in the paragraph below in terms of how disclosures can be effective:

> "Additionally, disclosure helps improve the public understanding of the structure and activities of enterprises, corporate policies and performance with respect to environmental and ethical standards and companies'

[138] *Ibid.*
[139] Fung B (2014) "The Demand and Need for Transparency and Disclosure in Corporate Governance" Universal Journal of Management Vol. 2, 75.
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*

relationships with the communities in which they operate. The OECD Guidelines for Multinational Enterprises might, in many jurisdictions be relevant for multinational enterprises. The corporate governance framework should ensure that the strategic guidance of the company and the effective monitoring of management by the board are effective and this should be coupled with the board's accountability to the company and the shareholders. Board structures and procedures vary both within and among countries".[145]

The problem with corporate governance specifically with regard to MNCs is that the corporate culture is foundational on the production of lack of accountability for directors. This is demonstrated by British companies, as Lord Caldecote opines, "the directors mark their own examination papers".[146] Notably ownership is the basis of power and is exercised through meetings of the shareholder-members of the company and it is an idea that has become over-successful.[147] MNCs no longer necessarily reflect this underlying concept, consequently, practices designed to reflect the original model do not relate to the actual situation in many companies today.[148]

[145] The updated G20/OECD Principles of Corporate Governance (OECD Report to G20 Finance Ministers and Central Bank Governors September 2015) available on http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf (accessed 23 February 2016) 31; Disclosure should include, but not be limited to, material information on:

- The financial and operating results of the company.
- Company objectives and non-financial information.
- Major share ownership, including beneficial owners, and voting rights.
- Remuneration of members of the board and key executives.
- Information about board members, including their qualifications, the selection process, other company directorships and whether they are regarded as independent by the board.
- Related party transactions.
- Foreseeable risk factors.
- Issues regarding employees and other stakeholders.

Governance structures and policies, including the content of any corporate governance code or policy and the process by which it is implemented.

[146] Tricker R I (1984) *Corporate Governance* (Gower Publishing, England) 1.

[147] *Ibid.*

[148] *Ibid.*

4.4 International Economic Law and MNCs

International economical law is a multiform and complex branch of law.[149] It contains rules and regulations which belong to the private or public law systems of individual states and others which originated from international legislation.[150] Most of the norms of international economic law the bulk of which were concluded by sovereign states as the main subjects of international law and the main actors of international relations are established by treaties.[151] States have created many international organizations with competences in the field of international economic relations which to a certain extent autonomously inspire treaty-making and thus contribute to the development of international customary law.[152]

The creation of the nation-state as a colonial enterprise is essential in the understanding of international law construction.[153] Furthermore, the establishment of international law institutions such as the UN, ICJ, ICC, with the inclusion of statutes (the Rome Statute). Although these constructions were created, to serve all humanity and those who are in need such as the Global South, however,, they remain at the margins of this creation of the global institutions as far as being an equal participant in global affairs. The recent spate of African countries' declarations of exiting the Rome Statute, that established International Criminal Court (ICC) is a manifestation of this marginalisation of the Global South and of the African continent specifically.[154]

In the second half of the 20th century the economic interdependence of the world has grown remarkably which is a development that has challenged the traditional structure of international economic law specifically as well as the structure of international law in general.[155] Even if a solid system of international economic law is still lacking, one already perceives the foundations of a universal order of economic relations to remain unchanged because of the following:[156]

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[149] Kunig P & Lau N & Meng W ed (1989) *International Economic Law: Basic Documents* (Walter de Gruyter, Berlin, New York) v.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] Dugard J (2018) 5 ed et al *International Law – A South African Perspective* (Juta Publishers, South Africa) 11-13.
[154] *Id* 278-279.
[155] Kunig (note 149 above) x.
[156] *Ibid.*

> "The present legal situation in the field of international economic relations is based on developments which took place during the last years of World War II. After the conference at Bretton Woods, the International Monetary Fund as well as the International Bank for Reconstruction and Development were established. Transcending the area of monetary co-operation, the concept of an international organisation dedicated to international trade was sponsored in the context of the evolving United Nations' System".[157]

These aspirations resulted in the 'Havana Charter" of 1948 as the founding statute of an International Trade Organisations.[158] It never entered into force.[159] The General Agreement on Tariffs and Trade (GATT) became the focal framework of international trade.[160] It completed the so-called Bretton Woods system which since the 1960s has to be constrained in the context of the OECD as another framework for the economic relationship between leading Western states as well as with the regional system of the European Economic Community and the Council for Mutual Economic Assistance.[161]

The drastic differences in economic development and bargaining power between the industrialised Global North and the Global South countries found an expression in the foundation of the United Nations Conference on Trade and Development (UNCTAD) in 1964.[162] This gave rise to the urgent calls to transform international legal structures into a New International Economic Order and make concrete suggestions of which still need to be worked out.[163]

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[157] *Ibid.*
[158] United Nations Conference on Trade and Employment, & United States. (1948). *Havana charter for an International Trade Organization: March 24, 1948, including a guide to the study of the charter*. Washington: U.S. Govt. Print. Off. available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-1-b&chapter=10&clang=_en (accessed 02 June 2018).
[159] *Ibid.*
[160] The following table covers the 1947 General Agreement on Tariffs and Trade (GATT 1947) and the multilateral trade agreements concluded during the Uruguay Round of negotiations. These include the 1994 Agreement Establishing the World Trade Organization (the Marrakesh Agreement) and the multilateral agreements annexed to the Marrakesh Agreement (the Covered Agreements).
[161] *Ibid.*
[162] Centre on Transnational Corporations (United Nations), United Nations., United Nations Conference on Trade and Development., United Nations Conference on Trade and Development., & United Nations Conference on Trade and Development. (1991). *World investment report*. New York: United Nations. Available at http://unctad.org/en/Pages/Home.aspx (accessed 02 June 2018).
[163] *Ibid.*

Essential claims aim at a preferential treatment of developing countries concerning the exploitation of and trade in raw material, be they situated in areas under national sovereignty or outside national jurisdiction, as well as at an easier access for developing countries' products, technology and capital.[164] Other goals are stricter control of MNCs as well as a reform of existing institutional structures of the world economy.[165] A catalyst of these aspirations are seen in the proclamation of a right to development which tries to relate the idea of a basic change of the existing international economic order to the concept of human rights and mechanisms of human rights protection.[166]

One important corollary of the international flow of capital is the protection of international investment.[167] At the same time the standards for such protection guaranteed by general customary public international law are more and more disputed.[168] National law standards are not sufficient for reliable protection.[169] This led to the creation of the, International Centre for Settlement of Investments Dispute (ICSID) as a multilateral arbitrary institution for investments disputes between states and between states and private parties.[170] On the substantive side Multilateral Investment Guarantee Agency (MIGA) is a quite recent attempt to approach the uncertainties of some investment abroad by a multilateral "insurance type solution".[171] It still has to prove its usefulness.[172]

After the decolonisation period, development aid has been of paramount concern to international community.[173] But, the increasing conviction of the developing countries that one major obstacle to speedy development is the old, purportedly unjust and bias

[164] Kunig (note 149 above) x.
[165] *Ibid.*
[166] *Ibid.*
[167] *Id* xii.
[168] *Ibid.*
[169] *Ibid.*
[170] International Centre for Settlement of Investment Disputes. (2003). ICSID convention, regulations and rules. Washington, D.C. :International Centre for Settlement of Investment Disputes,
[171] Multilateral Investment Guarantee Agency. 2013.MIGA Annual Report 2013 : Insuring Investments, Ensuring Opportunities. Washington, DC: World Bank Group. World Bank. Available at https://openknowledge.worldbank.org/handle/10986/16194 License: CC BY 3.0 IGO (accessed 02 June 2018).
[172] *Ibid.*
[173] *Ibid.*

international economic order generated the demand for a New International Economic Order (NIEO).[174]

From NIEO to the contemporary it is important to briefly explain what classical economic theory means before dealing with the neo-classical to provide a self-explanatory juxtaposition between the metamorphoses of this theory or lack thereof. Thus, classical theory suggests that during a recession or depression interest rates should fall which would stimulate consumption and investment spending.[175] Classical economic theory suggests that high unemployment rates lead to lower wage rates which lead to lower prices which then leads to higher demand because of the increased purchasing power of existing wealth.[176] This theory is rooted in the concept of a *laissez-faire* economic market.[177] A *laissez-faire* also known as free market requires little or no government intervention.[178] It also allows individuals to act according to their own self-interest regarding economic decisions.[179]

The neo-classical school of thoughts provides that market function better with nominal government interference. This school of thought was developed in the late 18th and early 19th century by Adam Smith, Jean-Baptiste Say, David Ricardo, Thomas Malthus, and John Stuart Mill. Many writers found Adam Smith's idea of free markets more convincing than the idea, widely accepted at the time, of protectionism. Put differently, neo-classical economics is an approach to economics that relates supply and demand to an individual's rationality and his ability to maximize utility or profit.[180] Neoclassical economics also use mathematical equations to study of various aspects

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[174] *Id* xii; see also Ruggie J G (1982) "International Regimes, Transactions, and Change: Embedded Liberalism in the Post-war Economic Order" *International Organisation* Vol. 36, No. 2. 386-387.
[175] Intermediate Macro-economics.
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*
[180] Boerger L (2016) "Exploring-Economics-Team | 18th of December 2016 *Patron and academic review:* Prof. Dr. Michael Roos. The term 'neoclassical economics' is imprecise and is used in different ways. Most mainstream economists do not identify themselves as members of the neoclassical school. The term 'neo-classical' was already coined by Thorstein Veblen in 1900. It describes the synthesis of the subjective and objective theory of value in a diagram of supply and demand, which was developed by Alfred Marshall. Marshall combined the classical understanding that the value of a commodity results from the costs of production with the new findings of marginalism, stating that the value is determined by individual utility. Until today, the market diagram representing the intersection of (objective) supply and (subjective) demand is a central element of neoclassical economics. Available at https://www.exploring-economics.org/en/orientation/neoclassical-economics/ (accessed 20 February 2018).

of the economy. [181]This approach was developed in the 19th century and was based on books by William Stanley Jevons, Carl Menger and Leon Walras, and became popular in the early 20th century.[182] Therefore, it would appear from the definitions of classical and neo-classical theory these definitions that they are all the same except that time and space differentiate the application of the ideology theory.

The heterodox school of thought analysis and the study of economic principles are considered to be outside of the mainstream or orthodox schools of economic thought.[183] Schools of heterodox economics include "Socialism, Marxism, post-Keynesian and Austrian and often combine the macroeconomic outlook found in Keynesian economics with approaches which are critical of neoclassical economics."[184]

The Trans-border activities of MNCs and the transnational structures of enterprises create new and difficult problems of concurring, competing or mutually incompatible jurisdictions of several states.[185] It might also illuminate differences of interest between the MNCs and the policies of its host state.[186] The search for common standards did generate a – non – code of conduct in the OECD and some other documents, despite the fact that in the UN the struggle still goes on to find common ground.[187]

It is this lack of decisive action from the UN mechanism regarding the exploitative nature of MNCs that still allows for the slave labour and many other crimes against the people of Africa. Therefore, corporate governance should be implemented with an ethos that enforces what appears to be "good" laws on paper. Unfortunately, development strategies and policies followed by African countries are increasingly formulated by outsiders which is why they are then uncritically imposed on African countries as a condition for aid, investments, trade access, political and military

[181] *Ibid.*
[182]Neoclassical Economics Definition| Investopedia available on http://www.investopedia.com/terms/n/neoclassical.asp#ixzz4Gw5dECt0 (accessed 20 March 2017).
[183] Spash C L and Ryan A (2012) "Economic Schools of Thought on the Environment: Investigating Unity and Division" *Cambridge Journal of Economics* Vol. 36, 1095-1096.
[184] *Ibid.*
[185] *Id* xiii.
[186] *Ibid.*
[187] *Ibid.*

support.[188] It is not surprising therefore, that these strategies and policies serve more the interests of the Global North rather than those of the African people they claim to be assisting.[189] In articulating a new approach to the economic development of Africa, emphasis should be placed on the question of the nature, ownership, management, allocation, utilization and distribution of the resources.[190]

4.5. Economic Policies in Africa and their Impact on the Economic Development of Africa and Human Rights

The origins of capitalism is said to have begun in the 13th to the 16th centuries.[191] The underlying theme of capitalism is the use of wealth to create more wealth.[192] The simplest form of this is the lending of money with interest which was reviled in the Middle-Ages as the sin of usury.[193] At a more sophisticated level, capitalism involves investing money in a project in return for a share of the profit.[194] In the case of a single owner of an industrial enterprise (such as a factory), the system reveals a characteristic distinction.[195] All the profits go to one person, though many others share the work and thus, full-scale capitalism results in an inevitable divide between employer and employed, or capital and labour.[196] Moreover, on a global scale through colonial-imperial structure, MNCs as agents of capitalism have resulted with dependency syndrome between the Global South and Global North which has a negative impact on human rights language.

The essential characteristics of capitalism only become evident with the increase in scale - in two quite separate contexts.[197] One is the formation of joint-stock companies in which investors pool their resources for a major commercial undertaking.[198] The

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[188] Ibrahim A A (2013) "The Impact of Globalization on Africa" *International Journal of Humanities and Social Science* Vol. 3 No. 15, 91.
[189] *Ibid.*
[190] *Ibid.*
[191] History World available on http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=aa49#ixzz4H6UG2Fmy (accessed July 15 2017).
[192] Ibrahim (note 188 above) 91.
[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid.*
[198] *Ibid.*

other which was not evident until the Industrial Revolution, is the development of factories in which many of workers are employed in a single private enterprise.[199] Capitalism is the dominant economic theory in which the economic and political systems, in a country's trade and industry are controlled by private owners for profit, rather than by the state.[200] Synonymous to the above definition is the fact that capitalism can be described as a way of organizing an economy so that the things that are used to make and transport products (such as land, oil, factories and ships) are owned by individual people and companies rather than by the government.[201]

The seemingly neutral language of human rights in relation to holding MNCs accountable is unhelpful - for instance the negative impacts of capitalism is foundational to the MNCs' human rights violations but the link is often missing in grand narrative of human rights discourse. For example the "ILO reports that an estimated 24.9 million people are victims of forced labor around the world, 16 million of whom are exploited in the private sector (which are controlled by MNCs). The risks within the apparel sector are pervasive and endemic at each stage of production, occurring across continents (especially in the Global South and driven by Global North MNCs), in supply chains from fast fashion to luxury brands".[202]

Perhaps continuing with a succinct argument which captures the ideology of capitalism in Friedman and Ramonet is the quotation of Alain Minc which state that:

> "Capitalism cannot collapse, it is the natural state of society'.[203] Democracy is not the natural state of society. The market, yes.' Only an economy disencumbered of social speed bumps and other "inefficiencies" can steer clear of regression and crisis. The remaining key commandments of the *pensée* unique build upon the first. For instance, the market's invisible hand

[199] *Ibid.*
[200] *Ibid.*
[201] Capitalism Dictionary available at http://www.merriam-webster.com/dictionary/capitalism (accessed on 05 September 2017).
[202] Know The Chain (2018) "Apparel & Footwear Benchmark Finding Report" available at www.knowthechain.org (accessed on 09 August 2019).
[203] Friedman, T & Ramonet, I. 1999. Duelling globalizations: a debate between Thomas Friedman and Ignacio Ramonet. *Foreign Policy*, Fall. Available at: www.sunysb.edu/sociology/faculty/Levy/Friedman%20and%20Ramonet.pdf (accessed 21 September 2017).

> corrects the unevenness and malfunctions of capitalism and in particular, financial markets, whose signals orient and determine the general movement of the economy.[204] Competition and competitiveness stimulate and develop businesses and thus bringing them permanent and beneficial modernization.[205] Free trade without barriers is a factor of the uninterrupted development of commerce and therefore, of societies".[206]

The question of imperialism-capitalism and its dominants nature is better articulated below:

> "Marxist writing particularly that of Lenin. The Marxist theory of imperialism forms part of the theoretical whole known as Marxism which is grounded in dialectical materialism and includes its own political economy and thus provides the tactics and strategy of proletarian revolution. Thus, the method used and the basis of interpretation of imperialism in the Marxist schema is also the method of historical materialism. Historical materialism means that historical changes in human evolution do not lie in motives and not in ideologies but in the material basis of the society in question".[207]

Dependency on the other side can be defined as an explanation of the economic development of a state in terms of the external influences of the political, economic, cultural and of the national development policies.[208] Dos Santos emphasizes the historical dimension of the dependency relationships in his definition by asserting that:

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[204] *Ibid.*
[205] *Ibid.*
[206] *Ibid.*
[207] Kemp T (2016) "The Marxist Theory Imperialism" Political Theory. Available at https://ordinaireme.wordpress.com/2016/04/26/the-marxist-theory-of-imperialism/ (accessed 01 August 2017); For Marxism, imperialism is not a political or ideological phenomenon on the contrary, it expresses the imperative necessities of advanced capitalism. For Marxists, therefore, the explanation of such aspects of imperialism as colonial expansion and power struggles between states has to be sought in the material conditions rather than in ideology and politics. While not denying the influence of forces which are mainly super structural, the Marxist theory rejects the view that the course of history can be explained in terms of power drives, love of war, desire for glory and the influence of outstanding personalities.
[208] Ferraro V (2008) "Dependency Theory: An Introduction," in The Development Economics Reader, ed. *Giorgio Secondi* (London: Routledge) 58-64; see also Sunkel O (1969) "National Development Policy and External Dependence in Latin America," *The Journal of Development Studies*, Vol. 6, No. 1, 23.

> "Dependency is an historical condition which shapes a certain structure of the world economy such that it favours the Global North countries to the detriment of the Global South and thus limits the development possibilities of the subordinate economics which is a situation in which the economy of a certain group of countries is conditioned by the development and expansion of another economy to which their own is subjected".[209]

There are three common features to these definitions which most dependency theorists share, firstly:

> "Dependency characterizes the international system as comprised of two sets of states which are variously described as dominant/dependent, centre/periphery or metropolitan/satellite. The dominant states are the advanced industrial nations in the Organization of Economic Co-operation and Development (OECD). The dependent states are those states of Latin America, Asia, and Africa which have low *per capita* GNPs and which rely heavily on the export of a single commodity for foreign exchange earnings".[210]

Secondly:

> "Both definitions have in common the assumption that external forces are of singular importance to the economic activities within the dependent states. These external forces include MNCs, international commodity markets, foreign assistance, communications and any other means by which the advanced industrialized countries can represent their economic interests abroad. Third, the definitions of dependency all indicate that the relations between dominant and dependent states are dynamic because the interactions between the two sets of states tend not only to reinforce but also intensify the unequal patterns. Moreover, dependency is a very deep-

[209] *Ibid.*
[210] *Ibid.*

seated historical process which rooted in the internationalization of capitalism. Notably, dependency is an ongoing process".[211]

In short, dependency theory attempts to explain the present underdeveloped state of the Global South largely by examining the patterns of interactions among nations and by arguing that inequality among nations is an intrinsic part of those interactions.[212]

The Washington Consensus refers to a list of ten specific policy reforms which Williamson claims are widely agreed in Washington to be desirable in just about all the countries of Latin America as of 1989.[213] Hence there is the "Washington" in the title. It is thus concluded that one of the purposes of the conference (held in 1989) was exactly to explore how much beyond Washington views had changed (focusing on Latin America) and that there was indeed a big change of views in the process.[214] The Institute for International Economics was of the view that it could help the process along principally through the tract that Bela Balassa honchoed from the Bank.[215] The ten policy reforms are, Fiscal Discipline, Reordering Public Expenditure Priorities, Tax Reform, Liberalising Interest Rates, A Competitive Exchange Rate, and Trade Liberalisation. Liberalization of Inward Foreign Direct Investment, Privatisation, Deregulation. Property Rights.[216]

Africa has had an external hand in its affairs for centuries.[217] Even after various countries in Africa had gained their independence, this external influence, by and large, remained, albeit in a different guise.[218] The opportunity for further external influence was brought about during the African economic crises of the 1970s and early 1980s.[219] The 1980s, in particular, saw the emergence of a new strand of development thinking based on a neoliberal paradigm which culminated first in the so-called Structural Adjustment Programme (SAP) and later in the Poverty Reduction Strategy

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[211] *Ibid.*
[212] *Ibid.*
[213] Williamson J "The Washington Consensus" A lecture in the series "Practitioners of Development" delivered at the World Bank on January 13, 2004. The author is indebted to colleagues at the Institute for International Economics for comments on a previous draft. *Institute for International Economics.*
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*
[217] Gumede V (2010) "Developmental State is Still a Pipedream in Africa" *Politics* Vol. 19, 37.
[218] *Ibid.*
[219] *Ibid.*

Papers.[220] The assumption underpinning SAP in Africa was that the State and State intervention were the sources of economic distortions and the underdevelopment of African economies.[221]

Gumede provides that the implementation of the above mechanism is aimed at among other things:

> "The reductions of government spending and the privatisation of State owned enterprises. The role and the capacity of the States in Africa and some other parts of the Global South were significantly reduced and Africa has a long way to go still in undoing the damage propelled by the SAP. Because of the continued external hand in the affairs of Africa by the Global North, Africa remains behind other continents in terms of economic growth and development. The human condition in Africa has effectively been deteriorating for about 20 or so years. Globalisation as discussed earlier is partly to blame because of the integration of labour markets, which has impacted negatively on African jobseekers. The social processes associated with the capitalist economic system are also partly to blame because they favour the well-off at the expense of the poor".[222]

Africa has privatised many of its State-owned assets and Africa has, generally, pursued policies recommended by the Global North.[223] In 1960, before globalisation, the most fortunate 20 percent of the planet's population were 30 times richer than the poorest 20 percent.[224] In 1997, at the height of globalisation, the most fortunate were 74 times richer than the world's poorest and this gap grows each day.[225] Presently, if one add up the gross national products of all the world's underdeveloped countries

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[220] Anyinam C (1994) "Spatial Implications of Structural Adjustment Programmes in Ghana" *Tijdchrift Voor Economics en Sociale Geografie* Vol. 85, No 5, 450.
[221] Gumede (note 217 above).
[222] *Ibid.*
[223] *Ibid.*
[224] *Ibid.*
[225] Friedman T & Ramonet I. (1999) Duelling globalizations: a debate between Thomas Friedman and Ignacio Ramonet. *Foreign Policy*, Fall. Available at: www.sunysb.edu/sociology/faculty/Levy/Friedman%20and%20Ramonet.pdf. (accessed 03 October 2017).

(with their 600 million inhabitants) they still will not equal the total wealth of the three richest people in the world. [226]

Africa in its many faces must pursue its own paradigm for economic and social development and should rethink the policies that underpin these efforts.[227] The structures of many African economies need significant transformation in order for African countries to construct democratic developmental states.[228] Africa needs to cut the umbilical cord, the gravy train and at best the super-imposed economic structure that has not fostered development in the entire world and most importantly the African continent.

4.6. Neoliberalism and its impact on human rights and Africa's economic strength

The history of contemporary economic evolution of the world has in the main concerned itself with imperialism, colonialism and capitalism. Like many other regulatory framework neoliberalism is a system that emanates from the ideology of liberalism. This economic phenomenon is based on a theory in economics which emphasises individual freedom from restraint and is usually based on free competition, the self-regulating market and the gold standard.[229] Put differently, liberalism in the twentieth (20th) century advanced a viewpoint or ideology associated with free political institutions and religious toleration as well as support for a strong role of government in regulating capitalism and constructing a welfare state.[230]

The interplay of neoliberalism with other factors is articulated by Bieler and Morton in their assertion that social forces as the main collective actors engendered by the social relations of production operate within and across these spheres of activity by bringing together a coherent conjunction between ideas which understood as intersubjective meanings as well as collective images of the world order, material capabilities, which

[226] *Ibid.*
[227] *Ibid.*
[228] Gumede (note 217 above).
[229] Liberalism definition available http://www.merriam-webster.com/dictionary/liberalism (accessed 15 September 2017).
[230] *Ibid.*

referring to accumulated resources and institutions which are amalgams of the previous two.[231]

It is with this framework that three successive stages of the world order have been traced within which the hegemonic relationship between ideas, institutions and material capabilities vary and during which different forms of state and patterns of production relations prevail which encompass the below time lines:[232]

(a) the liberal international economy (1789–1873);
(b) the era of rival imperialisms (1873–1945); and
(c) the post-Second World War era of *pax Americana*.

It is stated that in order to have a holistic approach to economic growth one would need to be imbued with production factors such as land with which one needs a place from where to do business; labour where one need workers; capital where one needs finance; finally, one needs entrepreneurship where one needs the idea to creatively grow the economy.

It is against this backdrop therefore, that neoliberalism is assessed as a hegemonic economic theory with far reaching implications for social-economic development in Africa and the Global South. Further, to advance possible alternative paradigms for economic development in Africa by first dealing with the baseline thinking of historical events. Secondly, to deal with neoliberalism and thirdly to assess its implications for social-economic development in Africa and the Global South. Finally, the fourth point is to provide an alternative paradigm for economic development in Africa especially in order to move away from the control of the MNCs.

Neoliberalism is a policy model of social studies and economics that transfers control of economic factors to the private sector from the public sector.[233]

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[231] Bieler, A and Morton, AD. 2003. Globalisation, the state and class struggle: a "critical economy" engagement with Open Marxism. *British Journal of Politics and International Relations* Vol. 5, No. 4, 476.
[232] *Ibid.*
[233] Neoliberalism, available on http://www.investopedia.com/terms/n/neoliberalism.asp (accessed 01 September 2017).

> "It takes from the basic principles of neoclassical economics which suggests that governments must limit subsidies and make reforms to tax law in order to expand the tax base, reduce deficit spending, limit protectionism and open markets up to trade. It also seeks to abolish fixed exchange rates, back deregulation, permit private property and privatize businesses run by the state. Of particular importance is the economic definition that views liberalism as the freeing of the economy by eliminating regulations and barriers that restrict what actors can do. Neoliberal policies aim for a laissez-faire approach to economic development. The definition in itself is evidence of the inherent bias of ideology".[234]

The concept of neoliberalism is not without its detractors and this is evidence of an evolving concept and its impact on the Global South jurisdiction in general and Africa in particular. The use of the term neoliberalism can be divided into two very clear and distinct periods marked by a structural break.[235]

In the 1970s:

> "Neoliberalism was used primarily to signify a category of economic ideas that arose in the 1930s to the 60s, associated with the Freiburg Ordoliberalism School, the Mont Pelerin Society, the work of Friedrich Hayek and the counter-Keynesian economics of the Chicago School. Some elements of this 'proto'-neoliberalism were influential in the making of the Wirtschaftswunder, or economic miracle of West Germany's post-war 'social market economy attributed to its Minister for Economics, Ludwig Erhard".[236]

By the early 1980s:

[234] Bieler (note 231 above).
[235] Venugopal R (2015) "Neolibiralism as Concept" *Economy and Society* Vol 44 Number 2 May. http://dx.doi.org/10.1080/03085147.2015.1013356 (accessed 15 September 2017) 167.
[236] *Ibid.*

> "Neoliberalism was used in a very different way, as it came to describe the wave of market deregulation, privatization and welfare-state withdrawal that swept the first, second and third worlds. It then went on to expand assertively as a concept to signify not just a policy model but a broader political, ideological, cultural and spatial phenomenon. By the early 1990s, neoliberalism had become elevated to an epochal phenomenon and was often used as loose shorthand for a prevailing dystopian zeitgeist. This has led to characterizations of neoliberalism as 'capitalism in its millennial manifestation'. The contention is made that 'we live in the age of neoliberalism' and the transition to this new age has been described by David Harvey as a revolutionary turning-point in the world's social and economic history".[237]

It is worth noting that a key characteristic of the economy is that all participants are intrinsically interconnected.[238] Although there are theoretically only four major role players in the economy, the market is the link that connects producers/sellers and buyers/consumers.[239] The market is, however, not an economic agent as such but is more of a mechanism through which agents interact.[240] The goods market is where products and services interact with potential buyers and the factor market links the production factors with those who need them. It is notable that not all economic interactions go through the market.[241]

This often complex and illusive concept called the market is an agent through which the major banks of the world pillage the Global South in their global monetary imposition. The market is essentially a Global North design for its own interest and it cannot in any shape and form be reformed to benefit the Global South. Both markets and states long preceded industrial capitalism and the latter was historically associated with the growth of integrated capital markets.[242] While Marxist writers have

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[237] *Id* 168.
[238] *Ibid.*
[239] Milanovic B (1998) *Income, Inequality, and Poverty during the Transition from Planned to Market Economy* (the World Bank, Washington D.C) 7.
[240] Venugopal (note 235 above).
[241] *Ibid.*
[242] Gill S and Law D (1989) Global hegemony and the structural power of capital. *International Studies Quarterly* Vol. 33, No. 4, 479.

typically stressed the emergence of wage labour markets as a defining feature of capitalism, we suggest that the emergence of elaborate capital markets is at least as important.[243] Markets historically have required some form of political organisation and protection normally provided by the state.[244] Thus, it is the functioning of the markets that informs the deprivation of the Global South as a mere consumer of goods and services emanating from its own natural resources.[245]

By the same token, governmental institutions require finance, which creates an added interest in both facilitation and regulation of the market, for example, obtaining taxes.[246] However, extensive regulations and restrictions often lower profits and breed forms of evasion (such as smuggling, black markets, and financial innovation).[247] The incentive for capital to evade controls is greater if national regulations vary, especially if technical obstacles in transport and communications are reduced, that is, as capital becomes more mobile.[248]

The growth in the Euro-markets since the 1960s is an important example of this and this is related below to the structural power of capital.[249] In the same way as capital and direct investment.[250] Under the recessionary conditions of the 1980s, this gave rise to competitive deregulation of different national capital markets.[251] Notably, competitive deregulation is a misnomer since it accompanied attempts to redefine market rules under new conditions.[252] Most importantly, however, is that the process progressively reduced the barriers to the international mobility of financial capital and thus creating a more integrated and global capital market.[253]

Open Marxism provides that by extension, the intention is to focus on the social class antagonism between capital and labour in order to affirm a commitment to

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[243] *Ibid.*
[244] Sinclair T J (2006) *Global Governance: Critical Concepts in Political Science* (Routledge, London and New York) 7.
[245] *Ibid.*
[246] *Ibid.*
[247] Gill (note 242 above) 479.
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.*
[251] *Ibid.*
[252] *Ibid.*
[253] *Ibid.*

emancipation within the social world by theoretically calling into question the separation of subject from object or struggle from structure and practically engage with social action within which aspects of class struggle obtain and unfold.[254]

Africa, and the South of the Sahara specifically, is the only region in the world where poverty and other socio-economic ills are not declining.[255] Over 70 per cent of the "bottom billion" are in Africa.[256] The population-weighted poverty gap is estimated to be above 40 per cent in sub-Saharan Africa relative to the $2 per day per capita international poverty line.[257] This is an indication of the wide chasm between the minimum level of income or consumption necessary for a sufficient living standard and what it would take, in monetary terms, to bring the most poor above the poverty line.[258]

Gumede goes further to state that:

> "Africa does not only have the highest illiteracy rate but also the highest child mortality rate and the lowest average life expectancy in the world. There is also poor or ill equipped physical infrastructure, such as schools, clinics, and roads, to name but a few examples. Compounding Africa's predicament is that its economies, with some exceptions, have been unable to grow and create jobs".[259]

The premise of Africa and Global South trouble stems from the acceptance of colonial mechanism such as the notion of international trade which is said to have a two-fold effect on the economy namely, exports and imports which is sustained by MNCs. Exports (such as gold, steel and fruit) boost the economy because foreigners pay for these exports and this causes an inflow of income (money) into the country. Hence, exports stimulate local production, employment and income.

[254] Bieler (note 231 above) 478.
[255] Gumede (note 217 above) 36.
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid.*
[259] *Ibid.*

Imports, on the other hand, represent a leakage or withdrawal of income because income generated locally has to be used to pay for the imports from other countries and this has a negative effect on the local production, employment and income. Spending on locally produced goods keeps money in the country. That is why South Africa encourages its citizens to purchase "Proudly South African" products.

There are also other factors that feed into the machine of capitalism. These factors range from inflow and outflow of capital investment funds to loans and so on. The inflow of foreign funds (foreign capital) promotes renewed economic growth because it enlarges the pool of funds that can be used for investment. This is critical for the creation of new production and employment opportunities in a country. The influx of foreign capital can be seen as an injection of money into the income stream. Conversely, the outflow of foreign funds represents a leakage of money. The inflow or outflow of foreign funds depends on business confidence and can be reversed quite easily. Outflows limit economic growth and employment opportunities.

No economy can flourish without some type of exchange, and for that a medium of exchange is needed. The truthfulness of the above statement notwithstanding, the terms of exchange have posed a challenge to that the Global South. Thus, despite Africa's re-imagination as a global integrated economy, it has never contextualised its economic principles.

Integration has been driven in large part by globalisation's defining technologies; computerisation, miniaturisation, digitisation, satellite communications, fibre optics, and the Internet.[260] The resultant integration, in turn, has led to many other differences between the Cold War and globalisation systems.[261] Unlike the Cold War system, globalisation has its own dominant culture which tends to be homogenising.[262] In previous eras, cultural homogenisation happened on a regional scale as was the case with the Romanisation of Western Europe and the Mediterranean world, the Islamisation of Central Asia, the Middle East, North Africa, and Spain by the Arabs, or

[260] Friedman (note 225 above).
[261] *Ibid.*
[262] *Ibid.*

the Russification of Eastern and Central Europe, and parts of Eurasia, under the Soviets.[263]

Whereas the defining measurement of the Cold War was weight, particularly the throw weight of missiles, the defining measurement of the globalisation system is the speed of commerce, travel, communication and innovation.[264] The Cold War was about Einstein's mass-energy equation, e=mc2.[265] Globalisation is about Moore's Law which states that the performance power of microprocessors will double every eighteen (18) months. Whereas the defining document of the Cold War system was "the treaty", the defining document of the globalisation system is "the deal".[266]

4.7 MNCs and Global Competition

In general, MNCs raise the level of productivity in their foreign affiliates to above that which is achieved on average by the "indigenous competitors", although not usually to the extent of matching productivity in the parent company.[267] United States of America affiliates in British industry in the 1950s and for Japanese-owned affiliated in British manufacturing in the 1980s.[268] The productivity differential over local firms was rather less in the case of Japanese affiliates (an average of 20 per cent in 1982 as opposed to 33 per cent achieved by US affiliates in 1954), and this is attributable to the fact that their investments were at a much earlier stage, with plant capacity and learning effects only gradually coming into operation.[269] Many studies in other countries have matched these findings, although they do not necessarily imply that inward direct investment concentrates in sectors in which the productivity differential is mostly in favour of foreign-owned affiliates (1985s).[270]

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[263] *Ibid.*
[264] Friedman T L (2000) *The Lexus and the Olive Tree: Understanding Globalisation* (Picador, New York) 10.
[265] *Ibid.*
[266] *Ibid.*
[267] Cantwell J "Innovation and Technology Competitiveness" in Buckley P J & Casson M (1992) *Multinational Enterprises in the World Economy: Essays in Honour of John Dunning* (Edward Elgar Publishing Company, England) 23.
[268] *Id* 24.
[269] *Ibid.*
[270] *Ibid.*

Dunning was the first to draw attention to the effects of the growth of international production on technological competitiveness.[271] His work has been treated as an investigation of the relationship between the competitiveness of MNCs and countries.[272] For this purpose, the degree of competitiveness is to be understood as being jointly determined by unit costs and product quality.[273] The degree of competitiveness is defined as the capacity to sustain growth.[274] Lower unit costs (on the supply side) and higher product quality (on the demand side) contribute to more favourable profit margins and a greater capacity for growth.[275]

Competitiveness is therefore, often proxy by productivity which is the total value of output relative to costs.[276] The publicised degree of competitiveness can also be measured through a comparison of the growth rates actually achieved which at the company level is reflected in trends in market shares (the competitive success or failure of the company in its industry), and the country level may be measured by the rate of expansion of local the production and shifts in export shares or trade performance (as a result of international competition between alternative production sites).[277]

Technological competitiveness refers to the capacity for sustain growth due to the technological capabilities of MNCs or countries.[278] It is distinguished by lower unit costs and higher product quality being attributable to superior conditions of production and individual organisational expertise, rather than to lower wage costs or better quality natural resource inputs.[279] Innovation is the process by which technology capabilities and hence competitiveness are changed over time.[280] This important component of so called modern society is mostly invisible in the Global South countries. This is because, like all other developments over centuries, innovation that

[271] *Id* 20.
[272] *Id* 21.
[273] *Ibid.*
[274] *Ibid.*
[275] *Ibid.*
[276] Cantwell (note 267 above) 21.
[277] *Ibid.*
[278] *Ibid.*
[279] *Ibid.*
[280] *Id* 22.

is aimed at the emancipation of the Africans inherently threatens the so called development of the Global North.

In the case of suppliers it seems that the effect of the establishment and growth of US-owned affiliates was most often in the form of widening rather than deepening the technological capacity of the local companies from which they purchased inputs.[281] It should be also be acknowledged that the growth of international trade as well as international production has influenced this shift towards more direct competition between the MNCs of the industrialised countries.[282]

As MNCs become more mature, the integration of their various affiliate operations tends to improve their firm-level of competitiveness, but no such general statements can be made about their effect on the competitiveness of countries.[283] Their impact varies across industries and this is most beneficial in sectors in which the country is a centre of excellence.[284] It may also be argued that the growth and reorganisation of international production are, like the extension of international trade, likely to increase the degree of specialisation of technological and productive activity in countries.[285] The pattern of technological competitiveness is thereby reshaped, even if there are attendant costs as in some industries sophisticated production moves elsewhere.[286]

Dunning concludes by stating that “even where there are detrimental consequences it may be unwise for countries to attempt simply to stand aside from the refashioning of the international division of labour. What they can do is to adopt policies which will help to promote domestic technological development and the acquisition of skills which would help to encourage MNCs to upgrade production in the areas of the greatest local potential.”[287] This assertion is correct because the independence and protection of rights by Africans can only happen when the ownership of resources and its management rest in the control and research by Africans.

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[281] *Id* 26.
[282] *Id* 35.
[283] *Id* 38.
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*
[287] *Ibid.*

4.8 The fallacy of FDIs by MNCs in aiding the Global South

MNEs and FDIs are commonly thought of as two sides of the same coin, although the relationship between them is by no means clear cut.[288] The simplest definition of the MNE is that of a firm adding value in more than one country but to fulfil this condition the MNE need not in fact be a Foreign Direct Investor.[289] A foreign affiliate can operate mainly through the renting of facilities and furthermore, even when assets are owned, the value of FDIs attributable to the investor could be zero, or negative in extreme cases.[290]

Gray makes the distinction between the three levels of variables:

> "Levels of variables (firm, industry and national) assumes even a greater importance in the decision to establish or enlarge a foreign affiliate.[291] FDI is the flow component corresponding to a change in the geographical distribution of the stock of real corporate assets, FDI takes place, therefore, in response to some identified but unexploited strategic profit opportunity. The model of relative production costs shows how MNEs can, by virtue of their power to obtain and to move certain firm-level resources internationally, change the pattern of international production and inevitably of international trade".[292]

Glegg states that:

> "FDIs are the financial value of a non-resident's interest in an affiliated enterprise defined as an enterprise over which effective control is exercised. It is well known that the value of assets controlled by an investing firm can be greatly underrepresented by its FDI. To complicate matters further the value of the level of control over total assets (and production)

[288] Clegg J (1992) "Explaining Foreign Direct Investment Flows" in Buckley P J & Casson M *Multinational Enterprises in the World Economy: Essays in Honour of John Dunning* (Edward Elgar Publishing Company, England) 54.
[289] *Id* 54.
[290] *Ibid.*
[291] Gray H P (1992) "The Interface between the Theories of International Trade and Production" (Edward Elgar Publishing Company, England) 53.
[292] *Ibid.*

> remains unaffected. As a consequence, internationally integrated financial management practices by MNCs frequently lead to volatile FDI flows (of either positive or negative sign) together with rapid changes in FDI positions".[293]

The underlying problem is that there is no ideal gauge of foreign activity to suit all circumstances and the measure chosen depends on the questions being asked or is dictated by the data available.[294] However, in its simplest form, MNC is merely a form or agent of FDIs.[295] Despite a long tradition of interest in the causes and effects of foreign investment within the capital-exporting countries, attention was mostly concentrated on the macro-economic aspects of the problem, rather than on the particular agents of capital export.[296]

Thus, it seems that analysis of the special features of investment by an MNCs arose in capital-receiving rather than capital exporting countries and it is possible that the first considered analysis of its significance for a host economy was made as late as the 1950s and in Australia.[297] For example, Australia had received large amounts of FDI long before the 1950s yet there is no evidence of Australian concern either at the near-monopolistic position of some British firms (such as Lever Brothers detergents monopoly) or at the implicit balance of payments problem, before the mid-1950s, therefore, it was the sudden expansion of General Motors-Holden (GM/H) as the only locally based company making, as distinct from assembling, cars, coupled with a meteoric rise of its transferred profits that stimulated economists in Australia to examine some of the fundamental issues involved.[298]

The preeminent feature of MNCs is their ability to move factors of production and intangible know-how relatively cheaply from one nation to another.[299] Once subsidiaries (international production) are established, the MNCs are able to

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[293] *Ibid.*
[294] *Id* 54.
[295] *Ibid.*
[296] Fieldhouse D K (1986) "The multinational: a critique of a concept" in in Teichova A, Levy-Leboyer M & Nussbaum H (1986) *Multinational Enterprises in Historical Perspective* (University Press, Cambridge, Great Britain) 11.
[297] *Ibid.*
[298] *Ibid.*
[299] Gray (note 291 above) 47.

internalise certain activities (thus enjoying any available economies of common governance).[300] An MNCs based in an industrialised Global North can be expected to supply inputs that are qualitatively superior and possibly cheaper than those available locally in the host economy.[301] This ability holds, but more narrowly, among industrialised countries where most of the transferred resources will are firm-or product-specific rather than generally better or cheaper than the equivalent asserts of their competitors.[302]

In this process, the industry-specific tendency towards concentration of the market eventually impacts on the structure at the international level and domestic concentration drives firms to integrate abroad either horizontally according to the nature of existing distortions.[303] These developments and the subsequent feedback of changes in the structure to further internalisation decisions, have been addressed within the literature which is notably in the oligopolistic intra-industry FDI.[304]

In this literature, there are three international dimensions that seek to explain FDI as an oligopolistic reaction to rivalry wherein concentration is a proxy for interaction.[305] The first of this conflicting interaction between indigenous firms is in the home market.[306] Research has found indications that this is soluble by some form of collusion at the very highest levels of concentration, but not at the slightly lower levels that appear to generate most FDI.[307] The second dimension is the bilateral international conflict between indigenous firms, for example, via trade. The third and least researched statistically constitute the possibility that firms from different home countries face conflict in third markets.[308]

The essential postulate originates in finance theory that risk-averse individual investors place a premium on the stability of earnings and therefore, have an incentive

[300] *Ibid.*
[301] *Ibid.*
[302] *Ibid.*
[303] Clegg (note 288) 58.
[304] *Ibid.*
[305] *Ibid.*
[306] *Ibid.*
[307] *Ibid*.
[308] *Ibid*.

to reduce risk by selecting an efficiently diversified portfolio of international assets.[309] Although such gains from international diversification are necessary for FDI they are not sufficient as there must also be imperfections in international capital markets such as naturally arising fixed costs in transactions or regulations which prevent individual investors from directly diversifying their personal portfolios.[310]

On evidence in the literature to date the most significant determination of FDI flows are those that underlie the generation of entrepreneurial activity and the hallmarks of which technological change and the growth of markets.[311] FDI may then be viewed as a natural agency through which comparative advantage is realised in a dynamic world.[312]

4.9 The Effect of Politics and Political Economy on the Enforcement of Human Rights against MNCs

MNCs are powerful organisations not only by virtue of their integrated management, control over large resources but also because of and their influence on the market, their role not only as employer, their role in the transfer of technology, and their role as agents of development.[313] They control and distribute large resources and the power of these MNCs is both economic and political.[314] MNCs are political in a narrower sense as well since they depend for their successful operation on legislation and policies which allow the movement of capital, goods, services and personnel across national borders.[315] To achieve their goals, they will act as pressure and interest groups both in national and international forums.[316]

In the field of international politics the MNC has designated a new transnational actor or organisation since the vast majority are national organisations which operate across

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[309] *Id* 68.
[310] *Ibid*.
[311] *Id* 72.
[312] *Ibid.*
[313] Hernes H (1977) *The Multinational Corporation: A Guide to Information Sources* (Gale Research Company, Michian) xi; These firms are large commercial organisations which operate –productive, extract, or provide services—in several countries, although their ownership management, and control are usually centralised in the one country which confers upon the parent firm or headquarters its nationality.
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*

national borders.[317] However, there are two attributes which political scientist ascribe to states control over a given territory and its population and an independent government.[318] These elements range from internal control to external independence and have legal and political implications which are important both factually and fictionally.[319] It is becoming increasingly clear, however, that governments share their political power with large interest organisation and groups, especially industrial, commercial and financial firms.[320]

The phenomenon of legitimate control over the national economy is usually viewed as 'environmentally constrained' by theorists and practitioners of MNCs and is subsumed in their books under the general heading of 'nationalism'.[321] The major consequences of these political 'environmental constrained' is their interference with the MNCs efficiency, which is seen as the essence of its service to national and international society.[322]

Behrman asserts that concern over the MNCs would not be so great if national governments had not been asked to assume expanding responsibilities of national security, personal protection, judicial system, education and maintenance of competition.[323] As it is the responsibilities of governments have ballooned greatly and are continuing to expand.[324] This new nationalism is not a return to simple mercantilism but an increasing imposition on governments of the responsibility for economic growth and social welfare of citizens.[325]

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[317] *Id* xi.
[318] *Id* xvi.
[319] *Ibid.*
[320] Allard G and Martinez C A (2008) "The influence of Government Policy and NGOs on Capturing Private Investment" *OECD Global Forum on International Investment, OECD Investment Division* 2, available at www.oecd.org/investment/gfi-7 (accessed 18 June 2018). This paper was submitted in response to a call for papers conducted by the organisers of the OECD Global Forum on International Investment. It is distributed as part of the official conference documentation and serves as background material for the relevant session in the programme. The views expressed in this paper do not necessarily represent those of the OECD or its member governments.
[321] Hernes (note 313 above).
[322] *Ibid.*
[323] Berhrman J N (1974) *International Control of Investments* in Hernes H (1977) *The Multinational Corporation: A Guide to Information Sources* (Gale Research Company, Michian) xvii.
[324] *Ibid.*
[325] Hernes (note 313) xvii.

The general interest in and concern with the impact of the MNCs on the nation state arose during the debate in the 1960s on the balance-of-payments effects of foreign investments and the various solutions suggested to achieve a more favourable balance.[326] Some suggested restrictions on the export of capital whilst some proposed new rules for the repatriation of capital and labour unions began to voice concern with "run-away" industry.[327] However, the debate quickly broadened into more general discussions concerning the loss of national sovereignty and assessments of conflicts of interest between MNCs and national governments.[328]

The Marxist school analyses the MNC within the framework of aggressive capitalist expansion and describes it as the new agent of imperialist exploitation.[329] Marxists stress the "need by monopolistic type firms to control raw material sources and markets in order to protect their dominant position and to secure their investments".[330] The large MNCs, as opposed to the State or the market, are the major institutions of the international capitalist system and it is the competition among them, not among nation states, which determines the course of that system.[331] The relationship among MNCs within and among developed states is one of competition while the relations with the less development are marked by neo-imperialist exploitation from which they cannot extricate themselves.[332] The policy recommendations, therefore, aim at complete rejection of foreign investment and at social revolution in the case of less development and the destruction of the capitalist system through revolution in the developed countries.[333]

The conceptualisation of the triangle:[334]

> "The MNC, the state, and the international system is central to the new models of international politics and theorists differ about the assignment of relative power and influence to each. Until recently, power in international

[326] *Ibid.*
[327] *Ibid.*
[328] *Ibid.*
[329] *Id* xxiii.
[330] Hernes (note 313 above) i; see also Magdoff (1970) *The Age of Imperialism*, 19.
[331] *Ibid.* see also Barrat-Brown M (1974) *The Economics of Imperialism* (Penguin Books) 225.
[332] *Ibid.*
[333] Hernes (note 313 above) xxiii.
[334] *Ibid.*

> politics has been associated with military capability and force and in that kind of model, the United States, Russia Union, and China remain the supreme actors. However, economic power has become a strong conceptual and empirical rival - in this respect, the United States, Europe, and Japan dominate. The foreign policy agenda of the major powers has thus been influenced by this major shift".[335]

The original power balance has thus been shifted to include states which control major resources, such as the OPEC (Organisation of Petroleum Exporting Countries) and those that can affect monetary stability, such as Japan.[336] As the 1974 United Nations report points out, there exist no international regulations to deal with these two new issues and international institutions comparable to the GATT or UNCTAD.[337] So, there is the possibility that countries will attempt to control each other's resources through their own MNCs and seek to export their own inflation.[338]

4.10 International Trade and its Effect on Human Rights

Carr states that "free trade among nations is largely seen as the key to economic growth, peace and better standards of living, leading to a happier state of human existence at a global level".[339] The Global South in general and Africa in particular have yet to see the promised-land filled with at least the bare minimum of food, let alone peace and happiness. Thus, the so called international free trade has brought little if not nothing to Africa. The General Agreement on Tariffs and Trade (GATT) 1974, love out of the cornucopia of horrors that the world witnessed in the 1930s and 1940s, enshrined the philosophy of free trade using the principles of non-

[335] Hernes (note 313 above); see also Keohane and Nye "World Politics and the International Economic System, "in Bergsten, 1973.
[336] The Organization of the Petroleum Exporting Countries (OPEC) is a permanent, intergovernmental Organization, created at the Baghdad Conference on September 10–14, 1960, by Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. The five Founding Members were later joined by ten other Members: Qatar (1961); Indonesia (1962) – suspended its membership in January 2009, reactivated it in January 2016, but decided to suspend it again in November 2016; Libya (1962); United Arab Emirates (1967); Algeria (1969); Nigeria (1971); Ecuador (1973) – suspended its membership in December 1992, but reactivated it in October 2007; Angola (2007); Gabon (1975) - terminated its membership in January 1995 but rejoined in July 2016; and Equatorial Guinea (2017). OPEC had its headquarters in Geneva, Switzerland, in the first five years of its existence. This was moved to Vienna, Austria, on September 1, 1965, available at http://www.opec.org/opec_web/en/about_us/24.htm (accessed 04 June 2018).
[337] *Ibid.*
[338] *Ibid.*
[339] Carr I (2007) *International Trade Law* (Routledge-Cavendish Publishing, England) 1xxxvii.

discrimination (also known as Most Favoured Nation obligation) and the elimination of quantitative restrictions.[340]

Carr point out the above reality eloquently as evidenced by the below paragraph:

> "This philosophy of free trade continues to this day in the form of GATT 1994. The gradual growth in international trade since the 1950s is largely due to the influence of GATT on the world stage and it seems that this growth is set to continue. Recently, developing countries like China and India have emerged as key players in the provision of manufactured goods and services on the international scene and are setting a trend for other developing nations to follow. The philosophy of free trade, however, has not gone unchallenged especially given the dire state of inequality prevalent in the Global South".[341]

When the liberal international trade system was being reconstructed following World War Two, the participants concentrated on dismantling wartime restrictions on cross-border trade and reducing border barriers that had grown since the 1920s.[342] Multiple "rounds" of multilateral trade negotiations under the GATT focused on the elimination of quantitative restrictions and the reduction in tariffs on the trade in industrial goods, with the universally politically sensitive agricultural sector largely excluded from this liberalisation process.[343]

Over time, the world has become more aware of the global effects of environmental degradation and the exploitation of the economically disadvantaged and the young by commercial enterprises.[344] Social and ethical issues in the context of trade have taken on a new meaning and non-governmental organisations have successfully harnessed

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[340] *Ibid.*
[341] *Ibid;* see also Byanyima W (2015) "The Rising Inequality in the Global South: Practice and Solutions" Symposium will took place on Monday, January 19th 2015 at St. Antony's College, University of Oxford, available at https://www.oxfam.org/en/pressroom/pressreleases/2015-01-13/rising-inequality-global-south-practice-and-solutions (accessed 04 June 2018).
[342] Noland M (2010) "The Twilight of Globalization" in Gaston N and Khalid A M *Globalization and Economic Integration: Winners and Losers in the Asia-Pacific* (Edward Elgar Publishing, United Kingdom) 29.
[343] *Ibid.*
[344] Carr (note 339 above) 1xxxvii.

citizens to question the role of the World Trade Organisation (WTO) and the philosophy of tree trade as enshrined in GATT 1994 so much so that there is widespread agreement that trade needs to acquire a human face.[345] Carr further state that the above is underpinned by the fact that:

> "Regulatory framework that promotes free trade is insufficient to promote growth in trade. Equally, the legal framework, which affects the rights and obligations of the parties entering into business transactions at the international level, needs to be clear and certain. After all, the parties would wish to know the nature and extent of the obligations they undertake and the remedies available to them should they breach the contractual terms".[346]

Given the plurality of legal systems and the variations in liability schemes, harmonisation through international conventions is widely seen as the best option of imparting certainty to the legal questions that arise in the context of international commercial transactions.[347] International organisations such as the UNCITRAL and UNCTAD took on the task of addressing various legal aspects affecting an international commercial contract, such as carriage of goods, agency, factoring and standby letters of credit using international conventions as the preferred method for achieving the desired harmonisation.[348]

International trade is represented by GATT and some selected agreements and decisions in Tokyo Round from 1979.[349] These legally binding instruments are in fact a clarification, improvements and effectuation of the GATT rules.[350] But since GATT itself for political reasons nowadays cannot be formally amended, states use the periodically held multilateral tariff negotiations (so called rounds) to develop such

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[345] *Ibid.*
[346] *Ibid.*
[347] *Id* 1xxxviii.
[348] *Ibid.*
[349] Kunig P & Lau N & Meng W eds (1989) *International Economic Law: Basic Documents* (Walter de Gruyter, Berlin, New York) xii.
[350] *Ibid.*

treaties as complements to GATT.[351] The Tokyo Round so far has yielded the most important set of such treaties and binding decisions.[352]

Starting with Adam Smith's exposition of absolute advantage and continuing effectively through all the theory of international trade since that time, trade patterns have been deemed to be determined by national characteristics.[353] The key cause of all international activity is differences in money costs of production between the two countries involved.[354] It makes sense, therefore, to begin by defining the relative production costs of several goods produced with multiple, internationally-immobile factors in two countries.[355] The rate exchange between the two national currencies and the absolute price-levels of factors in each country are taken as given exogenously.[356] This feature allows for net balances to exist on the capital account and does not constrain the model to produce sets of relative costs that would generate balanced trade under specified conditions of aggregate demand and opportunity costs.[357]

Meyer posits that "as the globe becomes more interdependent, as the low politics of transnational issues like trade and investment displace the high politics of war and national security, as non-state actors such as MNCs eclipse the income and power of the nation-state, MNCs move to centre stage in the international arena".[358] However, modern international trade theory which includes even the so-called new international economics operates in a vacuum with respect to the existence and role of MNCs in determining the pattern of trade.[359] The model is based on comparative money costs in different countries and serves to identify those forces which lead MNCs to export to or produce in one country or another and which lead 'arm's length' firms to export and import different goods.[360]

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[351] *Ibid.*
[352] *Ibid.*
[353] Gray (note 291 above) 41.
[354] *Ibid.*
[355] *Ibid.*
[356] *Ibid.*
[357] *Ibid.*
[358] Meyer W H (1996) "Human Rights and MNCs: Theory Versus Quantitative Analysis" *Human Rights Quarterly* Vol. 18, No. 2, 373.
[359] Gray (note 291 above) 42.
[360] *Ibid*

MNCs affect the pattern of trade only through the historic transfer of resources among countries.[361] And thus, rank the goods by the values of a given rate of exchange.[362] Those goods with positive values can be exported by a foreign country.[363] Because transport costs and tariffs are not necessarily equal in both directions, the rankings of goods in the two countries are not necessarily symmetrical.[364] Deva asserts that the involvement of the WTO as the basis of international trade is critical in evolving an international regime for the accountability of MNCs.[365] This is because violation of rights by MNCs is related, directly or indirectly to their carrying of "trade".[366]

The IMF creates a stable climate for international trade by harmonising its members' monetary policies and maintaining exchange stability.[367] It is able to provide temporary financial assistance to countries encountering difficulties with their balance of payments.[368] The World Bank, on the other hand, serves to improve the capacity of countries to trade by lending money to war-ravaged and impoverished countries for reconstruction and development projects.[369]

However, most African governments are finding themselves in a situation of "*fait accompli"* when it comes to making certain policies and decisions.[370] International agencies inclusive of the World Bank, IMF, UN and WTO, take decisions which are binding on African countries.[371] This could be looked at as eroding the sovereignty and power of the State.[372] Ibrahim asserts that "this is not only the case in Africa but that the poorer the country, the more chance of power erosion in the state. This arguably, would be minimized if the voice of African's States was increased and strengthened in

[361] *Ibid.*
[362] *Ibid.*
[363] *Ibid.*
[364] *Ibid.*
[365] Deva S (2003) "Human Rights Violations by Multinational Corporations and International Law: Where From Here?" *Connecticut Journal of International Law* Vol. 19, No.1, 22.
[366] *Ibid.*
[367] Gray (note 291 above) 42.
[368] *Ibid.*
[369] *Ibid.*
[370] Ibrahim A A (2013) "The Impact of Globalization on Africa" *International Journal of Humanities and Social Science* Vol. 3, No. 15, 89.
[371] *Ibid.*
[372] *Ibid.*

the world bodies. Stronger African regional bodies would also help in this respect provided these bodies are represented in the world bodies at the same time".[373]

There is an ongoing democratisation struggle in Africa.[374] Some African countries began the process of democratising their governments, political systems and societies sometime back.[375] However, the international partners they are working with in this globalized world are hardly democratic.[376] While the democratisation process requires that the people of the country in question get involved in the taking of decisions and policies that concern them, some of the big decisions affecting Africa today are more or less imposed by the globalisation players such as the World Bank, IMF, and the WTO, this has been the case, for example, with the liberalisation and privatisation policies in Africa.[377] It is not possible to be seen as democratic by the people you govern when they do not see or get involved in the process of making the decision and policies used to govern them.[378] This is a big dilemma for African leaders.[379]

4.11 The Impact of Corruption on Human Rights

Corruption is a pervasive problem in the Global South and specifically in Africa, not only hindering progress towards 'good governance' but also undermining the protection of rights.[380] The links between corruption and rights are manifold.[381] All the potential gains of rights are squandered by corruption as it stifles entrepreneurship, constrains economic development and ultimately becomes the yeast from which political dissent is brewed.[382]

Taking the commitment to 'good governance' of its founding treaty to a more concrete level, the AU Assembly at its 2003 meeting adopted the AU Convention of Preventing

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[373] *Ibid.*
[374] *Ibid.*
[375] *Ibid.*
[376] *Ibid.*
[377] Deva (note 365 above) 23; Liberalisation of international trade under the WTO regime has played its part in the creation of a power vacuum as far as regulation of MNCs is concerned; states, the potential regulators of MNCs, are now less potent in regulating MNCs.
[378] Ibrahim (note 370 above) 91.
[379] *Ibid.*
[380] Viljoen F (2007) *International Human Rights Law in Africa* (Oxford University Press, New York) 292.
[381] *Ibid.*
[382] *Id* 293.

and Combating Corruption (AU Anti-Corruption Convention).[383] Although the AU Anti-Corruption Convention is not framed in the language of human rights instruments, it recognises the link between corruption and rights when it stipulates that one of its aims is to "promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights".[384]

Corruption has always plagued the world, at least six billion (6bn) people around the world live in corrupt countries, according to Transparency International's (TI) is derived from the latest perceptions of corruption in the public sector.[385] Of particular concern in this study is the MNCs' corruption that violates human rights indiscriminately.[386] In South Africa, for instance, there is the Arms Gate that saw Global North MNCs allegedly paying politicians to win tenders.[387] In recent times a well-known MNC KPMG, has been embroiled in the channelling out of corrupt money from politicians to companies.[388] The results of all of this corrupt activities is the utter poverty and over 26.7 per cent unemployment rate that comprises largely of youth and an economic decline that deepens the wounds caused by colonial apartheid.[389]

Corruption in the main forms the biggest threat to the realisation of human rights not so because of corruption through organs of states but because of MNCs corrupt activities of government to circumvent accountability. The Global South depends exclusively of MNCs from the Global North and it is through the activities of the government and the MNCs that the language of human rights become obsolete because economic growth takes precedent. The following illustrates this point:

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[383] African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003,available at: http://www.refworld.org/docid/493fe36a2.html (accessed 12 June 2018).
[384] *Ibid.*
[385] "Corruption is still rife around the world" available at https://www.economist.com/graphic-detail/2018/02/22/corruption-is-still-rife-around-the-world (accessed 11 June 2018).
[386] Momoh Z (2016) "Multinational Corporation (MNCs) and Corruption in Africa" *Journal of Management and Social Sciences* Vol. 5, No. 2, 88. Global Network for Peace and Anti-corruption Initiative (GNPAI) Nigeria, 91.
[387] *Ibid.*
[388] Corruption Watch: KPMG, MCKINSEY MUST BE INVESTIGATED. CW weighs in on KPMG AND McKinsey's alleged involvement in Gupta-related business dealings, available at http://www.corruptionwatch.org.za/cw-kpmg-mckinsey-must-investigated/ (accessed 11 June 2018).
[389] South Africa Jobless Rate Steady at 26.7 in Q1, available at https://tradingeconomics.com/south-africa/unemployment-rate (accessed 11 June 2018).

International corruption is not peculiar to activities of MNCs in Africa alone as MNCs have been involved in various corrupt scandals across the globe. For instance, during the 2003 Iraq war, the document recovered showed that high ranking UN, French, Chinese, Russian officials (and America oil MNCs) illegally profited from the UN's $64 billion oil-for-food program that was supposed to ease civilians plight caused by economic sanctions on Iraq in the 1990s.

Siemens AG, an engineering MNCs based in Germany, admitted that it used an estimated $1.3 billion Euros illegally in elaborated bribe-and-kickback system to win foreign contracts across the globe. For instance, between 2002 and 2006, it was reported that Siemens AG slush funds, off-book accounting and suitcases full of cash were used to bribe officials in countries such as Argentina, Bangladesh, China, Iraq, Israel, Libya, Mexico, Nigeria, Russia, Venezuela and Vietnam, among others. Subsequently, in December 2008, Siemens AG admitted to have paid to US and European authorities, an estimated $1.6 billion in fines, an amount as unprecedented as the number and scope of global investigation into Siemens AG wrong doing (Cross Road Magazine, 2012: 12). Moreover, the case prosecuted against the French oil MNC, Elf, by Eva Joly according to Otusanya, Lauwo and Adeyeye (2012) indicates that MNCs had engaged in corrupt practices in developing countries.[390]

4.12 Conclusion

At the outset of this chapter, an argument was made with respect to the indispensability of sustainable growing economy and the realisation of human rights in general. Moreover, it was asserted that the economic structure as controlled by MNCs predominantly based in the Global North including the regulatory space from the UN level has had weak impact on utilising human rights language to hold MNCs accountable. The dichotomy within which human rights language exist is the incorrect thinking as demonstrated by this chapter that it is possible for the Global South whom

[390] Momoh (note 386 above) 88.

some's GDP are surpassed by MNCs and then in-turn have the capacity or the economic-political will to hold MNCs accountable for their human rights.

Therefore, the integrated systems are amongst the most important structures of the modern world that informs the relational power, economy and the law. From globalisation to corruption, this concepts have informed and relying on historical continuum of colonial-imperial-capitalist, they dictate the relationship between the Global North and the Global South.[391] This chapter has sort to demonstrate how the integrated systems are an obstacle to the enforcement of human rights standard against MNCs and consequently, to show how all this concepts in relation to the Global South has resulted with weak non-legal and legal mechanism.

This chapter has demonstrated that MNCs through their sheer power and also the state power (political, economic and military) from which this MNCs come from has prioritised global control of resources and that enforcement of human rights is the list of their priorities either through "necessities" and/or by design. This is demonstrated by the exploitative conduct of the MNCs primarily in the Global South which by all accounts cannot be construed as "mistake" but as a colonial-capitalistic economic ideology championed by the Global North. For instance the structural globalisation that promotes capitalism encourages exploitation of peoples in the Global South which was demonstrated to mirror that during colonial times.

[391] Austin G (2010) "African Economic Development and Colonial Legacies" *International Development Policy* I *Revue internationale de politique de development*, Vol 1, 35; Colonial rule facilitated the import of capital into this capital-scarce continent. But only in mining, and to some extent in "settler" and "plantation" agriculture, did this happen on a large scale. The survey by Herbert S. Frankel (1938) of external capital investment in white-ruled Africa remains the only comprehensive study for the colonial period. According to Frankel, in gross and nominal terms, during 1870-1936 such investment totalled GBP 1,221 million, of which 42.8% was in South Africa. This meant GBP 55.8 per head in South Africa, but only GBP 3.3 in the French colonies and GBP 4.8 in British West Africa. Public investment constituted 44.7% of the grand total and almost 46% of the non-South Africa total (Frankel 1938, 158-60, 169-70). Governments, and to some extent mining and plantation companies, invested in the transport infrastructure required for the development of, mainly, the export-import trade. In Nigeria and Ghana Africans also took a leading role in building motor roads and pioneering lorry services (Heap 1990). In institutional terms the colonial period saw the eventual abolition of human pawning, with its replacement by promissory notes and, in those areas of West Africa where it was possible, by loans on the security of cocoa farms. It also saw the introduction of modern banking, but the banks were much more willing to accept Africans' savings than to offer them loans, partly because of the colonial governments' non-introduction of compulsory land titling (Cowen and Shenton 1991).

Corporate governance, international trade, foreign direct investment, and corruption have one factor in-common which is maximisation of profit for MNCs. The intricacies of this world order is interdependent, interrelated and capitalistic in ideology. The international trade regime as propagated by the WTO, GATTs and IMF have resulted with untold economic inequality in the Global South which hampers the ability of state to enforce human rights standards against the MNCs.

FDIs have been flowing in the Global South ever since colonialism and during this era it was in relation to building-up the settler industries to be self-sufficient and to benefit the Global North. Then it was the post-colonial during the 1960s which saw the "political" independence without the economic independence which meant that the newly formed Global South is still dependent on the Global North MNCs and this how the integrated systems falls short of engendering the enforcement of human rights against MNCs.

Therefore, whether it be serious issue of corruption, or lack of corporate governance that needs to be remedied, the integrated systems above has demonstrated that there a common thread in all this issues that is still maintaining the dependency of the Global South on the Global North and that is colonialism. Hansen is then correct in the assertion that MNCs hold the customary duties of natural persons under international law, including the duty not to commit slavery amongst other things.[392]

Finally, Mills aptly puts into perspective the ordering of world structure that relates directly to why the language of human rights is inapt to bring about significant inroads in holding MNCs accountable by naming it is the global white supremacy.[393] He posits that the language of human rights is often devoid of race discussion and "the problem in part seems to involve a kind of exclusionary theoretical dynamic, in that the presumptions of the world of mainstream theory offer no ready point of ingress, no conceptual entrée, for the issues of race, culture and identity that typically preoccupy much of black and Third World Theory. The issues of Third World poverty and

[392] Hansen R F (2010) "The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap" *Global Jurist* Vol 10 No I (Advance) Article 9. 1.
[393] Mills C W (1998) *Blackness Visible: Essays on Philosophy and Race* (Cornell University Press, New York) 97.

economic underdevelopment can be handled, if the will exist, within the framework of discussions of international justice, through an expansion of moral concern beyond the boundaries of First World nation-states."[394]

Corruption by MNCs as highlighted above is a general rule rather than the exception especially in the Global South. Corruption thrives in weak legal system, political instability, and poor countries. All this calamities plague the Global South and are directly linked to the colonial economic structure and the human rights language that has often had moderate gains in holding MNCs accountable.

[394] *Ibid.*

CHAPTER FIVE

THE IMPACT OF MULTINATIONAL CORPORATIONS' HUMAN RIGHTS ABUSES ON SOUTH AFRICA, NIGERIA, AND THE DEMOCRATIC REPUBLIC OF CONGO (DRC)

5.1 Introduction

The history of the Global South and in particular Africa as a conquered continent provides a canvass upon which human rights language can be tested as a matter of past-present-future analysis with regard to holding MNCs accountable. There are three states located in the Global South, namely; South Africa, Nigeria and the Democratic Republic of Congo (DRC) that will be critically analysed. The said countries have been selected because of their economic performance and human rights enforcement capacity against MNCs in the African continent. For example, South Africa is dubbed the gateway to Africa with immense economic leverage although at times it exchanges the number one spot with Nigeria which is the most populous nation in Africa with real serious issues pertaining to oil MNCs that have troubled many indigent Nigerians.[1] The DRC has, however, remained amongst the bottom poorest despite it being the richest in mineral resources that fuel 70 per cent of the world's technology with respect to the coltan mineral.[2]

South Africa has seen relative political and economic stability due to its perceived strong constitutional dispensation, notwithstanding the fact that slave labour is still prevalent.[3] Nigeria on the one hand despite its Boko Haram problems has not seen fundamental shift in achieving legal certainty on enforcing human rights against MNCs. Finally, the Democratic Republic of Congo has never seen any relative peace simply because of the importance of the DRC and its minerals to the Global North. The three states represent the storyline of human rights language in the African continent with respect to the power of MNCs.

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[1] Business Report (2019) "SA's Role as an Economic Gateway to Africa" *Business Report* 4 February 2019, 8:30pm.

[2] Lalji N (2007) "The Resource Curse Revised Conflict and Coltan in the Congo" *Harvard International Review* Vol. 29, No. 03, 35; see also Almeida, London "They Drink It in the Congo review – on the Rocky Road of Good Intentions" available at https://www.theguardian.com/stage/2016/aug/28/they-drink-it-in-the-congo-almeida-review (accessed 12 August 2019).

[3] Anghie A (2001-2002) "Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations" *Journal of International Law and Politics* Vol. 34, 593.

The rapid evolution in the structure of MNCs is reflected in their operations in the developing world where Foreign Direct Investment (FDI) have grown rapidly.[4] In developing countries, such as South Africa (colonised by the Dutch and the British), Nigeria (colonised by the British) and the Democratic Republic of Congo (colonised by the Belgians), MNCs have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services.[5] Another key development is the emergence of MNCs based in developing countries as major international investors and by far the largest source of their economic growth.[6] Unfortunately, what unites the MNCs in these different jurisdictions is their obligation to respond to market forces in some fashion.[7]

The difference in colonisation is properly put into perspective by Austin when he states that:

> "Contrasts between the two largest empires in Africa are traditionally made with reference to greater British reliance on African chiefs as intermediaries ("indirect rule") and the French doctrine of assimilating a small minority of Africans into French culture and citizenship. On the whole it is arguable that, in economic terms, the similarities were much greater than the differences, except when the latter arose from the composition of their respective African empires. French rule, like British, relied on African intermediaries, including chiefs, even though France was much more insistent on abolishing African monarchies (as in Dahomey, in contrast to the British treatment of the structures and dynasties of the States of Buganda, Botswana, Lesotho and, after an abortive attempt at abolition, Ashanti). In West Africa the French made much greater use of forced labour, but that was primarily because the French territories were, from the start, relatively lacking in cash-earning and therefore wage-paying

[4] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. Available at http://dx.doi.org/10.1787/9789264115415-en (accessed 19 May 2016) 3.
[5] *Ibid.*
[6] *Ibid.*
[7] Hansen R F (2010) "The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap" *Global Jurist* Vol. 10, No. 1 (Advance Donoho D (2006) "Human Rights Enforcement in the Twenty-First Century" *Georgia Journal of International and Comparative Law* Vol. 35, No 1, 3-4.

> potential. That specific policy, *Corvée* and its use to benefit white planters rather than African farmers, made a difference to the colonial legacy in Ghana and Côte d'Ivoire. It meant that African cocoa farming took off much more quickly and dramatically in the former, so that Ghana was much wealthier at independence, when Côte d'Ivoire was in the process of catching up (and overtaking) after a late start, which it proceeded to do by the 1980s".[8]

The nature, scope and speed of economic changes have presented new strategic challenges for enterprises and their stakeholders.[9] MNCs have the opportunity to implement best practice policies for sustainable development that seek to ensure coherence between economic, environmental and social objectives.[10] The ability of MNCs to promote sustainable development is greatly enhanced when trade and investment are conducted in open, competitive and appropriately regulated markets.[11] Moreover, the above is seldom realised because the conduct of MNCs in the Global South is often clouded by colonial capitalist structures and impunity with regard to human rights violation as a result of weak legal capacity and lack of economic stamina. To this end, Donoho notes that:

> "The international human rights system enters the twenty-first century facing a profound anomaly. Floods of refugees and simmering ethnic conflicts continually challenge the international community's capacity to respond, and grotesque forms of physical abuse, such as torture and summary execution, remain common place. It seems undeniable that the elaborate international human rights edifice, now often rhetorically central in international relations, has made and can continue to make some differences. Yet, it is equally undeniable that the system has yet to fulfil its promises or significantly reduce violations of human rights worldwide".[12]

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[8] Austin G (2010) "African Economic Development and Colonial Legacies" *International Development Policy* I *Revue internationale de politique de development*, Vol. 1, 18.
[9] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. Available at http://dx.doi.org/10.1787/9789264115415-en (accessed 19 May 2016) 4.
[10] *Ibid.*
[11] *Ibid.*
[12] Donoho D (2006) "Human Rights Enforcement in the Twenty-First Century" *Georgia Journal of International and Comparative Law* Vol. 35, No. 1. 3-4.

The behaviour of MNCs in their home state fundamentally differs from their host State in operative methods labour rights and financial management.[13] In the Global South, rights compliance is an option depending on the MNCs public relations strategy. It is argued that the ideals contained in the OECD Guidelines, the Draft Norms and Ruggie's Guiding Principles and many other business and rights legal framework derive from legalised structural and institutional colonial enterprise at the highest level that facilitates Global North continual exploitation of the Global South.

It is common parlance that the ethos of MNCs is capitalism which has in its core as per Marx the exploitation of people and the alienation of people from the natural order of life. Therefore, an argument is made in chapter 6 (the recommendation) elucidating a normative, legal, philosophical and principles which is Botho (Ubuntu)[14] that if informed MNCs' conduct would have prevented the atrocities of human rights violations committed by MNCs especially in the Global South. Botho is the root of African philosophy which finds expression as *Motho ke Motho ka Batho* and is described as "to be a human be-ing is to affirm one's humanity by recognising the humanity of others and, on that basis, establish humane relations with them.[15] This maxim or aphorism is virtue-principle-system which provides a systematic cognitive process that puts the good as an outcome of everyone affected by their conduct, operations, policies or structures of individuals, communities and organisations such as MNCs.[16]

This is so because of the racial capitalism that still prevails in the Global South to the benefit of the Global North. This chapter will show that past-present-future conduct of MNCs especially in the Global South because of MNCs lack of Botho, have only focused on profit maximisation at the costs of human life through exploitation, for example when one has regard to Leopold II's Belgium Congo and the cutting of hands and in some instances the killing of Africans when they did not meet their quotas of productivity.

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[13] Hansen (note 7 above) 77.
[14] Ramose M B (2002) *The Philosophy of Ubuntu and Ubuntu as Philosophy* in Coetzee &Roux A P J *Philosophy From Africa: a Text with Readings* (Oxford University Press, South Africa) 230;
[15] *Id* 231.
[16] *Ibid.*

The superimposition of Botho as a yardstick of MNCs conduct in this chapter serves to discharge the third objective of this thesis which employs African episteme as a basis upon which enforcement of human rights standard can be achieved against MNCs. Though unfair yardstick to utilise in this chapter, because of the diametrical opposition of Botho and capitalism, the chapter, nonetheless demonstrate that the conduct of MNCs have been anti-Botho. Therefore, this chapter has demonstrated that the operations and conduct of MNCs in South Africa, Nigeria and DRC have not only negated human rights but they have conducted themselves in the most inhuman fashion as demonstrated in the above paragraph.

Finally, with Botho principle in mind, given the ambivalence of human rights language in the Global South to hold MNCs accountable, this chapter will analyse the impact of human rights language on the accountability of MNCs in the Global South and in particular, the African continent beginning with South Africa, Nigeria and lastly, the Democratic Republic of Congo. Simultaneously, the chapter will critically analyse the colonial-imperial-capitalist structure in the language of human rights to hold MNCs accountable.

5.2 From the arrival of Johan Anthoniszon "Jan" van Riebeeck, and the Vereenigde Oost-Indische Compagnie (VOC) to the Marikana massacre (South Africa's Hendrik Verwoerd's Ghost)

The South African human rights language begun from the moment of contact with European settlers in 1652 as this contact begun oppressive conflict. This is because Jan van Riebeeck did not found the Cape Colony in an empty land.[17] In 1652, when he set foot on the shores of Table Bay, the territories to the north and east had been

[17] Elphick R & Giliomee H (1979) *The Shaping of South African Society, 1652 – 1840* (Wesleyan University Press, Middletown, Connecticut) 3; see also Thompson L (2000) 3rd ed *A History of South Africa* (Yale Nota Bene, Yale University Press, New Haven and London) 1, Many historians of the white South African establishment start their history books with a brief reference to the voyage of Vascoda Gama round the Cape of Good Hope in 1497-98 and then rush on to the arrival of the first white settlers in 1652. Other historians are so committed to emphasizing the role of capitalism as the molder of modern Southern Africa that they ignore the processes that shaped society before Europeans began to intrude in the region.

occupied for centuries by the Khoi and for millennia by hunter-gathers.[18] For the next 150 years the colony's expansion would be both hindered and assisted by Khoi, San and "Bushmen" - yet until recently many writers on Cape History have dismissed them with a paragraph or even a sentence.[19] C W. de Kiewiet's summary of Khoisan decline is typical:

> "The 'Hottentos' broke down undramatically and simply. Their end had little of tragedy which lies in the last struggles of dying race".[20]

The indispensability of MNCs to colonialism cannot be overstated enough as this assist in focusing on the macro problem of human rights language and this is because modern South Africa began as a by-product of the MNCs of the Dutch merchants:[21]

> "The seventeenth century was the Golden Age of the Dutch Republic Its merchants were the most successful businessmen in Europe; their Dutch East India Company was the world's greatest trading corporation. Founded in 1602, the company was a state outside the state. 'Operating under a charter from the States-General (the Dutch government), it had sovereign rights in and east of the Cape of Good Hope, and by midcentury it was the dominant European maritime power in southeast Asia. Its fleet; numbering some six thousand ships totaling at least 600,000 tons, was manned by perhaps 48,000 sailors".[22]

Moreover, in the contemporary, for example, in the same year the apartheid South African government came into power in 1948, the Universal Declaration of Human Rights, now the common international standard for human rights, was adopted by the

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[18] *Ibid*; see also De Vos P and Freedman W ed (2013) "*South African Constitutional Law in Context"* (Oxford University Press, Southern Africa) 6-7; see also Wauchope G (1984) "Azania = Land of the Black People" 7-8 available at http://www.sahistory.org.za/archive/azania-%3D-land-of-the-black-people (accessed 15 June 2018).
[18] Donoho (note 12 above) 5-6.
[19] Elphick (note 17 above) 3.
[20] *Ibid.*
[21] Thompson L (2000) 3rd ed *A History of South Africa* (Yale Nota Bene, Yale University Press, New Haven and London) 32.
[22] *Ibid.*

United Nations.[23] South Africa was one of only eight countries that refused to sign this foundational human rights document, in large part because the government was already preparing to implement the apartheid programme which would systematically violate every one of the rights recognized in this declaration.[24]

The above explains the absence of the usage of human rights language as it pertains to Africans of South Africa in during colonial period with the exception of the events leading to the Constitutional dispensation in 1996 (in a narrow sense) even though the human rights violations begun in 1652. Consequently, it is argued that MNCs as inherent component of colonisation, forms the continuum of the colonial project of marginalisation of the Global South in all the facet of life including the realm human rights language as it is in the economy and politics.[25]

The approaches to the economic historiography of South Africa have gone through two distinct phases.[26] It concentrated primarily on the economic activities of the 'white' man to the exclusion of everyone,[27] especially African people. This human right negation for Africans happened despite dignity and freedom offered to the Europeans which means that it is not inconceivable that a rhetoric may be more prevalent than real attempts at dealing with business and human rights. Other population groups were only of interest only as suppliers of unskilled labour or when they disrupted the working of the 'white' economy.[28] The consequences of this phenomenon has since shaped the relationship between business and the peoples and the human rights language. This relationship in today's terms is characterised by the Global North's MNCs exploitation of the Global South.

Thus, the prologue of South Africa's business and human rights discourse can be traced to the 1600s when the Dutch East India Company occupied the Cape of Good

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[23] South African History Archive "The Birth of the Bill of Rights", available at http://www.saha.org.za/billofrights/the_birth_of_the_bill_of_rights.htm (accessed 15 August 2019).
[24] *Ibid.*
[25] Donoho (note 12 above) 5-6; see also Mutua M (2001) "Savages, Victims, and Saviours: The Metaphor of Human Rights" *Harvard International Law Journal* Vol. 42, No. 1, 205.
[26] Zbigniew A, Knonczacki, Parpart J L & Shaw T S (1991) *Studies in the Economic History of Southern Africa* Vol ii, South Africa, Lesotho and Swaziland (Frank Class, USA) x.
[27] *Ibid.*
[28] *Ibid.*

Hope as the refreshments station for its ships working between Europe and Asia.[29] The colony was not a colony of Europeans, but a colony in which a European administration, the Dutch East India Company (*VOC*) ruled over a mixed population of white settlers and their servants, namely, the African, Asian, Khoikhoi, and the San slaves.[30] Notably, the predominantly white settlers created a new extensive system of plantation and pastoral agriculture dependent on Khoikhoi and slave labour.[31] The Europeans brought with them to the Cape ideas about race, religion and status which in colonial life, formed the basis of distinctive new white dominated multi-racial society inclusive of how MNCs operate.[32]

It is against this backdrop, therefore, that the socio-economic arrangements and its legal foundations of the dominant and dominated have lived together until now and sadly for the foreseeable future. Thus, after an attempt on non-interference with the affairs of the Khoisan the *VOC* felt bound to support its Khoikhoi allies in cases where an issue in dispute concerned relations with the company.[33] Moreover, even purely local feuds between different Khoikhoi began to come under the mediation of the VOC as any disturbance of the peace was likely to lead to the disruption of the cattle trade.[34] This led to the *VOC* over lordship and ended the independence of the Khoikhoi and they themselves acknowledged their dependent status by having their chiefs confirmed in office by the *VOC* authorities.[35]

The meeting of the European settlers and the Africans was a meeting between unequal, with Europeans on other hand possessing nothing more than guns, the Bible and the thirst to conquer, and with the Africans rich in land, livestock and relative

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[29] Guelke L "The Beginning of Modern South Africa Society: The Meeting of Two Worlds" in Zbigniew A, Knonczacki, Parpart J L & Shaw T S (1991) *Studies in the Economic History of Southern Africa* Vol II, South Africa, Lesotho and Swaziland (Frank Class, USA) 1.
[30] *Ibid*; Hahlo H R and Kahn E (1968) *The South African Legal System and its Background* (Juta & Co., Limited, Cape Town, Wetton and Johannesburg) 567.
[31] Guelke (note 29 above).
[32] *Ibid.*
[33] *Id* 9.
[34] *Ibid.*
[35] Establishment of the Cape and its Impact on Khoi ad Dutch, available at http://www.sahistory.org.za/article/establishment-cape-and-its-impact-khoikhoi-and-dutch (accessed on 10 June 2018); Van Riebeeck arrived at the Cape on 6 April 1652 as an employee of the VOC to spearhead the establishment of the refreshment outpost at the Cape.

harmony.[36] It is worth noting that however, soon after inequality was flipped with the converse of the status quo. The European-dominated ways of life and economic organisation were very different from those of the Khoikhoi and the latter people were not unimportant in shaping the nature of the new colonial economy.[37]

Consequently, Guelke states that:

> "The Khoikhoi and San lost their land, livelihood and many of them lost their lives and the people who survived did so as dependent labourers and herdsmen on European-owned farms. The survivors retained only a remnant of their original culture and much of this remnant became blended with that of the slaves and settlers. The colonists settled in the country as individuals and individual rights to own and control the land provided the keystones of the resource system they established. The private control of individual parcels of land meant that the European colonists were tied to places in a way the Khoikhoi were not."[38]

Now, this system of private ownership was and still is diametrically opposed to the African sense and definition of ownership thus pointing to the conception of human rights language understanding in different context especially in the Global South. This permeation is still an obstacle today in terms of human rights language because the legal structuring is still skewed in favour of the Global North Coloniser including the human rights language and more importantly as it is used in relation to the issue of land. Therefore, the European controlled society (largely oppressed Africans) incorporated two important principles which gave it its specific colonial character.[39]

Firstly, the economy was based on the use of slaves and client labour and secondly, the economy involved the extensive exploitation of natural resources.[40] The recognition of individual rights to land combined with the nature of the labour and land

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[36] Mafokeng T (1988) "Black Christians, the Bible and Liberation" *Journal of Black Theology in South Africa,* 34-35.
[37] Guelke (note 29 above) 1 and 17.
[38] *Ibid.*
[39] *Ibid.*
[40] *Id* 18.

system created a pattern of nuclear settlements in which farmers ruled over a largely self-contained world comprised of family, slaves and dependents.[41] This condition of slavery signals grade zero on the scale of human rights, since it turns a *persona* into an object of private property, it must be noted that in the eighteenth century the kidnapped negro slaves were regarded both in law and by the vast majority of their captors and masters merely as property.[42] This situation promoted a high degree of individual self-reliance and favoured the large arable estate holder who was able to benefit from economies of scale.[43]

The last three and half centuries under the impact of colonisation, has seen a mounting government interference in the economy and made it imperative for a progressive historian in general and an economic historian in particular to concentrate on the socio-economic position and problem of the black population.[44] Thus, the position has been reversed in the sense that today what really matters is how the activities of the whites interfere with the economic position of the Africans.[45]

Moreover, "the decline of the Soviet hegemony and the end of the Cold War have fundamentally changed the geo-political landscape not only in Eastern Europe, but also in Africa, Asia and Latin America.[46] The satellite states and their dictators (leaders) in these continents are being increasingly deprived of the patronage and protection of their big power masters and must therefore, fend for themselves both politically and economically. The disintegration of planned socialist economies has exposed the flaws of state ownership and control of the MNCs thereby creating an inexorable drive toward privatisation, on the one hand, and a loosening of governmental control over private economic activity, on the other."[47]

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[41] *Ibid.*
[42] Bellman P N (2017) "Notes on the Representation of Slavery in Eighteenth Century English Art and Literature" 113 in Ward I (2017) *Literature and Human Rights: the Law, the Language and the Limitations of Human Rights Discourse* (De Gruyter Germany) 1.
[43] Guelke (note 29 above).
[44] *Ibid.*
[45] *Ibid.*
[46] Sethi S P (1993) "Operational Modes for Multinational Corporations in Post-Apartheid South Africa: A Proposal for a Code of Affirmative Action in the Marketplace" *Journal of Business Ethics* 12: 1-2 *(Kluwer Academic Publishers, the Netherlands)* 1.
[47] *Ibid.*

The above characterisation of the Soviet Union and Socialism is loud albeit very silent on the Western hold on Global South countries and the continued underdevelopment of Africa.[48] Politically, most of the third world nations have been free for a long time. But economically, an enormous position of the continent remains in chains.[49] Basic economic realities remain unchanged from the colonial period. Therefore, an honest assessment should also mention the brutality of the Global North capitalism in Africa and specifically in South Africa's economy. However:

> "The emergence of Japan and other East Asian economic countries with their own distinctive form of capitalism has radically altered the competitive mix in international trade where one can hardly escape foreign competitors regardless of whether one operates a small shop in a hamlet or a large business in a mega polis. Thus, is extended to situations where one is engaged in a service economy or operates in a high tech industry; and also where one lives in an industrially advanced country of the first world or is a poor citizen of the third world".[50]

Evidently, for the foreseeable future the relative bargaining power between MNCs and nation states, especially of the Global South, will significantly shift in favour of MNCs. Moreover, the third world countries will also lose ground in respect of two of their most important competitive advantages, that is cheap labour and abundant raw materials.[51] The increasing level of factory automation and the greater role of technology in creating value will lessen the dependence of the MNCs on these two factors of production.[52]

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[48] Bellman (note 42 above) 113; in England for example, which colonised South Africa and Nigeria, the attitudes towards slavery shifted as the century progressed, where in the early decades, the lucrative trade in African slaves and the highly profitable business. Such as sugar production to which it was linked, were generally considered as part and parcel of the commercial economy, a built-in institutionalized practice in the colonial system which ensured Britain's greatness.
[49] Chukwuemeka E, Anazodo R and Nzewi (2011) "African Underdevelopment and the Multinational-A Political Commentary" *Journal of Sustainable Development* Vol. 4, No. 4, 102.
[50] Sethi (note 46 above).
[51] *Ibid.*
[52] *Ibid.*

This shift in bargaining power, however, will not necessarily give MNCs market autonomy or political freedom.[53] As argued by Sethi, MNCs are likely to confront greater calls for accountability for their actions from NGOs, Civic Society and any other affected persons seeking to pressurise companies to alter their behaviour on moral and ethical grounds.[54]

The recent demands in South Africa concerned the attempt to boycott Israel's products because of its human rights abuses in Palestine were as recent as the 14th May 2018 killings of 58 Palestinians by the Israelis soldiers shocked the world.[55] Furthermore, the Marikana massacre is an excellent study case of how London Mining (Lonmin Plc) appears to enjoy continued world dominance in the platinum sector irrespective of the people murdered in its name.[56] On 10 June 2019, Sibanye-Stillwater completed the acquisition of Lonmin Plc[57], making Sibanye-Stillwater amongst the world largest platinum producer.[58] Again, this shows how human rights language is often times extremely limited or lack the necessary impetus to disrupt business in cases of infringements of rights by MNCs. Lonmin was initially christened in 1909 as the London and Rhodesian Mining and Land Company Limited.[59] Focused on mining and ranching, it was at one point an unprofitable flop, foreshadowing its eventual fate. "Tiny" Rowland, a corporate raider and maverick, would take up the reins and transform the group into a sprawling African business empire.[60]

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[53] *Id* 2.
[54] *Ibid.*
[55] Loveday M and Balousha H (2018) "Israelis Kill more than 50 Palestinians in Gaza Protests, Health Official Say" *the Washington Post* available at https://www.washingtonpost.com/world/middle_east/gaza-protests-take-off-ahead-of-new-us-embassy-inauguration-in-jerusalem/2018/05/14/eb6396ae-56e4-11e8-9889-07bcc1327f4b_story.html?noredirect=on&utm_term=.4f530a3bd691 (accessed 15 May 2018) ZEITOUN, Gaza Strip — Israeli forces killed 58 Palestinians at the boundary fence with Gaza on Monday, local health officials said, a level of bloodshed not seen since the most violent days of Israel's 2014 war in the territory.
[56] Tolsi N (2017) "Marikana: One Year after the Massacre" available at http://marikana.mg.co.za/ (accessed on 15 July 2017); see also Marikana Massacre 16 August 2012: available at www.sahistory .org.za/article/marikana-massacre-16-august-2012 (accessed 12 February 2018).
[57] Available at https://www.sibanyestillwater.com (accessed 09 July 2019).
[58] Seccombe A (2019) "Sibanye is now the proud owner of Lonmin" https://www.businesslive.co.za/bd/companies/mining/2019-06-10-sibanye-is-now-the-proud-owner-of-lonmin/ (accessed 09 July 2019).
[59] Stoddard E (2019) " Obituary: After the Marikana Massacre, the writing was on the wall for Lonmin" 12 June, available at https://www.dailymaverick.co.za/article/2019-06-12-obituary-after-the-marikana-massacre-the-writing-was-on-the-wall-for-lonmin/ (accessed 09 July 2019).
[60] *Ibid.*

The recent (367 years ago) story of Africa, unfortunately, begins with colonisation and ends with colonisation. It is notable therefore, that the functions of MNCs have always been in the interest of colonial enterprise because it sustains capitalism and the suppression of African executives and more so the African female. However, optimists would tell you that blacks have made good progress in the economic arena.[61] Most of the measures used by the apartheid regime have been abandoned in law and relaxed in practice.[62] Government is deregulating the economy and opportunities for black employment and entrepreneurship are expanding.[63]

In the continued scramble for Africa, the history of South Africa demonstrates large remnants of MNCs with the Anglo-American Corporation being the most notable in this regard.[64] The structure of the Anglo Group is complex as the MNCs consists of mining and investment conglomerates.[65] This world empire created by Sir Ernest Oppenheimer in 1917 has investments covering gold and diamond mining, finance and insurance houses and retail motor organisations in South Africa and other African countries, Canada, Australia and Brazil.[66]

The above Oppenheimer sophistication is well demonstrated below:

> "Oppenheimer Complex in South Africa is second only to the government as a taxpayer and employer and as such wields immense economic power. The Anglo group consists of a central core with four mining houses, Anglo-American Corporation, De Beers Consolidated and Charter Consolidated which controls many of the groups which are connected with each other and also with their subsidiaries by complicated patterns of interlocking shareholdings, directorships and management, with each of the four holding over 30 per cent of the shares in each other. According to Lanning and Mueller, although Anglo's holding companies are established 'with

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[61] Sethi (note 46 above) 3.
[62] *Ibid.*
[63] *Ibid.*
[64] Pangeti E (1986) "Agribusiness in Colonial Zimbabwe: the case of the Loveld" in Teichova A, Levy-Leboyer M & Nussbaum H (1986) *Multinational Enterprises in Historical Perspective* (University Press, Cambridge, Great Britain) 330.
[65] *Ibid.*
[66] *Ibid.*

> purely nominal capital, they can direct and indirect subsidiaries and affiliates which control much larger financial resources".[67]

Since 1986 Anglo-American has grown and maintained its global dominance in the diamond trading and in many of its other operations. An analysis of this global empire alone reveals how human rights manifested themselves giving credence to the Global North rhetoric of promotion and protection of human rights especially in the Global South. It is trite, that MNCs were and still are responsible for the death of many Africans because of unsafe mining operations and intentional exposure to dangerous chemicals such as silica, silicosis, and asbestos to mention but a few.[68]

Other examples of MNCs' human rights infringements in South Africa include anomalies which arose in *Lubbe v Cape Plc*[69] - in this case the victims of Cape Plc were left without recourse and from 1989 onwards the company no longer had a physical presence in the country and was, therefore, beyond the reach of South African law and South African claimants who sought to pursue compensation for alleged asbestos poisoning.[70] Although the case was eventually settled in 2001 in England, the difficulties experienced in getting to that stage provide valuable lessons for a renewed assessment of South African, SADC, COMESA and perhaps even the New Partnership for African Development (NEPAD) policy with respect to the FDIs of MNEs.[71]

Furthermore, at the global level, there are a number of well documented cases, for example, Union Carbide in Bhopal India, Standard Fruit and Dow Chemical in Costa Rica, Texaco in Ecuador, and Cape Plc in South Africa which reveal that domestic as well as international law has, to date, not offered adequate and/or timely solutions to the problems arising in cases dealing with extraterritorial jurisdiction.[72] Muchlinski

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[67] *Ibid.*
[68] Human Rights and Business Country Guide: South Africa (*the South African Human Rights Commission and the Danish Institute for Human Rights* 2015).
[69] Moeti K B & Mukamunana R (2006) "Social Responsibility and Accountability: The Case of Multinational Enterprises Operating in South Africa" *Journal of Public Administration* Vol. 41, No. 4, 727. See also *Lubbe v Cape Plc* [2000] UKHL 41.
[70] Weschka M (2006) "Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad? *ZaöR* Vol. 66, 633.
[71] *Ibid.*
[72] *Ibid.*

asserts that this is evidenced by the fact that the fundamental principle of international law is to confer upon each state, exclusive sovereignty over the territory it controls.[73] Strict adherence to this principle carries with it the corollary duty of non-intervention on the part of other states.[74]

South Africa is afflicted with serious economic problems that will strain the resources and creative abilities of its leaders.[75] In the 1990s, South Africa recorded an economic growth rate of only 0.9 per cent; an inflation rate of 14.6 per cent; and a population growth rate of 2.6 per cent.[76] Given these trends, and even assuming a modest upturn, South Africa will not feed, clothe and shelter its burgeoning population in the coming years even at the abysmally low current levels.[77] The service protests[78] every day and the levels of inequality are rising and have become an everyday reality in South Africa.[79]

South Africa provides that there must be change in the language of dialogue between those who control economic power and those who seek to gain a fair and equitable share in both existing power and in opportunities to make future economic gains.[80] This is because when Indians, Coloureds and African South Africans negotiated (compromised) with the colonial apartheid regime they:

> "Left it behind, it did not leave behind the structures and processes which generate inequality. Rather than confront this structural legacy with the seriousness and single-mindedness that it deserves, the ANC government has, on the contrary, sought relief in a wretched amalgam of a seemingly leftist discourse favourable to the poor and a rightist political and policy

[73] *Ibid*; see also Muchlinski T P (2007)*Multinational Enterprises & The Law* 2nd ed (Oxford University Press, New York),
[74] *Ibid.*
[75] Sethi (note 46 above) 4.
[76] *Ibid.*
[65] *Ibid.*
[78] Runciman C (2018) "Why South Africa's strike rate isn't as bad as it is made out to be" *Biznews* available at https://www.biznews.com/sa-investing/2018/04/30/south-africa-strike-rate-isnt-bad/ (accessed 15 June 2018).
[79] Lushaba L S (2016) *Theoritical Reflections on the Epistemic Production of Colonial Difference* (PhD Thesis, University of Witwatersrand) 168; Votaries of the new society be believed there is within it an equalization of opportunities, increased convergence in life-styles and closer social distance among people on account of muted economic inequality.
[80] Sethi (note 46 above) 4.

praxis beneficial to capital and the corporate world. In other words, whilst the ANC continues to talk 'left', it acts 'right'".[81]

Sethi explains the position of difficulties in implementation of transformation in the following passage:

> "Proposed in 1993 the adoption of an MNCs Code of Affirmative Action in the Marketplace (CAAM) which has four over-arching objectives; *Participation in Top Level Decision-Making in MNCs.* This would require MNCs to employ, train and promote local citizens to upper level management echelons, including board of directors. Such a course would be cost effective for the MNCs; *Greater Access to Ownership and Control of Productive Assets by the Local Population".*[82]

This approach would:

> "Necessitate that the MNCs to spin-off or create local subsidiaries that would be large enough to provide local entrepreneurs with experience in managing complex enterprises and operating in highly competitive markets and *Sharing of Producer's Surplus with Local Employees and Impacted Communities.* This approach would call for the MNCs to voluntarily share part of the gains from productive efficiencies in their local enterprises in a manner that supports the building of physical and human infrastructures in their operational areas, thus, *Allowing for Greatest Discretion to Local Employees for the Activities Affecting Their Own Quality of Life.* Under this approach, MNCs would be asked to make all those decisions affecting local workers and communities in a decentralized manner and in close consultation with the affected constituencies".[83]

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[81] Amuwo A (2005) "Problems and Prospects of Democratic Renewal in Southern Africa: A Study of Statecraft and Democratisation in South Africa, 1994-2003, in Hendricks C and Lushaba L. *CODESRIA*, Dakar. 55.
[82] *Ibid.*
[83] Sethi (note 46 above) 7.

One important area by which major economic decisions in the private sector can be influenced through representation on corporate boards.[84] Unfortunately, the record of South African companies in this area, as well as that of the MNCs including the Sullivan Signatory companies from the U.S., is rather dismal.[85] This is the worst indictment of MNCs both South African and foreign owned for the abdication of their responsibility and for also being short-sighted in their human resource management.[86] While university training is an important source of developing managerial talent, this is not the only source and might not always be the best source.[87] Japan is a prime example of a country which mainly uses on-the-job training and promotion from within to fill its managerial ranks.[88]

South Africa has also seen a series of protests around outsourcing and the use of "labour brokers" which is an issue that has been prioritised by the government for legal reform.[89] Land reform remains a controversial topic in the country due to the legacies of South Africa's colonisation and the discriminatory exclusion of Africans from the ownership of land.[90] Several laws and regulations that might have implications for human rights are silent on the issue, including, among others, the Companies Act in South Africa.[91] There is thus an urgent need for policy reform that clarifies the human rights responsibilities and accountability of company executives and directors.[92] It is worth noting that whilst MNCs may have greater responsibilities with regard to human rights obligations, there is however, no reason for excluding purely national companies

[84] *Id* 8.
[85] *Ibid*; Gallagher D (1985) "The Sullivan Principles: A Code for Companies in South Africa not an anti-disinvestment movement" *UPI* Sept 15. available https://www.upi.com/Archives/1985/09/15/The-Sullivan-Principles-A-code-for-companies-in-South-Africa-not-an-anti-disinvestment-movement/2673495604800/ (accessed 19 June 2018).
[86] Sethi (note 46 above).
[87] *Ibid.*
[88] *Ibid.*
[89] Loots J (2016) "Shadow" National Baseline Assessment of Current of Implementation of Business and Human Rights Frameworks, South Africa" (Centre for Human Rights at the University of Pretoria and International Corporate Accountability Roundtable (ICAR)) 2; as a general rule, MNCs have never had an interest in the human, infrastructural, educational development of its host country nor did they recognise the workers' safety, save its selfish desires (CSR and Public Relations exercises). For example, in terms of South Africa's domestic legislative framework, several issues require attention in terms of business and human rights impacts, concerns in the labour sphere revolve around, job insecurity, inadequate wages and poor working conditions especially in the informal sector.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

from the realm of such obligations.[93] Although some texts, such as the OECD Guidelines, are specifically addressed to 'multinational' enterprises, the Guidelines stress that the same expectations are relevant to both MNCs and domestic enterprises.[94]

South Africa is considered to have one of the best tax administrators in the region and the government is involved in external capacity building initiatives through the South African Revenue Service.[95] However, several concerns remain around the issue of illicit financial flows due to ongoing transfer pricing and other tax avoidance practices in the country.[96] The public procurement system in South Africa is frequently under scrutiny and often times faces allegations of corruption and cartel-related incidents.[97] While South African laws provide various guidelines for public procurement practices, there are no prescribed procedures in the law or specific oversight mechanisms.[98] Human rights and due diligence requirements and measurements are still lacking across the business spectrum in South Africa, including State-owned enterprises which are segment of the economy that is criticised by the South African media as being rife with corruption and misadministration.[99]

In 2013, the South African government unilaterally cancelled several of its BITs mainly with the Western European countries.[100] The Protection of the Investment Bill which was passed by the South African Parliament towards the end of 2015 will regulate FDIs going forward. It is notable, however, that whilst the "human rights" implications are still relatively unclear, the bill has been widely criticised for deterring foreign direct investment.[101] South Africa's business landscape is quite active in the field of corporate governance perhaps most notably through the efforts put into the

[93] Clapham A (2010) *Human Rights Obligations of Non-State Actors* (Oxford University Press, New York) 201.
[94] *Ibid.*
[95] Loots (note 89 above) 2.
[96] *Ibid.*
[97] *Id* 3.
[98] *Ibid.*
[99] Corruption Watch: KPMG, MCKINSEY MUST BE INVESTIGATED. CW weighs in on KPMG AND McKinsey's alleged involvement in Gupta-related business dealings, available at http://www.corruptionwatch.org.za/cw-kpmg-mckinsey-must-investigated/ (accessed 11 June 2018).
[100] Loots (note 89 above) 2.
[101] *Ibid.*

development of the King Report on Corporate Governance, which has a prominent focus on human rights.[102]

Loots provide that:

> "The remedy framework in South Africa consists of a combination of judicial, quasi-judicial and non-judicial remedies. The South African Human Rights Commission is one of a few national human rights institutions in the world to have a complaints mechanism and investigative powers. However, barriers to access remedies that victims of corporate human rights abuse face in South Africa include many of issues that are not unique to the country. Apart from recurring barriers such as difficulties in piercing the corporate veil and issues around *forum non conveniens*, victims in South Africa face very high legal costs with relatively little financial aid which is exacerbated by the "loser pays" principle".[103]

South Africa is also known to have a legal environment that is not very conducive to successful class-action lawsuits which is often the most appropriate filing class in business and rights-related cases.[104]

5.2.1 The Sullivan Principles

Reverend Leon Sullivan, a member of the Board of Directors of the General Motors Corporation, proposed in 1977 the Sullivan Principles which were adopted by numerous United States corporations doing business in South Africa.[105]

The six principles are:

(a) Non-segregation in all eating, comfort, and work facilities.
(b) Equal and fair employment practices for all employees.

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[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] Reverend Leon H. Sullivan (1977) "The Sullivan Principles" available at http://hrlibrary.umn.edu/links/sullivanprinciples.html (accessed 16 November 2016).

(c) Equal pay for all employees doing equal or comparable work for the same period of time.
(d) Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other non-whites for supervisory, administrative, clerical, and technical jobs.
(e) Increasing the number of blacks and other non-whites in management and supervisory positions.
(f) Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation, and health facilities.

The principles demonstrate how serious discriminated African South Africans took the issue of business and human rights and how the language of human rights was utilised to fight against MNCs' adverse conduct that was complicit in maintaining colonial apartheid. It is worth noting, however, that, during this period South African organisations of Africans such as the African National Congress (ANC) and the Pan-African Congress (PAC) were opposed to the philosophy implicit in the Sullivan Principles.[106] These groups were not working for the token amelioration represented by this type of approach as they were determined to completely dismantle the Colonial enterprise (Apartheid) structure erected by the white minority government.[107] The rejection of these principles by the ANC and the PAC back then and given the fact that many of the ideals espoused by Sullivan have not been fully realised even in the "new dispensation" - demonstrate that it is not about just about the legal or normative framework but a contest of power relations and ownership of means of production between the Global South and the Global North.

Under the prevailing South African law during South Africa's colonial apartheid, it was clearly impossible to implement the Sullivan Principles.[108] For example, under the Industrial Conciliation Act of 1924, Africans were denied the right to organise into effective unions and to bargain collectively.[109] Strikes were completely prohibited.[110]

[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*

The concept of “corporate equality” was not possible in a country which ensured through law and custom that no Africans may ever hold a position of authority over a white worker.[111]

However, many of these colonial obstacles are said to be a thing of the past and that what remains for an African is to protest and then get killed and thereafter, still don’t acquire a dignified remuneration at least for those who did not perish in the Marikana massacre.[112] This has occurred within the rhetoric of trade unions, democratic values and a constitutional dispensation (Marikana massacre).[113] The political powers may have changed but the behaviour of MNCs has not changed.

Reverend Sullivan writing in 1977 stated that approximately 1.5 per cent of the African South African population is employed by U.S MNCs.[114] The remainder of the African population, strictly segregated into townships and homelands would be untouched by corporate attempts at workplace equality.[115] The real impact of U.S MNCs in supporting the South African (apartheid) is in terms of the technology and capital placed at the disposal of the South African government.[116] Polaroid Corporation, until recently, supplied the photographic material used to produce the passes all non-white Africans are required to carry upon penalty of imprisonment.[117] The Sullivan Principles did not put an end to apartheid as Reverend Sullivan had hoped, but they did make a significant impact.[118] They made corporations "aware of the injustices in the South African employment system, by providing a focus for company programs, and by teaching the companies to have a sense of strength in numbers as they confronted social issues in South Africa”.

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[111] *Ibid.*
[112] Tolsi N (2017) “Marikana : One Year after the Massacre” available at http://marikana.mg.co.za/ (accessed 15 July 2017); see also Marikana Massacre 16 August 2012: available at www.sahistory .org.za/article/marikana-massacre-16-august-2012 (accessed12 February 2018).
[113] *Ibid.*
[114] Sullivan (note 105 above).
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] Anderson J C (2000) Respecting Human Rights: Multinational Corporations Strike Out” U. Pa. Journal Of Labor And Employment Law Vol. 2, No.3, 478.

This depiction of South Africa in relation to the role of business and rights has worsened irrespective of a new political and legal dispensation. In 2017, South Africa's inequality is worse than during its brutal apartheid.[119] This should not be alarming to slave labourers as the change never seemed to change business conduct but to legalise slave labour and change the face of its enforcers.[120] Curtis adds in relation to MNCs that "[t]hose who invest in South Africa should not think they are doing us a favour. They are here for what they get out of our cheap and abundant labour, and they should know that they are buttressing one of the most vicious system".[121] "Each trade agreement, each bank loan, each new investment is another brick in the wall of our continued existence".[122]

The colonial South African state at the time and the growing liberation struggles led to increasing calls for MNCs disinvestment from and the imposition of mandatory international economic sanctions on South Africa.[123] The African National Congress, Congress of South African Trade Unions, South African Council of Churches, United Democratic Front and the Commonwealth Group of Eminent Persons have strongly endorsed such trade and investment sanctions and have called upon all MNCs to voluntarily disinvest from South Africa.[124]

The *In Re South African Litigation*[125] case illustrate clearly the phenomenon of the past-present-future of colonial human rights protection as but an ineffective tool with

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[119] Dludla S (2017) "Inequality Worse than at the End of Apartheid: Oxfam" *IOL* available at www.iol.co.za (accessed 04 July 2018).

[120] Human Rights and Business Country Guide: South Africa (*the South African Human Rights Commission and the Danish Institute for Human Rights* 2015) states that The 2013 Global Slavery Index ranked South Africa 115th out of 162 countries, with an estimated 44,500 people in 'slavery, slavery-like practices (including debt bondage, forced marriage, and or sale of or exploitation of children), human trafficking and forced labour'.287 At the regional level, South Africa ranked 41st out of 44 countries.

[121] Curtis F (1991) "Foreign Disinvestment and Investment – South Africa: 1976-1986" in Zbigniew A, Knonczacki, Parpart J L & Shaw T S (1991) *Studies in the Economic History of Southern Africa* Vol II, South Africa, Lesotho and Swaziland (Frank Class, USA) 175; See words uttered Bishop Desmond Tutu.

[122] *Ibid;* see words uttered by former Prime Minister John Vorster.

[123] *Ibid.* On 12 June 1986, the South African government declared the second State of Emergency within a year. In its first eight weeks, over 140 black South Africans were killed and over 3000 community, union, student and religious leaders and activists were detained without charge. They are added to the 3000+ killed and 10000+ detained since August 1984.

[124] *Ibid.*

[125] *In Re South African Apartheid Litigation United States District Court S.D New York 56 F. Supp. 3d 3311 or In re South African Apartheid Litigation* available at http://business-humanrights.org/Links/Repository/1024200/link_page_view (accessed 12 June 2018).

no real interest in the disruption of the unlawful gains of colonialism benefiting the Global North. This case was dismissed by the Supreme Court in the United States of America. Furthermore, the call for disinvestments shows the lack of appreciation of human rights language and complicity of MNCs in the host countries they operate in. Arguably, if the government is murdering people, banks and automotive MNCs should not be supporting such governments. Regrettably, the stance of MNCs has been that "we do not get involved in domestic affairs of the state, we are here to conduct business".[126]

The summary of *In Re South African Litigation* case puts South Africa's colonial apartheid at the center of business and human rights language:[127]

> "In 2002, a group of South African nationals brought action under the ATCA against 20 banks and companies accused of aiding and abetting human rights violations committed by the South African government during apartheid. The plaintiffs were victims of extrajudicial killings, torture and rape. The South African government publicly opposed the trial before both the district and appellate courts in the United States. In October 2007, the court of appeals overturned the trial court's dismissal of the case. The defendants appealed the overturn, but the US Supreme Court upheld the appellate court's decision in May 2008. On 8 April 2009, a district court judge dropped several of the charges, while allowing a continuation of the suit against Daimler, Ford, General Motors, IBM and Rheinmetall Group. The judge refused to accept the defendants' arguments invoking the doctrines of political question and international comity. The judge also rejected arguments that the statute of limitations had expired. In a September 2009 letter to the judge describing the district court as the "appropriate forum", the South African government announced its support for the trial to proceed. The defendants then filed an interlocutory appeal (an appeal filed in civil proceedings prior expected to rule soon on the

[126] Curtis (note 121 above) 176.
[127] *In re Africa Apartheid Litig*., 346F Supp.2d 538 (S.D.N.Y 2004); *In re Africa Apartheid Litig*., 617F Supp.2d 228 (S.D.N.Y 2009); *In re Africa Apartheid Litig*., 624 Supp.2d 336 (S.D.N.Y 2009); see also De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 201-202.

questions of jurisdiction and appropriate legal grounds. If the court does not accept jurisdiction, the case will continue in district court.

Meanwhile, on 31 December 2009 federal judge Shira A. Scheindlin issued an opinion in which she stressed a point which may constitute an additional barrier for victims. To establish a corporation's liability for aiding and abetting human rights violations committed by a host country of an investment, it is not sufficient to show that the corporation invested in the state. Judge Scheindlin ruled that there must be a distinction between selling lethal weapons and selling raw materials or providing bank loans.

To illustrate her point, the judge used the example of poison gas, a lethal weapon, which was sold to the Nazis for use in concentration camps during the Second World War. Before accepting jurisdiction, the court of appeals asked the parties to submit their arguments on the question of whether companies can be held accountable for violations of customary international law. In particular, the victims needed to prove that companies can be held civilly and criminally liable under customary international law. The appeal was head by the second US Circuit Court of Appeals in New York in 2015 and it was dismissed.

Moreover, during the 1960s to 1986 disinvestments led to the support of rapid growth of private capitalist manufacturing and also supported the expansion of state capitalist production and South Africa's attempt to become 'sanction proof'.[128] These demonstrated the resolve of colonial capitalism where human destruction is part of a business strategy.[129] Therefore, the discourse elucidated the position during colonial apartheid in relation of FDIs to South African capitalism.[130] The literature largely falls into two categories namely; conventional/neoclassical or Marxian analysis with the liberal or neoclassical analysis providing that almost uniformly celebrated foreign

[128] *Ibid.*
[129] *Ibid.*
[130] *Id* 177.

investment in South Africa is being beneficial to economic growth and harmful to apartheid.[131]

The above conclusion has been supported primarily in two ways:

> "That is in terms of the benefits of economic growth per se in the 1950s, 1960s and early 1970s and in terms of demonstrating the effects of equal employment practices in the late 1970s and early 1980s. In the former, 'white businessmen and overseas investors could be reassured by what was known as the "Oppenheimer Thesis": that economic growth would make apartheid wither away as blacks were drawn into skilled jobs and middle class life".[132]

However, when after 15 years of rapid economic growth, apartheid wither away, the 'Oppenheimer Thesis' was increasingly replaced by what could be called the 'Sullivan Thesis'.[133] This, in effect, posited that TNCs should implement 'codes of conduct' consisting of a variety of non-discriminatory practices and programmes.[134] By treating their blacks and white employees fairly and equally while continuing to earn high profits – it was posited that the MNCs would create a demonstration effect whereby such non-racist practices would spread throughout the economy and begin to erode certain aspects of apartheid.[135]

In South Africa, there is evidence to suggest that MNCs operating locally are more influenced by government than global MNCs in Japan.[136] For instance, Sumitomo cogently explains that it is contributing to the Japanese Government's commitment to development in Africa although it should be noted that this relationship was

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[131] *Ibid.*
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] Levermore R (2014) "Organisational Geographies and Corporate Responsibility: A Case of Japanese Multinational Corporations Operating in South Africa and Tanzania" *The Journal of Corporate Citizenship* Issue 56 (Greenleaf Publishing) 69; This refers to *Multidomestic firm approach*; The MNC strategy network is receptive to local understandings of CSR exerted in the countries of operation. *Transnational firm approach;* Modern MNCs are influenced by a hybrid and hierarchical pressure by local and global networks.

downplayed during the interviews conducted.[137] Similarly, international firms and global MNCs highlight decision-making that occurred with home country bias with top-down centralised decision-making, at the expense of the subsidiary country's sensitivities.[138]

For example:

> "Most of the Asian MNCs focus mainly on Corporate Social Responsibility (CSR) that takes place in Japan rather than in host (subsidiary) countries. Panasonic, Itochu, Sumitomo and Komatsu concentrate more on reporting CSR occurring in Japan than they do in South Africa and Tanzania. For instance, both types of companies highlight the importance of Japanese heritage to the way they approach CSR. They universally pay tribute to the history and heritage of the organisation and its influence on CSR".[139]

Itochu is a good example of a company that really emphasises heritage and Japanese local tradition.[140] The company ethos of *'sampo yoshi'* is defined as the 'tradition of Itochu that we always ask ourselves whether a business is truly good for society'.[141] Furthermore, many of the MNCs largely monitor and command the CSR decision-making process in Tanzania or South Africa.[142] For instance, Sony and Komatsu either refuse to be graded according to their CSR impact (required through South African legislation) or receive such low grades that they are largely barred from public procurement contracts.[143]

Asbestos[144] mines and their environments in South Africa were uniquely dusty and Acute Respiratory Distress (ARD) was rife.[145] Social and political factors in South

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[137] *Id* 78.
[138] *Id* 79.
[139] *Ibid.*
[140].*Ibid.*
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid.*
[144] Asbestos is a fibrous mineral, which can be subdivided into three main types: white (chrysotile), blue (crocidolite), and brown (amosite). This include anthophyllite, tremolite, and actinolite.
[145] McCulloch J & Tweedale G (2004) "Double Standards: the Multinational Asbestos Industry and Asbestos-Related Disease in South Africa" *The Politics of Environmental Health Policy* Vol. 34, No. 4, (Baywood Publishing Co., Inc.) 663.

Africa, especially colonial apartheid, allowed these MNCs to apply double standards, even after 1960 when the much more serious hazard of mesothelioma was identified.[146] This shows the need for greater regulation of MNCs.[147] Because of the lack of such regulation in the early 1960s, an opportunity was lost to prevent the current high morbidity and mortality of ARD both in South Africa and worldwide.[148] Even in 2017, spanning a period of around 57 years the world is not closer to a treaty that regulates MNCs.

Asbestos provides an excellent case study of the behaviour of MNCs in a major industry especially in South Africa.[149] This is more than merely academic interest as it also impinges on contemporary legal, political, and social issues.[150] Many of the current concerns about globalisation are reflected in the history of asbestos in South Africa.[151] McCulloch asks; did MNCs behave responsibly? What was the extent of their knowledge about ARD? To what extent did political and economic factors shape corporate decision-making? Above all, did MNCs dealing in asbestos seek to apply (as they claimed) best-practice standards in health and safety abroad?[152]

The relative indestructibility, high tensile strength, and fireproof qualities of asbestos fibre made it a key engineering and building material in the 20th century.[153] World asbestos production became dominated by Johns-Manville in the United States and Turner & Newall (T&N) and Cape Asbestos in the United Kingdom and these were MNCs with mines in South Africa and Canada and factories in the United States and the Far East.[154] The major mines were owned and operated by three U.K. firms: Cape Asbestos, and its subsidiary Cape Asbestos South Africa Pty (CASAP); the Griqualand Exploration & Finance Company Ltd. (GEFCO); and T&N (which operated a string of

[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*
[149] *Id* 664; see also Thabane L (2014) "Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's Protect, Respect and Remedy' Framework and Guiding Principles" Vol. 14 *AHRLJ*. 52.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] *Id 665.*
[154] *Ibid.*

African mining subsidiaries, such as Rhodesian & General Asbestos Corporation and New Amianthus Mines).[155]

McCulloch and Tweedale state that:

> "In the absence of alternatives, Black and Coloured labour accepted the inhuman conditions offered by the mentioned MNCs and many others. Asbestos was therefore intrinsically bound up with colonial apartheid. This meant low wages and high profits. This was reflected in the company's employment structure in 1965, Cape had only 50 employees at its London head office, but about 10,000 on the mines and another 3,000 or so in its U.K. factories. T&N on the other hand was less dependent on mining in the late 1950s, for example, T&N employed about 16,500 in the United Kingdom and 20,000 worldwide (about 11,000 of whom worked in the South African mines). Nevertheless, once T&N had purchased two mines in the Mashaba district in 1917 and the Amian thus mine in 1924, its South African mines (and the Bell mine in Canada) were the linchpin of its global operations. These mines were consistently profitable sometimes extraordinarily so. In 1957, for example, T&N recorded a post-tax profit of nearly £6 million, of which more than half (£3.2 million) was from South African mining".[156]

As early as the 1920s, deaths at T&N's Rochdale factory and at Cape's London plant led to the first medical descriptions of asbestosis, the chronic fibrosis of the lungs which killed workers by suffocation or heart failure or pneumonia.[157] Such was the prevalence of asbestosis that the British government launched an inquiry which in 1931 resulted in government medical examinations, workmen's compensation and dust regulations.[158] By the 1940s, the company doctor at Cape Asbestos in London,

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[155] *Ibid* 'Terrible Twins' Gefco and Msauli Flew in the Face of Health Warnings (2002) *BusinessReport* available at https://www.iol.co.za/business-report/economy/terrible-twins-gefco-and-msauli-flew-in-the-face-of-health-warnings-785337 (accessed 19 June 2018).
[156] *Id* 666.
[157] *Ibid*; see also Nyeko B (2005) "Swaziland and South Africa Since 1994: Reflections on Aspects of Post-Liberation Swazi Historiography *CODESRIA*. 32.
[158] *Ibid.*

Hubert Wyers, accepted that there was a lung cancer risk for asbestos workers, a hazard confirmed by an epidemiological study of T&N's Rochdale workforce.[159]

However, T&N's misgivings about working conditions were private ones as its annual reports extolled the mines for their technical excellence, harmonious race relations, commitment to African advancement and a "full social life" with tennis courts and golf courses.[160] In June 1952, Dr G. B. Peacock, an assistant health officer with the Department of Native Affairs, reported on conditions in the Northern Transvaal.[161] Peacock was well informed about asbestosis and he believed that the main hazard came from small asbestos fibres rather than host rock dust.[162] He too found that the mills were filthy and he was shocked to see so many juveniles processing fibre.[163]

Peacock examined 26 African workers including five women and found lung disease in six of whom three had probably sustained their disability from their current employment.[164] "The one of these three who had been employed on the asbestos mine for the shortest period" wrote Peacock, "had been doing this kind of work for the past seven months".[165] Moreover, more than 20 years earlier, Merewether and Price had found that in British factories it took at least eight years of heavy exposure to produce asbestosis Peacock also referred to the common practice of sacking employees once they showed signs of disease as "despicable".[166] With no X-ray units on the fields, employers made such decisions on the basis of symptoms, such as shortness of breath and chronic coughing.[167]

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[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid*: Maumey M and Pacheco (2017) "Masothelioma in South Africa" *The Mesothelioma Center,* available at https://www.asbestos.com/mesothelioma/south-africa/ (accessed 20 June 2018); A former global leader in asbestos production, South Africa once operated a thriving industry for more than a century. Extensive mining and use of the mineral in the past have resulted in thousands of deaths from mesothelioma, a rare and aggressive cancer almost exclusively caused by asbestos exposure.
[164] *Ibid.*
[165] *Id* 670.
[166] McCulloch J (2013) "Asbestos Mining in Southern Africa, 1893–2002," *International Journal of Occupational and Environmental Health* Vol. 9, No. 3, 230-235, available at DOI:10.1179/oeh.2003.9.3.230 (accessed 20 June 2018).
[167] McCulloch J & Tweedale G (note 145 above).

Double standards continued to operate in the South African asbestos mines into the 1970s when the gap between United Kingdom (UK) and overseas safety practices was as wide as ever.[168] Notwithstanding the fact that asbestos companies were obliged to comply with stringent fibre thresholds in the UK, it was in their policy toward crocidolite that the UK MNCs demonstrated their indifference to workers abroad.[169] The UK industry agreed to cease importing blue asbestos in 1970 because it was so dangerous, yet it was mined in South Africa into the 1990s.[170] This clean-up policy when UK medical knowledge was at last made available to South Africans was not the result of any new-found concern for African workers.[171] It was largely a public relations exercise forced on the MNCs by the media and the respective governments, which in turn reacted to pressure from labour and various nongovernmental organisations.[172] In London, conscientious shareholders began asking searching questions about ARD at Cape's annual meetings and were staggered to learn that five black South Africans a week were being incapacitated by asbestosis.[173]

The first major improvements in health standards came only with the emergence of black trade unions in the early 1980s by which time the industry was already in its twilight.[174] It was the application of double standards by MNCs "that gives the lie to the efficacy of self-regulation".[175] This is evidenced by the fact that U.K. asbestos companies proved incapable or reluctant to apply even the most basic standards of hygiene in South Africa.[176] This was a particularly telling offence because these firms were not backstreet affairs but blue chip companies.[177] Ultimately, only government regulation was capable of compelling them to adopt better health standards thus making the need for improved control of MNCs self-evident.[178]

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[168] *Id* 674.
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] *Id* 675; In 1974, a U.K. government inquiry confirmed that T&N and Cape were among several MNCs that paid indigenous workers below the poverty level and operated wage discrimination.
[174] *Ibid.*
[175] Ibid.
[176] *Ibid*; see also Meintjes S, Hermanus M, Scholes M and Reichart M (2008) "The Future of Penge: Prospects for People and the Environment" *Centre for Sustainability in Mining and Industry for the Asbestos Relief Trust* available at http://www.asbestostrust.co.za/documents/Penge_Report.pdf (accessed 20 June 2018) 11.
[177] *Ibid.*
[178] *Ibid.*

McCulloch and Tweedale furthermore provide that:

> "Increased accountability of these MNCs is also necessary because since leaving South Africa they have not hesitated to use complex and confusing corporate structures to distance themselves from legal liability. It took a long legal battle before 7,500 South African plaintiffs and their lawyers succeeded in bringing a class action suit against Cape Plc in London. Begun in 1997, the action resulted in a modest settlement in 2003, when the owners of Cape agreed to pay £7.5 million compensation, after initial promises of a £21 million trust were broken. This settlement was possible through the Brussels Convention which applies to all E.U.-based companies as it stipulates in article 2 that the place of jurisdiction of a case is the country of domicile of the parent company. By contrast, the way in which Cape was able to argue for years in the English courts over where the case should be tried shows that many legal ambiguities await resolution and that the legal control of MNCs as regards health and safety is still in its infancy".[179]

The reality in South Africa is that the exploits of colonial-apartheid are legitimised through the Constitution which leaves the Africans still finding it hard to break the chains of MNCs slave labour and the coloniser's unwillingness to redistribute the wealth.[180] Moreover, the MNCs' neglect of human rights is reflected in the legal uncertainty regarding MNCs accountability in the following cases which ended up with out of court settlements after many delays or rather the slow process of adjudication

[179] *Ibid.*

[180] Braun L and Kisting S (2006) "Asbestos-Related Diseases in South Africa: The Social Production of an Invisible Epidemic *American Journal of Public Health* Vol. 96, No. 8, 1387. Their operations and profits in South Africa were facilitated by racialized and gendered labour policies that were established gradually during the early colonial era, intensified during segregation after the union of South African colonies in 1910, and consolidated in a particularly brutal form with the ascendancy of the National Party in 1948. Unlike the competing Canadian and Italian asbestos mines, the ex- traction of mineral in South Africa during the late 19th century and early 20th century was dominated by small companies, syndicates, and individual producers who then sold their products to multinational companies.

with respect to the might of MNCs. For example the summary of *Lubbe et al. v. Cape plc*[181] becomes important to illustrate the above point:

> "Filed in February 1997, the suit sought damages from the UK-domiciled company Cape plc in relation to its work with asbestos, carried out in part in South Africa. The plaintiffs, South African nationals, alleged serious health problems resulting from their occupations or the location of their homes near the factory in question. They argued that the parent company had failed to act with general care and to exercise due diligence in monitoring the factory's activities, and was thus responsible for the problems. English courts established jurisdiction in both procedures under Article 2 &1 of the Brussels Convention. Discussion between the parties focused on the application of *forum non conveniens*. The company argued that South African courts were a more appropriate forum, because the damage and the event giving rise to damage took place in South Africa. After lengthy proceedings, the House of Lords decided that *forum non conveniens* did not allow for the case to be stayed in English courts and heard in South Africa because although the injury, victims and evidence were located in South Africa, the victims could not receive legal aid there".

Another case which demonstrate the diminished legitimacy of human rights is that of *Ngcobo v. Thor and Sithole v. Thor*[182]

> In 1994 and 1998, two employees of a South African subsidiary filed separate suits in the High Court of Justice against Thor Chemicals (UK) Ltd, Thor Chemical Holdings Ltd, and John Desmond Cowley, CEO of Thor Chemicals Ltd. In the course of their work for the South African subsidiary, which specialized in the production and handling of mercury, the two

[181] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 211; see also *Lubbe et al. v. Cape plc, op.cit.,* 1998; *Group Action Afrika et al. v. Cape plc* (QBD 30 July 1999) (2000) 1 Lloyd's Rep. 139; *Rachel Lubbe et al. v. Cape plc, op.cit*., 2000. See also R. Meeran, "Liability of Multinational Corporations : A Critical Stage in the UK", in M.T. Kamminga and S. Zia-Zarifi (eds.), Liability of Multinational Corporations under International Law, Kluwer Law International, The Hague / London / Boston, 2000, p. 258.

[182] De Schutter (note 181 above) 211; see also *Ngcobo v. Thor Chemicals Holdings* [1995] TLR 579; *Sithole v. Thor Chemicals Holdings* [1999] TLR 100.

> employees were exposed to excessive levels of mercury and suffered a variety of neurological problems. The plaintiffs argued that the British parent company had been negligent in implementing and monitoring its dangerous operations in South Africa, and that it had not adopted the measures necessary to prevent such harm.
>
> In each of the two cases, British courts rejected the companies' calls for the application of forum non-conveniens. During the trial of *Ngcobo v. Thor*, the courts ruled that a link existed between the negligence of the parent company in England and the harm caused in South Africa. The courts also cited the risk of a miscarriage of justice. Under South African law, the Workmen's Compensation Act 1941 (SA), granted compensation to victims of work related accidents (who were rendered unable to perform their jobs) and subsequently barred them from suing their employer in court. If victims were able to obtain financial compensation, barring them from pursuing further justice, the amount was ridiculous. Both cases settled with compensation going to the victims.

South Africa has in recent years seen a serious mobilisation of human rights language against colonial apartheid actions by the MNCs. One of the biggest class action in South African history saw thousands of miners who worked for six MNCs obtaining some sense of justice against this MNCs by a settlement of R5 billion to be paid to mineworkers and their dependents, affected people who contracted silicosis or pulmonary tuberculosis during or after being employed as gold miners from March 1965.[183] An exposition of *Ex Parte Nkala and Others*[184] will be undertaken below:

> The application is brought *ex parte* by the surviving class representatives and 20 of the respondent mining companies ("the Settling Companies"), and is unopposed. On 13 May 2016 this court certified a class action against companies operating in the gold mining industry, with two separate and distinct classes; a silicosis class and a tuberculosis class *("the Nkala*

[183] *Ex Parte Nkala and Others* (44060/18) [2019] [ZAGPJHC 657 (26 July 2019); see also *Nkala and Others v Harmony Gold Mining Companies Ltd and Others* [2016] ZAGPJHC 97: 3 All SA 233 (GJ).
[184] *Ibid*.

certification application" or "Nkala"). The court also ordered that any settlement agreement reached by the class representatives on behalf of a class must be approved by the court to be valid. A settlement agreement was subsequently concluded between the class representatives and the Settling Companies and signed on 3 May 2018. Clause 2.1.1 of the settlement agreement provides for the suspension of the operation of the settlement agreement until it is sanctioned by a court of law.[185]

The class representatives and the Settling Companies, hereinafter referred to as "the applicants", have consequently joined forces to apply for the settlement agreement to be approved and made an order of court. Eight of the mining companies that were respondents in *Nkala* are not parties to the settlement agreement. They are DRD Gold Limited ("DRD"), East Rand Proprietary Mines Limited ("ERPM"), Randgold and Exploration Company Limited, Evander Gold Mining Company Limited, Blyvooruitzicht Gold Mining Company Limited, Doornfontein Gold Mining Company Limited, Simmer and Jack Mines Limited and African Rainbow Minerals Gold Limited. They are referred to collectively as "the Non-Settling Companies".[186]

The settlement agreement, in a nutshell, provides for the payment of benefits to mineworkers and the dependents of deceased mineworkers, who contracted silicosis or pulmonary tuberculosis as a result of their employment by the Settling Companies, through the Tshiamiso Trust ("the Trust"). The Trust will be funded by six of the Settling Companies namely African Rainbow Minerals Limited, Anglo American South Africa Limited, AngloGold Ashanti Limited, Gold Fields Limited, Harmony Gold Mining Company Limited and Sibanye Gold Limited, who are also the founders of the Trust ("the Founders"). Their liability to fund the Trust is unlimited.[187]

[185] *Ex Parte Nkala*, para 2.
[186] *Ex Parte Nkala*, para 3.
[187] *Ex Parte Nkala*, para 5.

The Trust is, in terms of the trust deed, obliged to identify and locate eligible mineworkers and dependents. Claims may be submitted to and received by the Trust for a period of 12 years from the date the Trust becomes effective. The effective date of the Trust is the date on which the suspensive conditions in the settlement agreement are fulfilled. The suspensive conditions, set out in clause 2.1 of the settlement agreement, are the following:

(a) The court's approval of the settlement agreement and confirmation of the court's termination of the class action litigation as against the Settling Companies.

(b) Confirmation that the number of claimants that have elected to opt out of the settlement agreement within the prescribed period do not exceed 2000 (two thousand). This condition may be waived by the Settling Companies.

(c) The lodgement of the trust deed with the Master and the issuing of letters of authority by the Master to the first trustees of the Trust.[188]

The Trust is aptly named the Tshiamiso Trust. Tshiamiso means "to make good" or "to correct" in Setswana. The object of the Trust is defined in clause 3 of the trust deed which reads as follows:

> "The object of the Trust is to give effect to the Settlement Agreement and provide Benefits to Eligible Claimants (being the beneficiaries of the Trust) in the amounts and upon the terms set out in this Trust deed (Trust Object). The activities of the Trust shall be directed at, and the Trust Fund shall be used for the pursuit of, the Trust Object".[189]

The Founders are jointly liable, in terms of the proportions set out and/or determined in accordance with Clause 27 of the trust deed, to fund the

[188] *Ex Parte Nkala*, para 5.
[189] *Ex Parte Nkala*, para 22.

payment of benefits to be made by the Trust. Their liability to fund the Trust is unlimited and is secured by guarantees to the Trust, which, collectively, amount to R5 000 000 000 (R5 billion). Clause 8.3 of the trust deed provides that the Founders will also make a once-off initial (start-up) contribution of R5 000 000 (R5 million) towards the Trust administration in order to ensure that the Trust is in a position to commence its work as soon as possible after the settlement agreement's conditions precedent are fulfilled. The applicants are of the view that this amount will be sufficient for the Trust to establish the systems that are required and to begin screening claimants and processing claims. Thereafter the Founders will provide further payments to fund the administrative needs of the Trust, up to a maximum of R845 000 000 (R845 million). The determination of such needs will be done by the Trustees, assisted by experts.[190]

Benefits will be funded in the same way. In terms of the trust deed, the Founders are required to make initial contributions in an aggregate amount of R1420 000 000 (R1,42 billion), for the first 2 years of the Trust's life. Thereafter the Founders will provide further payments to fund the amounts required by the Trust to pay benefits to eligible claimants. The Trustees, on an annual basis and duly assisted by experts, will determine the contributions that are payable by the Founders to enable the Trust to settle the benefits that will be due to eligible claimants. If there is a shortfall in the amount that has been determined by the Trustees for a particular year, the Founders will pay the additional amount determined by the Trustees. The trust administration funding and the benefits funding are separated to ensure that the money intended to pay eligible claimants is not used for administration expenses or for any other purpose.[191]

The Founders have incorporated an agent ("the agent") for purposes of representing them in certain matters governed by the trust deed. The class lawyers have appointed Mr Richard Spoor ("Mr Spoor") to represent the

[190] *Ex Parte Nkala*, para 23.
[191] *Ex Parte Nkala*, para 24.

claimants' interests in certain matters governed by the trust deed ("the claimants' agent"). The agent and the claimants' agent bear joint responsibility to nominate experts who will be called upon to resolve disputes that may arise relating to contributions made by the Founders. The agent and the claimants' agent are also responsible for the appointment, replacement and removal of trustees under defined circumstances. The consent of both agents is required for any amendment to the trust deed, provided that no amendment adversely affects the rights of eligible claimants. The agent and the claimants' agent must meet annually with the trustees to assess the efficiency with which claims are processed and to consider improvements that can be made.[192]

The Trust will be administered by no less than five and no more than seven trustees at any given time. The trustees are charged with the administration of the trust within the confines of the trust deed and the Trust Property Control Act 57 of 1988 ("the Trust Property Control Act"). They have a fiduciary duty to ensure that eligible claimants receive the benefits to which they are entitled in terms of the trust deed. The trustees are vested with the power, and are obliged to, *inter alia,* administer the trust funds in the interest of the beneficiaries: to locate claimants; to ensure that claims are properly managed and processed; to see to it that benefits are paid to eligible claimants; and to conduct reviews and dispute resolution. The trustees are obliged to establish a Trust Advisory Committee, which is to comprise of representatives from government, trade unions, community leaders, non-governmental organisations, and any other bodies or entities which the trustees may appoint. The Trust Advisory Committee will meet at least twice each year to advise, give input, and raise concerns with the trustees on matters relating to the Trust.[193]

The Trust will receive claims for a period of 12 years and will operate for an additional period of 1 year to finalise any outstanding claims that were

[192] *Ex Parte Nkala*, para 25.
[193] *Ex Parte Nkala*, para 26.

lodged with it during the preceding 12 years. Dr Deborah Budlender ("Dr Budlender"), an independent policy researcher employed by RSI and AK, explained in her affidavit that the 12-year period takes account of the latency period for the possible contracting of silicosis. She is of the opinion that symptoms of the diseases will in all likelihood manifest during the lifespan of the Trust. We believe that a 12-year period will provide sufficient time to alert claimants to the existence of the Trust and to enable claimants to lodge their claims.[194]

The settlement covers all persons who qualify as members of the Settlement Classes. The Settlement Classes are broader and more inclusive than the classes that were certified in *Nkala.* It was necessary to amend the classes to include more mineworkers, to achieve better integration with the statutory regime under ODIMWA, and to recognise that compensation is payable under the settlement agreement only in respect of years worked on mines owned or controlled by the Settling Companies, and not on years worked on the mines of Non-Settling Companies.[195]

The Settlement Classes consist of two silicosis and two tuberculosis classes. Class 1 comprises all persons:

(a) who, as at the effective date are undertaking, or prior to the effective date have undertaken, risk work;
(b) who, on or before the effective date, have or will have contracted silicosis or will have been exposed to silica dust;
(c) who undertake or have undertaken risk work on one or more of the qualifying mines after 12 March 1965; and
(d) who are not listed in Schedule D of the trust deed (which comprise the named or identifiable groups of persons whose claims have been settled previously).[196]

[194] *Ex Parte Nkala*, para 27.
[195] *Ex Parte Nkala*, para 28.
[196] *Ex Parte Nkala*, para 29.

Class 2 comprises the dependants of any of the persons contemplated in Class 1 who is deceased as at the effective date.[197]

Class 3 comprises all persons:

(a) who, as at the effective date are undertaking, or prior to the effective date have undertaken, risk work;
(b) who on, before or after the effective date have or will have contracted tuberculosis; and
(c) who undertake or have undertaken risk work on one or more of the qualifying mines after 12 March 1965.[198]

Class 4 comprises the dependents of any of the persons contemplated in Class 3 who is deceased as at the effective date.[199]

One of the most important features in the definition of the Settlement Classes is the replacement of the term "underground mineworkers", used in the definition of the certification classes, with the term "risk work". During the negotiation of the settlement the parties agreed that the Trust scheme must cover mineworkers who performed work on the surface of the mine, where they could have been exposed to excessive dust levels - for example in a laundry where clothing of underground mineworkers is washed. "Risk work" for purposes of the Settlement Classes thus includes:

(a) ODIMWA risk work at controlled mines (should these be declared);
(b) All underground work, irrespective of whether it was performed at a controlled mine in terms of ODIMWA;
(c) Surface work where there is potential excessive exposure to silica dust, regardless of whether it was performed at a

[197] *Ex Parte Nkala*, para 30.
[198] *Ex Parte Nkala*, para 31.
[199] *Ex Parte Nkala*, para 32.

controlled mine in terms of ODIMWA and regardless of whether it was performed underground or aboveground.[200]

Benefits will be payable to eligible claimants with silicosis or tuberculosis or, where those persons have passed away, to their dependants or estates. The benefits paid under the settlement and trust deed are in addition to those payable under ODIMWA. Eligible claimants will be paid a specific amount depending on the nature and severity of the concerned mineworker's illness. Dr Budlender explains that applying standardised amounts per disease category is far preferable to a system in which each individual claimant's circumstances have to be determined and taken into account to determine the benefit payable to him or her. It is a more efficient and less costly scheme.

In respect of benefits payable to mineworkers suffering from silicosis, three degrees of disease are recognised by the trust deed. They are:

(a) Silicosis Class 1. Sufferers have mild lung function impairment i.e. less than 10% lung function impairment. The Trust benefit for this category of silicosis is R70 000. ODIMWA does not compensate for silicosis of this nature.
(b) Silicosis Class 2. Sufferers have moderate lung function impairment i.e. more than 10% and less than 40% lung impairment. Under ODIMWA, members of this class are considered to have Silicosis First Degree. The maximum compensation payable for Silicosis First Degree is R63 100. The Trust benefit for this category of silicosis is R150 000.
(c) Silicosis Class 3. Sufferers have serious lung function impairment i.e. more than 40% lung impairment. This corresponds with Silicosis Second Degree under the ODIMWA regime. The maximum compensation payable for Silicosis Second Degree is

[200] *Ex Parte Nkala*, para 33.

R140 506. The Trust benefit for this category of silicosis is R250 000.[201]

The trust deed also provides for a special award of up to R500 000, payable at the discretion of the trustees, to any person who is certified as having Silicosis Class 3. Such a person must have at least 10 years cumulative employment; must have undertaken risk work on one or more qualifying mine(s) during the qualifying period; and must have at least one of the following disease processes: progressive massive fibrosis for mineworkers aged less than 50 years; lung cancer; *car pulmonale;* or massive fibrosis involving the lungs or oesophagus.[202]

Provision is made for two categories of dependant silicosis claims. The first involves a "Dependant Silicosis Claimant Category A". Here, the claimant is the dependant of a mineworker who died during the period between 12 March 1965 and the effective date, and in respect of whom the Medical Certification Panel determines that silicosis was the primary cause of death. The benefit provided for "Dependant Silicosis Claimant Category A" under the trust deed is R100 000 per concerned mineworker. The second involves a 'Dependant Silicosis Claimant Category B". The claimant here is the dependant of a mineworker who died in the period between 1 January 2008 and the effective date, who does not satisfy the requirements in respect of category A, but in respect of whom the medical certification panel or the Trust Certification Committee determines that the deceased had Silicosis Class 2 or Class 3. This category caters for difficulties of proof, particularly in relation to showing that silicosis was the primary cause of death. The benefit provided for "Dependant Silicosis Claimant Category B" under the trust deed is R70 000.[203]

The Trust will pay benefits to tuberculosis claimants as follows:

[201] *Ex Parte Nkala*, para 37.
[202] *Ex Parte Nkala*, para 38.
[203] *Ex Parte Nkala*, para 39.

(a) *"Tuberculosis Claimant".*

This is someone who undertook risk work at a qualifying mine during a qualifying period for a cumulative period of at least two years between 1 March 1994 and the effective date; and who was diagnosed with tuberculosis while so employed or within 1 year of leaving employment. lf the lung function impairment caused by tuberculosis is in the *"first degree"* as defined in Schedule H to the trust deed, the benefit payable is R50 000 per affected person. By comparison, under ODIMWA the maximum compensation payable for 'first degree tuberculosis", is R63 100. If the Jung function impairment caused by tuberculosis is in the *"second degree"* as defined in Schedule H to the trust deed, the benefit payable is R100 000. Under ODIMWA, the maximum compensation payable for "second degree tuberculosis" is R104 506.[204]

(b) *"Historical Tuberculosis Claimant".*

This is someone who, between 1 March 1965 and 28 February 1994, undertook risk work at a qualifying mine during a qualifying period, for a cumulative period of at least two years; and who was issued with a *"tuberculosis certificate"* under the provisions of ODIMWA, while he was employed or within 1 year of his leaving employment. If the tuberculosis certificate does not *disclose* the degree of impairment, the benefit payable is R10 000. If the tuberculosis certificate discloses that the degree of impairment was in the *"first degree",* the benefit payable is R50 000. If the tuberculosis certificate discloses that the degree of impairment was in the *"second degree",* the benefit payable is R100 000.[205]

(c) *"Dependant Tuberculosis Claimant".*

[204] *Ex Parte Nkala*, para 40(1).
[205] *Ex Parte Nkala*, para 40(2).

This is the dependant of a mineworker with two or more years' cumulative service of undertaking risk work at a qualifying mine during a qualifying period and who is determined by the medical certification panel of the Trust as having had tuberculosis which was the primary cause of his death before the effective date, while employed or within 1 year of leaving his employment. The benefit provided for is R100 000 per affected worker.[206]

The Trust does not provide for progression of the disease condition and claimants will receive only one benefit. This represents a negotiated compromise between the parties. In exchange for removing the possibility of claimants filing new claims if their disease progresses, the parties agreed to increased values of the benefits payable in each disease category. The result has three advantages: First, it eases the claimants' administrative burden. This is important in light of the fact that most claimants are poor and live in rural and remote parts of Southern Africa. (Mr Spoor is of the opinion that very few, if any, would be likely to return to the Trust even if their disease were to progress.) Second, it ensures that claimants can receive meaningful compensation in a timeous manner. (Having regard to the mortality rates and advanced ages of qualifying claimants, Mr Spoor submits that it is preferable to secure higher benefits for them as soon as possible.) Third, it minimises the Trust's administration costs because the Trust will be able 'to focus its resources on locating, examining and paying as many eligible claimants as possible.[207]

The benefits are payable by the Trust as once-off, lump-sum payments. Dr Budlender discusses the comparative benefits of this method of payment in her affidavit and opines that the choice of lump sum awards rather than recurrent payments is more cost effective than paying benefits in monthly instalments. It also gives ex-mineworkers and their families more control over the use of their money. Trust benefits will be adjusted annually, from the last day of the month on the third anniversary of the payment date (the

[206] *Ex Parte Nkala*, para 40(3).
[207] *Ex Parte Nkala*, para 41.

payment date is the last day of the calendar month immediately following the calendar month in which the effective date falls), in accordance with the Consumer Price Index for the preceding year. The trustees are required to establish a financial literacy programme to assist claimants to manage their awards and must also establish a fraud protection programme.[208]

Claimants who are alive as at the effective date but who die before submitting a claim, or who die after submitting a claim but before their claim is paid, will be treated as living claimants and the full value of their claim will be paid to their estates. The process to be followed by claimants for submitting their claims to the Trust is set out in clause 12 of the trust deed. Two reviewing authorities shall be established to resolve disputes lodged by a claimant (within 30 days) over determination in the claims process (clause 12.15 of the trust deed).[209] These are:

(a) The Medical Reviewing Authority, which will hear and resolve disputes over any certificate of medical finding or medical ineligibility by the Medical Certification Panel. The Medical Reviewing Authority shall be an independent medical practitioner appointed by the trustees, with wide investigative powers and the power to confirm and uphold or rescind a certificate of medical finding (clause 12.15.5 of the trust deed);

(b) The Certification Reviewing Authority will hear and resolve disputes over any certification of eligibility or non-eligibility by the Trust Certification Committee. The Certification Reviewing Authority shall be an independent person appointed by the trustees with wide investigative powers and the power to confirm and uphold or rescind a Trust certification (clause 12.15.6 of the trust deed).[210]

We accept, as a starting point, that the settlement agreement is not intended to, and could never make full redress for the loss and harm

[208] *Ex Parte Nkala*, para 42.
[209] *Ex Parte Nkala*, para 43.
[210] *Ex Parte Nkala*, para 44.

> suffered by gold mine workers, their families and communities over the last 100 years as a result of the epidemic of lung disease that afflicted them, and the system of migrant labour and racial discrimination that sustained this epidemic. It is therefore important to recognise that, as with all negotiated settlements, the settlement agreement represents a compromise between the parties and their competing interests. The settlement is a private legal settlement of the civil claims of the class members, represented by the class representatives and the class lawyers on the one hand, and the Settling Companies on the other.[211]
>
> The class representatives filed affidavits in which they have all expressed their support for the settlement agreement. They indicate that they are anxious for the settlement to be concluded as speedily as possible, so that members of the Settlement Classes - many of whom are very ill and elderly - will receive compensation in their lifetime. Nobody has suggested that the settlement is not in the interests of class members. We believe that settling the class action is more beneficial for the litigants than litigating the claim. The settlement arrived at caters for the best interest of the applicants and is fair, adequate and reasonable.[212]

Another important case that has seen an attempt to undermine land rights of the African people located in the Xolobeni area of the Eastern Cape is that of *Baleni and Others v Minister of Mineral Resources and Others*[213]

> The Constitutional Court in *Daniels v Scribante & Another* has added its voice to the recognition of the fundamental link between the dignity of African people and communities with their land - their "most treasured possession" - by commencing its judgment with a quote from the passionate and painful words uttered by an old man, Mr Petros Nkosi:

[211] *Ex Parte Nkala*, para 48.
[212] *Ex Parte Nkala*, para 90.
[213] *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 289; [2019] 1 All SA 358 (GP); 2019(2) SA 453 (GP) (22 November 2018).

"The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world".[214]

On the Wild Coast there is an area called Umgungundlovu. It is a coastline area of immense natural beauty. The sands on this beautiful coastline are also rich in titanium. Several hundred people (the applicants) and their ancestors have lived on this land according to their customs and traditions for centuries. Living in this area are about 70 to 75 households known in isiMpondo as "imizi" comprising of more than 600 individuals. These imizi include approximately 307 adults and 315 children. The applicants include representatives of 68 of these imizi comprising of 128 adults.[215]

It is not in dispute that the applicants hold informal rights to the land as defined by the Interim Protection of Informal Land Rights Act ("IPILRA") and that they occupy their land in accordance with their law and custom. The applicants' account of the "living customary law" applicable in respect of this land is also not disputed by the respondent parties.[216]

An Australian Mining Company (the Fifth Respondent - Transworld Energy and Mineral Resources (SA) Pty Ltd - "TEM") wants to mine the titanium-rich sands under the Xolobeni Mineral Sands Project. To this end TEM has applied for a mining right for titanium ores and other heavy minerals in the Xolobeni area, Eastern Cape. The disputed area (the proposed mining

[214] *Baleni*, para 1.
[215] *Baleni*, para 2.
[216] *Baleni*, para 3.

area) comprises of some 2 859 hectares and comprises a strip of land over a coastal land of some 22 kilometres long and 1,5 kilometres inland from the high water mark. The vast majority of the applicants, together with their families live within or in close proximity of the proposed mining area.[217]

TEM intends to conduct open-cast mining activities on some 900 hectares of land within the mining area. The mode of excavation will require the establishment of a number of plants and operations including wet separation plants and the accompanying slimes dams and tailing dams. The rest of the area will be taken up by power lines, access roads, offices, stores, accommodation for a number of employees and the like.[218]

This application is currently the subject of an eighteen-month moratorium imposed by the Minister of Mineral Resources (the first respondent - "the Minister") in terms of section 49(1) of the Minerals and Petroleum Resources Development Act ("MPRDA"). The moratorium came into effect on 9 June 2017 and has the effect of suspending the obligations of the Minister and the Department of Mineral Resources. The Minister's motivation for imposing the moratorium is the "social and political climate at Xolobeni and the social disintegration and highly volatile nature of the current situation in the area". The other respondents are the Director-General- Department of Mineral Resources (the second respondent): the Deputy Director- General: Mineral Regulation Department of Mineral Resources (the third respondent); the Regional Manager: Eastern Cape- Department of Mineral Resources (the fourth respondent); the Minister of Rural Development and Land Reform (the sixth respondent) and the Director-General - Director of Rural Development and Land Reform (the seventh respondent).[219]

Most of the affected imizi in the area are related by blood or by marriage and have lived in this area for generations. The overwhelming majority of

[217] *Baleni*, para 4.
[218] *Baleni*, para 5.
[219] *Baleni*, para 6.

these families have family graves in the area and are considered to be essential sites for family and community rituals. The Umgungundlovu community is therefore made of the collection and intertwined relationships between the living and the dead.[220]

This community is no stranger to adversity and in earlier years this community was also faced with attempts to remove them from their land and to relocate them. They have successfully resisted these attempts precisely because of the fact that such a relocation would result in them leaving behind the graves of their ancestors.[221]

The Umgungundlovu community enjoys a rich cultural life and are proud of their membership of the greater Amadiba Traditional Community and the amaMpondo nation. They take pride in their long history of occupying, owning and using their land. According to the papers, the history of this community stretches as far back to the early 1800's when their forebears established settlement on this land after they had emigrated from Zululand to escape the conquests of the Mfecane that sought to subdue and incorporate autonomous territories into Zulu domain. It was since these early days that this community has continued to pay observance to and application of the precepts of their customary law in respect of their everyday lives. The customary law that can be traced back to their forbearers, is passed on from one generation to the next through oral tradition and practice and continues to be sacrosanct to the life of this community.[222]

Land, according to this community's customary law, accrues to persons by virtue of them being members of the Umgungundlovu community. In order to protect their continued way of life on this sacred land, land applications by outsiders are subjected to robust assessment processes in order to preserve and protect the interests of this community. Decisions according

[220] *Baleni*, para 7.
[221] *Baleni*, para 8.
[222] *Baleni*, para 9.

to the customary law of the Mpondo community, typically does not take place on a majoritarian basis and decisions are seldom taken on the basis of a majority vote: Often a higher degree of consensus and circumspection is required to pass a decision in respect of issues that has the potential of conflict and division.[223]

The community further strongly opposes this proposed mining on the basis that they fear the disastrous social, economic and ecological consequences of mining. The community also strongly opposes the influx of outsiders coming to live in their community and is concerned that they will overwhelm their way of life and that they may introduce social ills that are often associated with mining activities.[224]

The community of Umgungundlovu is therefore strongly opposed to the proposed mining activities of TEM on the basis that it will not only bring about a physical displacement from their homes, but will lead to an economic displacement of the community and bring about a complete destruction of their cultural way of life. They further tell the Court that the proposed mining activities of TEM threatens to tear their community apart and leave them divided, insecure and vulnerable. Even before mining has commenced, this community already feels threatened and vulnerable and left out by the process which culminated in the awarding of mining rights to TEM. According to the applicants, TEM has made no effort at all to present a proposal to the community as to how they plan to mitigate the impacts of the proposed mining activities on individual families and the community. In the absence of any cogent, considered and concrete proposals from TEM as to how these potential catastrophic impacts will be mitigated or compensated, this community further tells the Court that they cannot consent to mining on their land.[225]

[223] *Baleni*, para 10.
[224] *Baleni*, para 14.
[225] *Baleni*, para 18.

Whilst recognising that mining can provide benefits to communities, the Foundation tells the court that, in their experience and in light of various studies in respect of mining on communities, communities are vulnerable to grievous harm that often outweighs any gains. For this reason, they hold the view that communities should be empowered to determine whether mining should take place on their land. To this extent the Foundation associates itself with the international movement to require free, prior and informed consent before mining activities may occur on community land.[226]

I have already mentioned the volatile situation that exists in this community as a result of the granting of mining rights to TEM. This opposition by some of the community members has created friction within the community. Under the umbrella of an association called the Amadiba Crisis Committee, the community opposes the mining and the mining rights application. It was also as a result of these tension that a moratorium was placed on the application.[227]

The divisions within the community is perpetuated by the allegations that iNkosi Lunga Baleni ("Baleni") who was once a staunch opponent of the proposed mine, now supports the proposed mining. He has, according to the papers, accepted a vehicle belonging to TEM and is a director of XolCo and TEM respectively. Baleni's subsequent turnabout has served to intensity conflict and dissatisfaction in the community. When directors of XolCo and their associates tried to gain access to the proposed mining site in 2015, violence erupted. On 28 May 2015 an interim interdict was granted against certain XolCo directors and their associates preventing them from intimidating, victimising, threatening and assaulting members of this community and from bringing firearms to community meetings. This interdict was subsequently discharged. Violence again erupted in December 2015 when a group of mining opponents were assaulted by a group of mining supporters.[228]

[226] *Baleni*, para 20.
[227] *Baleni*, para 21.
[228] *Baleni*, para 22.

On 3 February 2016 the community received a redacted copy of the mining right application from TEM's attorneys. An objection in terms of section 10 of the MPRDA was thereafter filed. The community thereafter got word that drilling would commence on 22 February and that if access was not allowed, force would be used. Drilling did, however, not commence apparently in an attempt to "hose down any potential violent confrontation between pro and anti-mining lobby groups". In March 2016 word got out that there was a hit list of mining opponents. That same evening a certain Mr Radebe was shot and killed by two unknown assassins which gave rise to speculation amongst the community about the motives for the killing.[229]

In the recent Constitutional Court in *Maledu,* the Court expressly considered the submission that the MPRDA and IPILRA are not in conflict with one another and that they should therefore be "interpreted and read harmoniously". More in particular, that court, with reference to the clear purpose of IPILRA, recognises the right of communities to decide what should happen to their land and that their consent is required before they may be deprived of their land:[230]

> "Mindful of our past, which was characterised by oppression, deprivation of a significant segment of our society and deep-rooted inequalities, our Constitution places a high premium on the absolute need to redress the injustices of that shameful past. In relation to those members of society who were denied equal access to land and security of tenure, section 25(6) of the Constitution sets out to redress the attendant inequalities. It provides in unequivocal terms that any "person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to tenure which is legally secure or to comparable redress". As is manifest from its preamble, IPILRA seeks to provide for the protection of certain rights to and interest in land that were

[229] *Baleni*, para 23.
[230] *Baleni*, para 77.

previously not otherwise protected by law. To provide such protection, IPILRA ensures that communities have a right to decide what should happen to land in which they have an interest. It offers communities legal protection to assume control over and deal with their land according to customary law and usages practiced by them.[231]

Most significantly, IPILRA provides that no person may be deprived of any informal right to land without his or her consent. Where land is held on a communal basis, a person may be deprived of such land or right in land in accordance with the custom or usage of the community concerned, except where the land in question is expropriated.

However, in instances where land is held on a communal basis, affected parties must be given sufficient notice of and be afforded a reasonable opportunity to participate, either in person or through representatives, at any meeting where a decision to dispose of their rights to land is to be taken. And this decision can competently be taken only with the support of the majority of the affected persons having interest in or rights to the land concerned, and who are present at such a meeting."

Lastly, granting special protection to these communities by requiring consent as oppose to mere consultation is in accordance with international law. Multiple international instruments require that communities such as the applicants have the right to grant or refuse their free, prior and informed consent to any mining development that will significantly affect them. In terms of the *General Recommendation No. 23: Indigenous Peoples issued in terms of the* Convention on the Elimination of All Forms of Racial Discrimination it is recognised that:

"The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in

[231] *Baleni*, para 77.

particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized."[232]

In recognition of this fact, the following recommendation is made to States, with particular reference to the indigenous peoples right that no decision will be taken affecting their rights without their informed consent:

The Committee calls in particular upon States parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent; ...[233]

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not

[232] *Baleni*, para 78.
[233] *Baleni*, para 79.

possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."[234]

In terms of the International Covenant on Economic Social and Cultural Rights it was similarly held in its 2009 General Comment 21 that-

"States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories."[235]

The Human Rights Committee, in terms of the International Covenant on Civil and Political Rights, held in a matter that served before it *Angela Poma Poma v Peru,* that it constituted a violation to culture and religion where the indigenous Aymara peoples consent was not obtained prior to depriving them of access to water. It held that-

"In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision - making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."[236]

[234] *Baleni*, para 79.
[235] *Baleni*, para 80
[236] *Baleni*, para 81.

> Lastly, although the African Charter does not expressly provide for the concept of free, prior and informed consent, the bodies responsible for the interpretation of the Charter (the African Commission on Human and People's Rights and the African Court on Human and People's Rights) have held that, having regard to the provisions of the African Charter, no decisions may be made about people's land without their free, prior and informed consent.
>
> In the event the following order is made:
>
> It is declared that the First Respondent lacks any lawful authority to grant a mining right to the Fifth Respondent in terms of section 23, read with section 22 of the Mineral Petroleum Resources Development Act 28 of 2002, unless the First, Sixth and Seventh Respondents have complied with the provisions of the Interim Protection of Informal Rights to Land Act 31 of 1996.
>
> It is declared that in terms of the Interim Protection of Informal Land Act 31 of 1996, the First Respondent is obliged to obtain the full and informed consent of the Applicants and the Umgungundlovu Community, as holder of rights in land, prior to granting any mining right to the Fifth Respondent in terms of section 23, read with section 22 of the Mineral Petroleum Resources Development Act 28 of 2002. The costs of this application are to be paid, jointly and severally by the first, second, third, fourth and fifth respondents.[237]

The *Nkala* case is an important milestone in terms of class suits in South Africa but it falls squarely within the pattern of settlements from MNCs to the victims which is ordinarily made after long protracted legal battles that is costly in terms of money and human capital. This case comes after many years of deliberate or negligent disregard for human rights language whilst exalting profits for MNCs with the aid of state that

[237] *Baleni*, para 84.

either is negligent or are deliberate with regard none-enforcement of labour rights and other constitutional provisions such as the right to dignity.

The *Baleni* (Xolobeni) case has demonstrated an important civic activism that prohibited the power of MNCs and the state's complicity in the acquisition of mining rights at the expense of communities. It is also important to note that the African Charter was found to be inadequate when it came to the question of explicit requirement of consent of the community that would be affected by mining activities. Moreover, the negation of the human rights language by the state and the MNCs is indicative of how many violations of rights occur in the Global South where the regulatory framework is weak in relation to the "pressures" of economic development of a particular country.

5.3 From the Royal Dutch Shell to the "Flames of Hell" affecting the Ogoni people of Nigeria

MNCs have been a source of controversy ever since the East India Company developed the British taste for tea and a Chinese taste for opium as mentioned earlier on.[238] Thus, the history of MNCs in African states and other Global South countries is marked by its origins in policies of imperialism and colonialism.[239] Nigeria was no exception as a developing country and this is because Nigeria has played host to MNCs long before independence till to date.[240] Although the number and activities of these MNCs have grown over time, Nigeria still struggles to develop socio-economically as a nation.[241]

The earliest MNCs entered the Nigerian jurisdiction during the colonial period under the British.[242] It is worth noting that Nigeria is a former British colony and the British colonial administration established the basis of the modern Nigerian legal and

[238] Osuagwu G O & Obumneke E (2013) "Multinational Corporations and the Nigerian Economy" *International Journal of Academic Research in Business and Social Sciences* Vol. 3, No. 4. 359.
[239] Eluka J, Uzoamaka N P & Ifeoma A R (2016) "Multinational Corporations and Their Effects on Nigerian Economy" *European Journal of Business Ethics and Management* Vol. 8, No 9. 59.
[240] *Ibid.*
[241] *Ibid.*
[242] McCulloch J & Tweedale G (note 145 above) 676.

institutional framework.[243] One of the major aims of the British colonial administration was to make the colonies self-sufficient and, at the same time, profitable.[244] An important early development in 1900 was that all mineral rights were nationalised and vested in the British crown and in 1907, contrary to widespread traditional practices of communal landholding, all land was also nationalised and vested in the British Crown.[245]

European countries needed a market for surplus products and a place to access cheap raw materials and labour. Therefore, Africa including Nigeria became the obvious destination because of their wealth in land and natural resources.[246] It is notable that the MNCs dominated the Nigerian economy before and after its independence.[247] Consequently, today, MNCs like the United African Company (UAC), Toyota motors, Coca-Cola, Lever brothers, Mobil oil, Shell BP, to name a few, dominate the landscape of Nigerian economy.[248] For instance, Nigeria is one of the largest producers of oil in the world which accounts for over 80 per cent of its income.[249] The profits from this sector does not benefit the people of the Nigeria, but the Global North in the main and the political elites are left with the crumbs.[250] To make matters worse, most of these MNCs have been fingered on several occasions playing active roles in the under development of Nigeria.[251]

It is true that Nationalisation concentrates power and it allows the distribution of wealth amongst people, historically, this was perfectly "necessary" for nationalisation for the British crown and her glory. This practice of nationalisation however is against the global economy in present Nigeria and this has resulted to her dismay.[252] Thus, control is vested in the "who" administers it. The policies of the colonial administration gave

[243] *Ibid.*
[244] *Ibid.*
[245] Amao O (2008) "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States" *Journal of African Law* Vol. 52, No. 1. 90.
[246] Eluka (note 239 above).
[247] *Ibid*; see also Chukwuemeka (note 49 above) 102.
[248] *Id* 59.
[249] *Ibid.*
[250] *Ibid*; see also Giuliani E and Macchi C (2014) "Multinational Corporations' Economic and Human Rights Impact on Developing Countries: a review and research agenda" *Cambridge Journal of Economics* Vol. 38, 480.
[251] *Ibid.*
[252] Amao (note 245 above).

the pioneer British companies free space in which to operate.[253] The MNCs operated under a favourable legal regime because of their links to the colonial power which legislated for the country.[254]

To exploit the Nigerian resources a British company, the Niger Company, set up the Naraguta Tin Mining Company under the charge of an engineer, HW Laws.[255] In 1904, HW Laws led a military campaign on the location of the resource, the Jos Plateau, and took control of the area from African people who were actively engaged in mining activities in that area.[256] Though there was no official policy statement by the colonial government as to the displacement of indigenous people by the company, Lord Lugard, the head of the British administration in Nigeria stated that "minerals can only be discovered and exploited by the science and capital of Europeans, and to them the government can provide at once more security and more control than native chiefs and can allocate the royalties for the good of the country as a whole".[257]

Amao asserts that:

> "Oil prospecting started in Nigeria in 1906, however, no legislation was introduced to govern the oil industry until the end of 1914 with the introduction of the Oil Ordinance no 17. Under this law, oil exploration and exploitation was limited to British citizens and British companies. In 1937, an exploration licence covering the whole mainland of Nigeria was granted to Shell-BP and the area covered was 357,000 square miles".[258]

The company was able to explore and select 15,000 square miles of the original concession without competition thus securing a first mover advantage over later entrants.[259] The company discovered oil in commercial quantity in 1958 in Oloibiri in

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[253] *Ibid.*
[254] *Ibid*; Wengraf L (2014) "Legacies of Colonialism in Africa: Imperialism, Dependence and Development" *International Socialist Review* Issue 103, available at https://isreview.org/issue/103/legacies-colonialism-africa (accessed 20 June 2018).
[255] Amao (note 245 above).
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid.*
[259] *Ibid.*

the present Rivers State.[260] By 1959, on the brink of Nigeria's independence, the sole-concessionary right granted to Shell-BP had been reviewed and companies of other Western nationalities were brought into the field.[261] Such companies include Mobil, Gulf, Agip, Safrap (now Elf), Tenneco and Amoseas (now Texaco and Chevron).[262] Under the Petroleum Profits Tax Ordinance introduced in 1959, an equal share of profit between the companies and the country was introduced for the first time.[263]

To compound the looting by the MNCs, successive Nigerian governments have continually denied the people of the oil-rich Niger Delta area of the country their economic, social and cultural rights and by extension their right to development.[264] The socio-economic discontent manifests itself in paramilitary criminality, hostage taking, the sabotage of oil installations and car bombings in the area.[265] This has resulted in substantial economic losses for the major beneficiaries of oil exploration in Nigeria namely, the MNCs operating in Nigeria and the Nigerian State.[266] The former include Shell Petroleum Development Company (Shell), Texaco, Total, Exxon-Mobil and Chevron.[267]

Activities of the above MNCs in Nigeria have generated a repulsive reaction from many economic theorists like Onimode, who regard MNCs as monsters that have consistently and systematically stultified economic development in various parts of the world.[268] Furthermore, Akor argues that in spite of the Nigerian Indigenization programme in the 1970's, the activities of the MNEs in Nigeria have sustained and intensified the contradictions of underdevelopment in many ways.[269] This view prompted Onimode to conclude that there is more myth than reality in the

[260] *Ibid.*
[261] *Ibid.*
[262] *Ibid.*
[263] *Id* 91.
[264] Yusuf H O (2008) "Oil on troubled waters: Multi-national corporations and realising human rights in the developing world, with specific references to Nigeria" *African Human Rights Law Journal*, Vol. 8, No. 1, 80; see also Bakre O M (2008) "Looting by the Ruling Elites, Multinational Corporations and the Accountants: the Genesis of Indebtedness, Poverty and Underdevelopment of Nigeria" available at http://visar.csustan.edu/aaba/Bakre2008.pdf (accessed 20 June 2018).
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid*; Calatayud MJT, Candelas JC and Fernandez PP (2008) "The Accountability of Multinational Corporations for Human Rights' Violations" *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* Vol 64, No 65, 181.
[268] Osuagwu (note 238 above) 360.
[269] *Id* 364.

developmental activities of the MNCs in Nigeria.[270] Onimode further argues stated that a thorough empirical analysis of the impact on the Nigerian economy and consciousness will reveal the following:

> "That the profit repatriation where most of the capitals in the form of profits are not invested in the country but sent to the home countries of MNCs for investment, thereby rendering Nigeria industrially underdeveloped. The royalties or pittance paid to the government by these MNCs cannot because of its meagreness be employed into heavy industrial projects. In brief, the MNCs export abroad the capital that would have been used to develop Nigeria. It is thus arguable that the MNCs distort the economy and the economic development in Nigeria because the capital needed for development is no longer here in the country but abroad".[271]

The underdevelopment of Nigeria is further entrenched by technological backwardness and it is in this area that MNCs are regarded as the worst culprits because it is in this sector that the MNCs play their greatest trick imaginable.[272] The MNCs by purporting that they help industrialize Nigeria create a branch-plant economy of small inefficient firms incapable of propelling overall development.[273] The local subsidiaries exist only as enclaves in the host economy rather than as engines of self-reliant growth.[274]

The MNCs as agents of colonial capitalism have been the same and objectively analysed, they never had the intention of developing Nigeria. The project of saving the savages has never died but has been just cloaked itself in "human rights" language. Furthermore, the non-binding international instruments have yet and will probably never amount to any serious disruption of MNCs' looting of Nigeria. Osuagwu asserts that:

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[270] *Ibid.*
[271] *Ibid*; Wengraf (note 254 above).
[272] Osuagwu (note 238 above).
[273] *Ibid.*
[274] *Ibid*; see also Udoka U E (2015) "The Impacts of Multinational Corporations to the Nigerian Economy" *International Journal of Social Science and Humanities Research* Vol. 3, No 2, 111-112.

> "MNCs operating in Nigeria intentionally and deceitfully introduce inappropriate types of technologies that hinder indigenous technological developments. These MNCs employ capital intensive productive techniques that cause unemployment. All these prevent the emergence of domestic technologies. Before the advent of the MNCs, in Nigeria, there were so many assorted types of technologies all over the country, although they were of low scale type. The MNCs rather than help them grow, knocks them off systematically through the introduction of more advanced technologies. The MNC both retain the control of the most advanced technology and do not transfer it to Nigeria or the rest of the developing economies at reasonable prices".[275]

This is how the Global North is under-developing Africa and this is a matter of past-present-future phenomenon which renders the dependence of Africa to be rooted in colonialism despite its "post-colonial status". Moreover, MNCs increase the mal-distribution of income in Nigeria and other Global South countries which feed into its global capitalism. The case of oil workers earning in a month what some federal civil servants earn in a year does not augur well with the development of the nation.[276] Therefore, the type of technology that the MNCs imports(ed) into Nigeria and to the Global South countries is the one that serves the few urban elite because it is only them that have the resources to get at it while the general populace continues to face stark underdevelopment.[277]

Thus, it defies logic when one considers that all the educated Africans and the African Chief Executive Officers put in charge of so-called developed countries in Africa have yet to acquire the requisite skills to independently grow Africa's economy. The diagnosis of this illogicality is simple in that a township dweller has the skills to trim the lawn of the madam in at the gated community. However, the same skilled lawn trimmer sees it as an insult to do it at his own village or township or even his house. Thus, this dilemma speaks to the state of the African mind in relation to his own love of self, more than incapacity.

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[275] *Id* 364.
[276] *Ibid.*
[277] *Id* 365.

Osuagwu and Obumneke identify structural distortion as one of the factors that stabilise the under-development of Nigeria.[278] The practice of industrialisation in an open economy of the Nigerian government has been to give the MNCs the freedom to choose their line of operations, the locations of their industry and other productive processes.[279] The MNCs natural base is usually in urban centres of the Nigerian society like Lagos, Kaduna, Enugu and Port Harcourt.[280] This urban concentration of MNCs distorted the structure of the society by enhancing an uneven "development".[281]

Another issue in Nigeria and indeed for the rest of Africa is the political instability. This is because MNCs require a stable host government, which of course is sympathetic to capitalism. Thus, they try as much as possible to protect the existing government whenever a reactionary leader or group seems to take over the government.[282] The MNCs try to maintain the status quo that is, dependent development which encourages the emergence of authoritarian regimes in the host country and go ahead to create alliances between international capitalist and domestic capitalist elites.[283]

It is on record that the MNCs kept President Mobutu of Zaire in power for so long because he was tutelage to them (MNCs) and they (MNCs) sucked dry the economy of Zaire.[284] The MNCs were equally responsible for the early exit and assassination of Patrice Lumumba because he would not allow their exploitative activities.[285] The same story is true of Captain Thomas Sankara of Burkina Faso and so many others.[286] So, the MNCs in Africa have gained much from the political instability.[287] Africa now has

[278] *Ibid.*
[279] *Ibid*; see also Chete LN, Adeoti JO, Adeyinka FM and Ogundele O (2011) "Industrial Development and Growth in Nigeria: Lessons and Challenges) *Nigerian Institute of Social and Economic Research (NISER)* 1, available at *https://www.brookings.edu/wp-content/uploads/2016/07/L2C_WP8_Chete-et-al-1.pdf* (accessed 23 June 2018).
[280] *Ibid.* The industries in these cities are mainly those of oil and consumer goods.
[281] *Ibid.*
[282] *Id* 365.
[283] *Ibid.*
[284] *Ibid*; Kinyanjui GJ (2013) *The New Scramble for African Resources as a Source of Conflict: A Case Study of the Sudan Conflict* (Master's thesis, University of Nairobi, Kenya) 16-17.
[285] *Ibid*; Gassama I J (2008) "Africa and the Politics of Destruction: A Critical Re-examination of Neocolonialism and Its Consequences" *Oregon Review of International Law* Vol. 10, No. 2, 328-329.
[286] *Ibid.*
[287] *Ibid.*

the greatest number of countries experiencing one kind of political crisis or the other.[288] In all these, the wicked hands of the MNCs and their home governments are glaringly present.[289]

Similarly, the Democratic Republic of Congo, which will be discussed in the following sub-theme in this chapter has been haunted by the Ghost of Leopold II and Belgium, as will be elucidated in a sub-theme in this chapter below. The Ghost is violent, terrorising the socio-economic and political stability of the DRC yet the mineral extraction is still fuelling the Global North countries unabatedly. The people of the DRC are, however, still tormented in the same way as if Leopold II still very much alive and they still face deprivation of livelihood and exploitation of the high order.

Gilpin notes that the domineering presence of the MNCs in Nigeria is characterised as constituting a form of "cultural imperialism or *coco-cola ization* of the society", through which Nigeria and the rest of the Global South countries lose control over their culture and social development.[290] These MNCs undermine the traditional values of the Nigerian society and introduce through its advertising and business practices new values and tastes inappropriate to the Nigerian nation.[291] A typical example in this regard is the introduction of foreign violent and crime-laden films and videos as well as pornographic materials into Nigeria.[292] It has been rightly observed that these foreign values are not only bad in themselves but are detrimental to the development of the country because they create demands for luxury and other goods that do not meet the true needs of the common masses.[293]

Therefore, the charge of cultural imperialism, despite its veracity, has to be stated at the same time that the very process of economic growth itself is destructive of traditional values, since it necessarily involves the creation of new tastes and

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[288] *Ibid*; Murithi T (2015) "Pan-Africanism and the Crises of Postcoloniality: From the Organisation of African Unity to the African Union" in Omeje K (2015) *The Crises of Postcolonialinity in Africa* (Council for the Development of Social Sciences Research in Africa, CODESRIA, Dakar); see also Korten DC (1998) "When corporations rule the world", European Business Review, Vol. 98, No. 1, available at https://doi.org/10.1108/ebr.1998.05498aab.007 (accessed 25 June 2018).
[289] *Id* 366.
[290] *Ibid.*
[291] *Ibid.*
[292] Osuagwu (note 238 above) 366.
[293] *Ibid.*

unaccustomed desires.[294] MNCs are inherently exploitative.[295] When one accepts the argument that MNCs are agents of capitalism then the inherent exploitative nature of capitalism and its negation of human rights language is well illustrated by the seminal case of *Wiwa et al v. Royal Dutch Petroleum et al*:[296]

> The Center for Constitutional Rights (CCR) and co-counsel from EarthRights International have brought three suits – *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson and Wiwa v. Shell Petroleum Development Company* – on behalf of the relatives of activists killed in relation to their activities for the protection of human rights and the environment in Nigeria. The suits target The Hague, Netherlands-domiciled Royal Dutch Petroleum Company and Shell Transport and Trading Company, merged in 2005 under the name Royal Dutch/Shell plc, the head of the corporation's operations in Nigeria, Brian Anderson, and the corporation's subsidiary in Nigeria, Shell Petroleum Development Company (SPDC).
>
> The defendants are accused under the ATCA and the TVPA of complicity in human rights violations against Nigeria's Ogoni people. The specific violations include summary execution, crimes against humanity, torture, inhumane treatment, arbitrary detention, murder, aggravated assault and subjection to emotional distress. The suit against Royal Dutch/Shell is also based on the Racketeer Influenced and Corrupt Organisations (RICO) Act, a federal law that aims to combat organised crime. Royal Dutch/Shell has worked since 1958 to extract oil from Nigerian soil in a region where the Ogoni people lived. The pollution resulting from the work has contaminated the agricultural land and water supplies upon which the regional economy depends. The plaintiffs allege that for decades, Royal Dutch/Shell worked with the Nigerian military regime to stifle all opposition to the company's activities. The oil company and its Nigerian subsidiary provided financial

[294] *Ibid.*
[295] *Ibid.*
[296] *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson and Wiwa v. Shell Petroleum Development Company*; see also De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 186, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).

and logistical support to the Nigerian police and bribed witnesses to produce false evidence.

In 1995, the parent company and its subsidiary worked together with the Nigerian government to arrest and execute the Ogoni Nine. This group included three leaders of the Movement for the Survival of Ogoni People (MOSOP) and the Commissioner of the Ministry of Trade and Tourism, a member of the Rivers State Executive Board. On the basis of false accusations, a special military tribunal tried the Ogoni Nine and they were hanged on 10 November 1995. Human rights defenders and political leaders alike have condemned both the killings and the failure to respect the victims' right to a fair trial. On behalf of the victims and relatives of the deceased, CCR filed suit on 8 November 1996 against Royal Dutch Shell and Shell Transport and Trading Company in the Southern District of New York. In 2000, the Court of Appeals acknowledged that the United States was an appropriate forum to decide the case. The court established personal jurisdiction with respect to Royal Dutch Shell/Shell Transport and Trade by virtue of their maintenance of offices in New York. District Court Judge Kimba Wood acknowledged the plaintiffs' ability to bring legal action under the ATCA, the TVPA and RICO.

In September 2006, Judge Wood admitted the charges of crimes against humanity, torture, prolonged arbitrary detention and abetting these crimes. He declared inadmissible the charges of summary execution, forced exile, and infringements of the rights to life, freedom of assembly, and freedom of association. The trial for *Wiwa v. RPDC and Wiwa v. Anderson* began on 26 May 2009. On 8 June 2009, following 13 years of proceedings in *Wiwa v. Shell,* the parties came to a settlement that covered all three cases. The terms of the settlement were released: U.S.D. 15.5 million in damages, the creation of a trust benefiting the Ogoni people, and the reimbursement of certain costs of litigation. The settlement is currently being implemented."[297]

[297] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 186, available at

The exploitative nature of MNCs has resulted in the local communities receiving little or nothing from the oil revenues generated from the Nigerian resources.[298] The Ogoni, an ethnic group of some 500,000 people living in the Niger Delta in the Rivers State, have long tried to change this unfair distribution and accused the oil companies of causing severe environmental damage in their region.[299] In particular this concerned Shell, due to its prominent role in oil exploration in the Delta.[300] But the Ogoni and MOSOP under the leadership of Ken Saro-Wiwa a playwright, former government employee, and environmental activist continued to attack Shell for the legacy it had left in Ogoniland and made Shell's responsibility for the local situation a worldwide issue.[301] Shell's troubles culminated when the tensions between Ogoni leaders and the Nigerian regime came to a head in 1995 with the execution of Ken Saro-Wiwa and eight other activists.[302]

Shell has been associated with what British Prime Minister John Major then called a ''judicial murder".[303] Although Shell's Chairman, Cor Herkstroter, had sent an appeal for clemency to the Nigerian government, the efforts on behalf of Mr Saro- Wiwa were widely perceived as lacklustre and insufficient.[304] Although the MOSOP campaign had generated unfavourable press coverage of Shell's operations in Nigeria for some time, the trial and execution of Ken Saro-Wiwa brought public attention to a climax.[305]

The arguments of Shell's adversaries converged on three issues: the environmental situation and the living conditions of the local population; the distribution of oil revenues; and the way in which Shell was involved in politics and exercised its own

https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).

[298] Holzer B (2007) "Framing the Corporation: Royal Dutch/Shell and Human Rights Woes in Nigeria" *J Consum Policy* Vol. 30. 287.

[299] *Ibid*; Osofsky H M (1996-1997) "Environmental Human Rights under the Alien Statute: Redress for Indigenous Victims of Multinational Corporations" *Suffolk Transnational Law Review* Vol. 20, 359.

[300] Holzer (note 298 above).

[301] *Ibid.*

[302] *Ibid*; Muchlinski P T (2001) "Human Rights and Multinationals: is there a problem?" *International Affairs* Vol. 77, No. 1. 41-42.

[303] Holzer (note 298 above).

[304] *Ibid.*

[305] *Ibid*; see also Newman D (2002) "*Wiwa v. Royal Dutch Petroleum Co*" *Int'l & Comp. Envtl. L*. Vol. 2, No. 3, available at htttp://www.earthrights/shell/ (accessed 25 June 2018).

agency.[306] The environmental damage caused by oil exploration was at the heart of the Ogoni campaign itself.[307] The description of the alleged damage was often rather brief and abstract, referring to environmental damage, industrial pollution, or oil spills from rusting pipelines.[308] While the contamination of soil and water by leaking oil probably has the most serious long-term consequences, the issue of gas-flaring proved to be a more powerful image.[309] Descriptions of the flaring of unwanted gas and pictures in TV documentaries and in an advertising campaign by environmental groups described a ‘‘hell on earth’’.[310]

There is an Ogoni song that goes, ‘‘the flames of Shell are the flames of hell’’.[311] Ogoni land is an ugly land to die for, black smoke hangs over it day and night and one must travel by boat through its creeks and marshland past rich palm forests and poor villages, chasing the dark plumes fly over by helicopter at night and the land looks like it is on fire.[312] Talk to people in the day and you realise the land is aflame.[313] Many newspaper reports about the roots of the conflict mentioned in the Ogoni demand for a fair share of their land’s oil wealth, for a slice of the pie, for a just distribution of the wealth.[314] The fact that most Ogoni have no electricity and no running water was contrasted with the fact that the military regime earns billions and that Shell makes good profits too - and with other oil producing communities which benefit from the oil exploration, most notably Kuwait.[315] For Phido, representative of MOSOP UK, the

[306] *Id* 290; see also Han X (2010) “The Wiwa Cases” *Chinese Journal of International Law* 433-449. 434.The operation of Shell's oil production devastated the local environment. Gas flaring and oil spills only aggravated the destruction. Owing to these circumstances, nine environmental and human rights activists led a movement in protest of Shell's egregious behaviour.
[307] *Id* 291.
[308] *Ibid.*
[309] *Ibid.*
[310] *Ibid.*
[311] Ogoni Protest Song circa 1970Gas Flaring “The flames of Shell are flames of hell We bask below their light Nought for us serve the blight Of cursed neglect and cursed Shell*”.* Available at http://priceofoil.org/thepriceofoil/human-rights/gas-flaring/ (accessed on 28 June 2018).
[312] *Ibid*; see also Palomaki A (2013) “Flames Away: Why Corporate Social Responsibility is Necessary to Stop Excess Natural Gas Flaring in Nigeria” *Colo. Nat. Resources, Energy & Envtl. L. Rev*. Vol. 24, No. 2, 506-508.
[313] *Ibid.*
[314] *Ibid.* 292.
[315] *Ibid*; see also Nwankwo B O (2015) “The Politics of Conflict over Oil in the Niger Delta Region of Nigeria: A Review of the Corporate Social Responsibility Strategies of the Oil Companies” *American Journal of Educational Research* Vol. 3, No. 4, 383-392. Available at http://pubs.sciepub.com/education/3/4/1/ (accessed 29 June 2018).

mismatch between Shell's profits and the situation of local communities also showed that oil production had turned out to be a curse rather than a blessing.[316]

Shell's operations in Nigeria led to its involvement in the domestic politics of Nigeria.[317] Shell stressed that it had no role as a government and was not responsible for the actions of the Nigerian regime and thus pursued the way of silent diplomacy to achieve a commutation of Saro-Wiwa's verdict.[318] The intervention of Shell, however, turned out to be rather feeble.[319] In a letter to Gen. Abacha, Shell's Chairman Cor Herkstroter appealed for clemency and a commutation of the sentences.[320] Shell insisted that a silent diplomacy approach should be more effective than direct pressure and it pursued this approach along with South African President Nelson Mandela, who also hoped to achieve a commutation of the sentences.[321]

Holzer asserts that:

> "Silent diplomacy was not exclusively used to the benefit of Saro-Wiwa. Rather, Shell had tried to stop the international campaign in exchange for an intervention on behalf of the writer. In a series of secret meetings with Ken Saro-Wiwa's brother, Owens Wiwa, the head of Shell Nigeria, Brian Anderson, had offered to use the MNCs influence on Nigeria's military regime to try to win freedom for Saro-Wiwa - if leaders in Ogoniland called off their appeal to Western consumers and global protests against Shell. When this conditional offer was publicised by Owens Wiwa and repeatedly reported, Shell's argument for non-interference fell apart. If Shell was in a position to offer such an intervention on terms favourable to the company, its assertions that it could not intervene in principle sounded hollow. Therefore, the view that Shell continued to collude with the military leaders appeared to be well founded".[322]

[316] See Interview with MOSOP, 11 November 2000.
[317] *Ibid.*
[318] *Id* 293.
[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*
[322] *Id* 294.

Shell's counter-arguments were mainly defensive and focused on the denial of responsibility.[323] The spokesperson stated that "Shell is only to a very limited extent responsible for the pollution of the Niger Delta environment", and this was one of the arguments regularly put forward by the MNCs.[324] Regarding the specific problems of Ogoniland such as environmental damage and rights abuse, Shell argued that its operations contributed to the development of the region through community projects and employment. However, neither the environmental problem nor the rights woes could be disputed.[325]

The public debate about Shell's role in Nigeria turned the MNCs into a symbol of the dubious alliances between military regimes and other MNCs.[326] However, the most salient framing did not concern the rights situation directly but the environmental degradation in the Niger Delta.[327] Similar to how ecology, "human rights" and distributional issues interacted on the ground in Nigeria, the respective framings gave credibility to one another on the discursive level of newspaper reporting.[328] The dismal situation and unfair treatment of the Ogoni people were rarely disputed.[329]

But, while Shell obviously preferred to attribute those problems in Nigeria to external circumstances (including the local state apparatus), its critics pushed for an internal attribution to the motives and agency of the MNCs.[330] Sykes and Matza asserts that what aggravated Shell's situation was the fact that it could not mobilize any higher reason to justify or neutralize its wrongdoings.[331] The only viable explanation for

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[323] *Ibid*; see also Udobong E E (2005) "Multinational Corporations Facing the Long Arm of American Jurisdiction for Human Rights and Environmental Abuses: The Case of *Wiwa v. Royal Dutch Petroleum*, Co. *Southeastern Environmental Law Journal* Vol. 14, No. 89, 96-97.
[324] *Ibid.*
[325] *Ibid*; Officially, Shell's reluctance to take an active part was justified by its business principles which rule out political activities (Shell 1997). Fending off the demands for an open engagement in domestic politics, Shell emphasized that it is ''not a political company and that a privately-owned, international enterprise cannot and should not intervene in domestic affairs.'' As Brian Anderson, head of Shell Nigeria, pointed out, "we are only here in order to do business." Thus, Shell sought to use its leverage with the regime to achieve a solution on the backstage. Yet, as this strategy did not work, Shell decided not to act at all without realising that inaction too may need to be legitimated if others attribute responsibility for its consequences.
[326] *Ibid.*
[327] *Id* 295.
[328] *Ibid.*
[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid*; see also Sykes G M and Matza D (1957) "Techniques of Neutralisation: A Theory of Delinquency" *American Sociological Review* Vol. 22, No. 6, 664-670.

Shell's behaviour and the one provided by Shell itself was the economic interest of doing business and providing Western consumers with affordable energy, an explanation that could only serve to increase the moral indignation.[332]

Consequently, politicians, celebrities and social movement organizations in both Europe and Africa supported calls to boycott Shell.[333] However, arguments against the legitimacy or efficacy of such a boycott were few and far between.[334] Finally, Holzer points out that if men define situations as real, they are real in their consequences.[335] Unfortunately, this has not translated in better or improved protection of rights of the Ogoni people but has breed organisations such as Boko Haram. The same is to be said about the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria.*[336] Though important for confirming the justiciability of socio-economic rights, the legacies of the human rights abuses appear to have no long lasting rights promotion and protection of peoples from the MNCs.[337] This is demonstrated by the case of *Bowoto v. Chevron*[338] which puts the agency theory as a mechanism to hold MNCs liable for human rights violations:

> "This decision recognises the applicability of agency theory and ratification theory (an alternative theory of liability which holds the principal liable for acts committed by the agent outside of its duties, provided the principal expresses agreement) to a suit brought under the ATCA to determine a parent company's liability for its subsidiary's activities. In May 1998, members of the Ilaje community attended a peaceful demonstration to draw attention to the disastrous environmental and economic harm local communities experienced due to the oil extraction activities of Chevron's

[332] *Ibid.*
[333] *Ibid*; see also Skogly S I (1997) "Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria" *Netherlands Quarterly of Human Rights* Vol. 15, No. 1, 50.
[334] *Ibid.*
[335] *Ibid.*
[336] (2001) AHRLR 60 (ACHPR 2001).
[337] Williams O (2012) *Case Study: Serac v Nigeria Examining the Role of International Law in Supporting Social Movement Goals* (Masters Thesis, American University in Cairo, Egypt) 10-11.
[338] *Bowoto v Chevron Texaco*, 2007 WL 2349336 (N.D. Cal. 2007) 15-16; see also De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 186, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).

Nigerian subsidiary. The event was organized on an oil platform off the Nigerian coast and ended with Nigerian security forces committing a number of abuses, including murder, torture and cruel, inhuman or degrading treatment.

The plaintiffs invoked several theories of liability, including agency. They alleged that the Nigerian government's security forces had acted as an agent of Chevron's Nigerian subsidiary, which in turn acted as an agent of the parent company, Chevron Corporation, and two Chevron companies domiciled in United States, Chevron Investments Inc. and Chevron USA, Inc. The plaintiffs argued that the parent company, Chevron, and its subsidiaries should be held liable for having provided material and financial support, for having controlled the Nigerian security forces and for having participated directly in the attacks.

The US court recognised jurisdiction under the ATCA and accepted the plaintiffs' proposed agency theory. The court ruled that an agency relationship could be inferred from the conduct of the parties and that the existence of the relationship is largely determined by the specific circumstances of the case. The Court recognised that sufficient evidence existed to establish that Chevron and its subsidiaries exercised "right of control" over the security forces they hired.

Although holding the principal legally responsible requires that the damage caused by the agent occurs in the course of the duties assigned to it by the principal, a contract breach by the agent does not necessarily exonerate the principal from liability. The Nigerian government could be considered as acting within the limits of the duties assigned to it, even if Chevron did not authorize the conduct in question in the following situations:

(a) A link could be reasonably made between the conduct and the duties Chevron had assigned to the government; or

(b) Chevron could reasonably expect such behaviour to occur given the violent past of the security forces. If the conduct goes beyond the scope of duties assigned to the agent, agreement between the parties could be found in a prior authorisation or subsequent ratification. If the parent company (principal) knew or should have known the facts and accepted the conduct of the subsidiary (agent) in question, it is to be held liable for the act committed by its agent. There are two required elements: knowledge and acceptance. The acceptance of previously unauthorized conduct can be established when;

(c) The parent company (principal) adopts the conduct of the subsidiary (agent) as an ”official act” of the company;

(d) The parent company (principal) provides assistance to the subsidiary (agent) to conceal the fraudulent conduct (Chevron Corporation published false reports of the facts in question and concealed the financial ties linking the subsidiary with the military);

(e) The parent company (principal) continues to use the services of the subsidiary (agent) following the conduct in question; or

(f) The parent company (principal) fails to take the necessary steps to investigate or halt the conduct in question. A parent company (principal) can thus be held liable for the activities of a subsidiary (agent) acting outside the scope of the duties authorized by the parent company at the time of the disputed facts. In November 2008, after examining the merits of the case, the jury did not recognize the liability of Chevron and its subsidiaries.

In 2003, a similar complaint was filed against Chevron in California courts. The companies won the trial in 2008. The decision was appealed to the Ninth Circuit Court of Appeals, the trial was held on 14 June 2010.

Dutch courts in Action: The Shell Nigeria case[339]

Two Nigerian farmers, Oguru and Efanga, residents of Oruma village in the Niger Delta state of Bayelsa, brought action with Milieudefensie (Friends of the Earth Netherlands) against Shell in Dutch courts. A leaking oil pipeline operated by Shell Nigeria contaminated farmland and drinking water near Oruma. Shell Nigeria also caused other harm, including causing fish farms to be unusable, forests to be destroyed and health problems among people in and around Oruma. The leak was not the first major oil leak Shell dealt with in its Nigeria operations.

Shell noted between 200 and 340 leaks per year between 1997 and 2008. Between 1998 and 2007 Shell Nigeria was responsible for 38% of Shell's oil spills in the world. On 8 May 2008, the victims notified Shell of their intention to hold the company liable in Dutch courts. On 7 November 2008, Shell was served a subpoena which detailed the disputed facts. Before the court examined the merits of the case, Shell requested a ruling on whether Dutch courts had jurisdiction to hear the case. On 30 December 2009, the Civil Court of The Hague seized jurisdiction. The trial was set for 10 February 2010, but was postponed because the plaintiffs sought more time to prepare. Proceedings resumed on 24 March 2010, at which time the plaintiffs filed a motion for disclosure, requesting that Shell provides them with a number of key documents. These documents would provide additional evidence to establish Shell's liability for the actions of its Nigerian subsidiary. The motion also called for the disclosure of specific documents related to oil leaks, information Shell has been highly reluctant to share in the past. Hearings are scheduled for summer 2010.

The relationship between Shell and Shell Nigeria

[339] De Schutter O (2016) 3rd ed "Corporate Accountability for Human Rights Abuses: A guide for Victims and NGO's on Recourse Mechanisms" *International Federation for Human Rights,* 186, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019); see also This information is largely pulled from Milieudefensie, "Documents on the Shell legal case", www.milieudefensie.nl/english/shell/documents-shell-courtcase (accessed 12 June 2019).

Royal Dutch Shell plc. (Shell), a multinational, operates as a single entity. Decisions are made at headquarters and all subsidiaries and partners must comply. Shell's environmental policy, as evidenced by a guide and the adoption of a "Health, Safety & Environment Policy" and "Global Environmental Standards", is managed and verified for compliance from the company's headquarters. Thus, all decisions relating to the multinational's policies have the ability to influence Shell Nigeria's operational conduct. As the sole shareholder, Shell exercises direct influence and absolute authority over the nomination of Shell Nigeria's CEOs. It was Shell's responsibility to appoint leaders with the experience and ability to repair or at least limit the harm resulting from oil production. This was the basis upon which Oguru, Efanga and Milieudefensie brought legal action against

Royal Dutch Shell plc and Shell Nigeria.

Shell Nigeria objected to appearing alongside Shell before a Dutch court and the court held that the two entities were not sufficiently connected for the court to be able to recognize jurisdiction over the subsidiary. Judges, Oguru, Efanga, and Milieudefensie cited *Freeport v. Arnoldsson* case in which the European Court of Justice held that a lack of offices or business premises in a particular state does not preclude the company from being brought before the courts of that state. Article 6, paragraph 1 of Regulation No 44/2001, provides that in cases with multiple defendants, a defendant may be sued in the jurisdiction where one of the defendants is domiciled, on condition that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". According to the ECJ, the fact that claims may be brought against several defendants on different legal grounds does not preclude the application of this provision. Together with Mileudefensie, two Nigerians, Chief Barizaa Dooh and Friday Alfred Akpan, filed two additional complaints on 6 May 2009. The Goi and Ikot Ada Udo cases accuse Shell of similar offenses in Dutch courts".[340]

[340] De Schutter (note 339 above)186.

Securities and Exchange Commission v. ABB Ltd,[341]

"In 2004, the SEC investigated ABB Ltd, a Swiss engineering group in Sweden. In its complaint, the SEC determined that between 1998 and 2003, ABB subsidiaries in the US and overseas seeking to enter into business relationships with Nigeria, Angola and Kazakhstan offered illicit payments of more than U.SD. 1.1 million to officials in those countries. According to the complaint, all of the payments were made to influence the actions and decisions of foreign officials in order to assist ABB's subsidiaries in establishing and maintaining business relationships in the countries.

The complaint further alleged that the payments were made with the knowledge and approval of certain members of staff responsible for managing ABB subsidiaries, and that payments worth at least $865,726 were made after ABB registered with the SEC in April 2001 and was from that point on subject to the SEC's reporting obligations. Finally, the complaint accused ABB of having poorly accounted for the payments in its books and records, and of failing to have implemented significant internal controls to prevent and detect such illicit payments.

The SEC held that in making the payments through its subsidiaries, ABB violated the antibribery provisions of the FCPA (Section 30A of the Securities Exchange Act of 1934). The SEC also held that ABB's improper recording of the payments violated the FCPA's relevant books and records provisions (Article 13 (b) (2) (A) of the Securities Exchange Act of 1934).

Determined to accept ABB's settlement offer, the SEC took into account the full co-operation that ABB provided SEC staff during its investigation. The Commission also considered the fact that ABB itself brought the matter to

[341] *S.E.C. v. Montedison*, S.P.A., Lit. Release No. 15164, 1996 WL 673757 (D.D.C., 1996). In this case, the SEC prosecuted the Montedison company for FCPA violations committed in the course of its activities in Europe. The court held that the company was liable; in De Schutter (note 338 above) 324, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).

the attention of SEC staff and the US Department of Justice. In 2004, the SEC ordered ABB Ltd. to pay a fine of $10.5 million and an additional sum of $5.9 million. In addition, ABB paid approximately $17 million in legal fees".[342]

In Nigeria like a typical Global South country, it experienced racialised economy and patterns of dependency on its former master based in the Global North still persist. This dependency is maintained by Global North MNCs and an inefficient language of human rights as demonstrated by the cases above where MNCs settle out of court their human rights violations. Without underestimating the settlement and how they signify some progress, the argument herein made is that this cases demonstrate how human rights language has not as yet found strong legal grounds for any victims of human rights violations perpetrated by MNCs to effectively utilise.

5.4 From Leopold II's Ghost to the World's largest Coltan producer leading to utter poverty: The sad tale of the Democratic Republic of Congo (DRC)

The Democratic Republic of Congo (DRC) is a peculiar nation indeed and it boasts as the second most prominent country in Africa for its rich natural resources which are enough to feed all of her people.[343] Furthermore, over 80 per cent of the world's supply of coltan[344] is mined in the DRC.[345] In contrast to the richness its natural resources, the DRC finds herself in seventh in Africa and number two in the world (2017) rankings of the poorest countries.[346]

The recorded history of the DRC from the perspective of the Human Rights Watch which is a Non-Governmental Organisation (NGO), describes the chronological history and significant moments of the DRC by assessing namely: Early history (1300s - 1800s), the Belgians (1870s -1959); Independence (1960 -1990s); War (1994 - 1999);

[342] De Schutter (note 339 above).
[343] "10 Most Mineral-Rich Countries in Africa" available at www.afkinsider.com (accessed 14 October 2017).
[344] Coltan is a dull metallic mineral which is a combination of columbite and tantalite and which is refined to produce tantalum.
[345] Lavery C "Plight of African Child Slaves Forced Into Mines – For Our Mobile Phones" available on www.laborrights.org (accessed 14 October 2017).
[346] "List on the Poorest Countries in Africa" www.answersafrica.com (accessed 14 October 2017); see also "30 Poorest Countries in the World" www.businessinsider.com (accessed 14 October 2017).

Failed peace efforts (1999 - 2003); Transition (2003 - 2006); and a New Government, but more conflict (2006 onwards).[347]

The 1300s was the period of the Kongo Empire, a highly structured and developed state, ruled over a region that today covers parts of south-western Congo, northern Angola and a slice of the Republic of Congo.[348] In the 1480s the Portuguese explorers arrived at the mouth of the Congo River establishing the first contact between the Kongo kingdom and Europe.[349] In the 1500s, the Atlantic slave trade impacted Kongo.[350] Over the next 300 years, more than five million slaves were captured from within several hundred miles on either side of the Congo River mouth with most of them shipped to Brazil.[351] In 1526, Kongo's King Afonso sent a letter to the Portuguese King João III imploring him to end the practice, stating his country is being "depopulated".[352]

The mission was clear and well executed towards having the acquisitions of the conquered peoples and thus have them work as cheap labourers in the MNCs for the development of so-called developed worlds. The remaining slaves would then be made to work for MNCs within the DRC. The legalisation of this exploitation was important for the coloniser not to fight with his fellow white man and had little to do with the subject of oppression, but the smooth relations between the masters.

The Belgians arrived in the 1870s with Belgium's King Leopold II having started his colonial project in central Africa and in 1871 the British explorer Henry Stanley - who navigated the Congo River to the Atlantic Ocean for King Leopold, opened it up as a trade route - giving the famous greeting to Doctor Livingstone, to a missionary, who had been out of contact for some time.[353] In 1885, Leopold announced the

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[347] DR Congo: Chronology (2009) available at https://www.hrw.org/news/2009/08/21/dr-congo-chronology (accessed 02 July 2017).
[348] *Ibid.*
[349] *Ibid.*
[350] *Ibid.*
[351] *Ibid.*
[352] *Ibid.*
[353] *Ibid;* See also Campbell A (2008) "A Short History of the Congo (Democratic Republic-DRC) *Information Secretary, Christian World Service.* Available on https://www.cws.org.nz/files/A%20Short%20History%20of%20the%20Congo.pdf (accessed 1 July 2017); Congo became the fiefdom of Belgium's King Leopold and then Belgian's colony. The resources it took were rubber, palm oil and minerals (mainly copper and gold).

establishment of the Congo Free State which was to be under his direct control.[354] The 1880-90s saw the Kuba kingdom resist against the foreign invaders (Colonisers), although Leopold's agents eventually enforced their authority up and until the late 1890s when Edward Dene Morel, a British journalist, began to expose the brutal system of slave labour used by King Leopold to profit from Congo's rubber and ivory.[355] A few years later, in 1904, he officially launched the Congo Reform Association, one of the 20th century's first international human rights movements to campaign for change in Congo.[356]

There has never been good intentions on the part of the colonisers to afford the so-called “human rights”. In actual fact it was impossible for how can the coloniser herself to create, formulate, ideologise, promote, and protect the human in the “human rights” when the subject was never human. It is indeed absurd to think that the Belgians could protect the Congolese from the Belgians themselves. This is the fallacy of so-called human rights particularly between the Master and the slave.

In 1902 Joseph Conrad's novella, “*The Heart of Darkness”*, based on his experience as a steamer captain on the Congo River, detailed the horror of Leopold's forced labour regime later, academic research established that Leopold's rule and its immediate aftermath, might have slashed as many as 10 million of the Congolese population.[357] In 1913, the industrial mining of copper began in the Katanga province and diamonds were discovered in Kasai, notably and even in the 1935s forced labour continued though less murderous than before.[358] The Belgian government set a requirement that all Congolese must do 60 days of compulsory labour each year until 120 days were reached per year and this gave rise in 1941 to the first labour strikes in major cities which were brutally repressed.[359] To a “colonial degree” 1948 saw the recognition of workers’ rights and the introduction of minimum wages and in 1959, the anti-colonial riots in Kinshasa (then called Leopoldville) began with demands for independence from Belgium.[360]

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[354] *Ibid.*
[355] *Ibid.*
[356] *Ibid.*
[357] *Ibid.*
[358] *Ibid.*
[359] *Ibid.*
[360] *Ibid.*

The African person in general has never obtained compensation or anything that resembled reparations for having been the subject of enslavement. To date the Congolese continue to leave below the poverty line, and thus this state of affairs is apportionment on the rebels and the government's corruption. Notably, the Congo gained independence in June 1960 and just before the handover, Belgium robbed the treasury and transferred the debt to the new Congolese government.[361] This colonial practice was not unique to the DRC as South Africa suffered the same fate since the colonisers looted and hid money and only left their debts and bad decisions to new governments. Still in the 1960s, Patrice Lumumba won Congo's first elections and became the coalition government's prime minister.[362] He attempted to steer a neutral course between the United States and the Soviet Union at the height of the Cold War. Furthermore, a secessionist movement were launched in the south eastern Katanga province, which was supported by the Belgians in an attempt to hive off the rich copper belt from the Congo state.[363]

In September 1960 Lumumba was removed from power and arrested in a coup d'état led by Col. Joseph-Désiré Mobutu with encouragement from Belgium and the United States.[364] It is still amazing that the DRC receives aid from the very same people who engineered the demise of thee single powerful leader of the peoples of the DRC.[365] Patrice Lumumba was shot in January 1961 by a firing squad with assistance from Belgian officials after a CIA attempt failed and his body was secretly buried but later dug up, cut up with a hacksaw and dissolved in acid in an attempt to cover-up the crime.[366] If one did not appreciate the mind-set of the coloniser and their murderous exploits of Africans, one would think the great leader Lumumba was a paedophile,

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[361] *Ibid.*
[362] *Ibid*; see also Gassama (note 285 above) 328.
[363] *Ibid*; see also Gassama (note 285 above) 329.
[364] *Ibid.*
[365] After years of neglect and conflict, small-scale coffee farmers in eastern Congo have tripled their incomes by improving yields, enhancing quality and attracting international buyers; An Unspeakable Act. A heoric Survivor; Stories to Inspire the End of Extreme Poverty. Read how a Congolese family recovers from sexual violence; DRC wildlife USAID helps rangers use GPS to combat animal poaching at the national park. DRC health clinics treat the physical and mental wounds of rape survivors, and teach crafts to boost their incomes. DRC Humanitarian Assistance USAID provides humanitarian assistance to people affected by conflict in eastern Congo. DRC Cassava USAID provides Congolese farmers with seeds and tools that increase cassava production. Available https://www.usaid.gov/democratic-republic-congo (accessed 19 April 2017).
[366] DR Congo (note 347 above).

rapist and a child serial killer.[367] On the contrary, this was a giant who wanted to be free and direct the natural resources of Katanga to his people to benefit like the Belgians and the rest of the world.[368]

Then in 1965, Mobutu seized power in a CIA-backed coup and brutally cracked down on political rivals by hanging some in public executions and thus remained president of Congo for 32 years.[369] The AFDL rebels and the Rwandan army seized Kinshasa and Laurent Kabila, the rebel leader, was installed as president in 1997.[370] As a result of this installation the country was renamed the Democratic Republic of Congo.[371] The period was characterised by the exploitation of diamonds in the DRC - May 2000 saw the diamond industry launching discussion with campaign groups in Kimberley, South Africa, on how to stop the trade in conflict diamonds.[372] In June, the UN established a panel of experts to investigate reports of the illegal exploitation of Congo's mineral wealth and its link with the ongoing conflict.[373]

In April 2001, the UN panel of experts on illegal exploitation published its first detailed report concluding that the Congo war had evolved into a conflict for access and control over minerals.[374] Although the UN panel of experts recommended sanctions against top military officials and companies involved in the illegal trade, no action was taken in this regard.[375] The UN call thus prompted for further investigations and in an updated

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[367] *Ibid.*
[368] Author's emphasis; see also Weissman SR (2014) "What Really Happened in Congo: the CIA, the Murder of Lumumba, and the Rise of Mobutu" *Foreign Affairs* 14-24.
[369] DR Congo (note 347 above).
[370] *Ibid.*
[371] *Ibid.*
[372] *Ibid.*
[373] *Ibid*; United Nations Security Council (2001) "Security Council Condemns Illegal Exploitation of Democratic Republic of Congo's Natural Resources" available at https://www.un.org/press/en/2001/sc7057.doc.htm (accessed 28 June 2018). According to the Panel of Experts, illegal exploitation of the mineral and forest resources of the DRC had taken place at an alarming rate in two phases. During the first phase of mass-scale looting, stockpiles of minerals, coffee, wood, livestock and money from territories conquered by the armies of Burundi, Rwanda and Uganda were taken and transferred to those countries or exported to international markets. The second phase was one of systematic and systemic exploitation, requiring planning and organization, the report states. That exploitation flourished because of the structures developed during the conquest of power of the Alliance of Democratic Forces for the Liberation of Congo-Zaire. It was carried out in violation of the sovereignty of the DRC, national legislation and sometimes international law, and led to illicit activities. Key individual actors, on the one hand, including top army commanders and businessmen, and government structures, on the other, have been the engines of that systematic and systemic exploitation.
[374] *Ibid.*
[375] *Ibid.*

mortality survey, the International Rescue Committee established that the total death toll in the Congo had increased to 2.5 million with huge losses among children.[376]

Further, the mortality survey conducted in April 2003 by the International Rescue Committee reported with the view of establishing the death toll of the Congolese civilians since 1998 was deemed to have risen to 3.3 million, the largest civilian death toll of any war since World War Two.[377] Moreover, Diab notes that Léopold II became of jealous that he did not preside over an empire like his cousin, Queen Victoria, across the Channel.[378] Léopold II spent years in search of a land that he could transform into his personal fiefdom.[379] During his private rule, an estimated 2-15 million Congolese died through forced labour and other forms of exploitation.[380]

In October 2002 the UN panel of experts on illegal exploitation published another report concluding the withdrawal of foreign troops since they were unlikely to curb the plunder of Congo's mineral wealth since elite criminal networks have been established to carry on the exploitation.[381] The panel listed 85 international MNCs that violated international business norms in Congo.[382]

The UN panel on illegal exploitation in October 2003 published its final report concluding that the plunder of Congo's mineral wealth is likely to continue to fuel conflict and cause immense human suffering if national and international measures to curb it are not put in place.[383] The panel recommended that UN member states investigate 33 companies it had previously listed. However, the UN passed no resolutions and ended the mandate of the panel without any tangible outcome.[384] The NGO, Human Rights Watch published 'The Curse of Gold', in June 2005 which was a

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[376] *Ibid.*
[377] DR Congo (note 347 above).
[378] *Ibid.*
[379] Diab K (2010) "Congo's Colonial Ghost" *The Guardian First published on Wednesday 21 April 2010 13.30 BST.*
[380] DR Congo (note 347 above).
[381] *Ibid*; see also United Nations Security Council (2001) "Security Council Condemns Illegal Exploitation of Democratic Republic of Congo's Natural Resources" available at https://www.un.org/press/en/2001/sc7057.doc.htm (accessed 28 June 2018).
[382] *Ibid*: see also Batware B (2011) "The Role of Multinational Corporations in the Democratic Republic of Congo" (MA Peace and Conflict Studies, EPU), available at https://acuns.org/wp-content/uploads/2012/06/RoleofMultinationalCorporations.pdf (accessed 29 June 2018).
[383] *Ibid.*
[384] *Ibid.*

report detailing the widespread human rights abuses linked to ruthless efforts by armed groups and MNCs to control and profit from gold mining areas in north eastern Congo.[385] As a result, Swiss company buying gold from Congo, criticized in the report, immediately announced that would halt its purchases.[386]

Moreover, UN human rights experts completed a report detailing serious rights violations committed by Kabila's presidential guards during the March fighting with Jean-Pierre Bemba's bodyguards in Kinshasa.[387] Top UN officials decided not to publish the report.[388] The complicity of the UN in deliberately resolving not to act resulted in the loss of lives by many Africans. In July 2008, the UN High Commissioner for Human Rights launched a six-month project to document the most serious human rights violations committed in Congo between 1993 and 2003.[389] The project was due to cover the controversial 1996-97 period when thousands of Rwandan Hutu refugees disappeared.[390] In the same year the British government concluded that two UK-based companies violated international business norms contributing to the brutal conflict in Congo and rights abuses.[391] This came five years after the UN panel of experts on illegal exploitation provided it with information and despite the damming report no criminal charges were brought against the company's executives.[392]

To date the world still depends on the DRC for over 80 per cent of its technological advancements and despite its enormous mineral wealth, the DRC is still one of the poorest countries in the world largely due to the uncontrolled and thuggery of the MNCs and its African political elites act of plundering its resources.[393] With a per capita

[385] *Ibid*; see also "The Curse of Gold" Congolese Gold Miner "We are cursed because of our gold. All we do is suffer. There is no benefit to us" available at https://www.hrw.org/report/2005/06/01/curse-gold (accessed 02 July 2018).
[386] *Ibid*
[387] *Ibid.*
[388] *Ibid.*
[389] *Ibid*; see also Norley MJR (2013) "The Complicity of Markets in Human Rights Violations" available at http://www.e-ir.info/2013/10/19/the-complicity-of-international-markets-in-the-violations-of-human-rights-in-undeveloped-states/ (accessed 01 July 2018). This content was written by a student and assessed as part of a university degree. e-ir publishes student essays & dissertations to allow our readers to broaden their understanding of what is possible when answering similar questions in their own studies.
[390] *Ibid*; see also Reyntjens F (2004) "Rwanda, Ten Years on: From Genocide to Dictatorship" *African Affairs* Vol. 103, 177-180.
[391] *Ibid.*
[392] *Ibid.*
[393] Diab (note 379 above).

GDP of around $100 per year, it comes close to the bottom of the well-being league, though its human development index is constantly rising.[394] In fact, the DRC is a classic example of the fragile African state which is based largely on colonial capitalism and the failure of the Congolese leaders to eradicate it.[395]

Although Belgium had undertaken that it would never grant independence to the DRC, international pressures and the fact that most countries in Africa were becoming independent ensured that it could not resist the trend.[396] So, in a matter of months from the beginning of 1960 it arranged for 'independence', which occurred on 30 June that year, though some Belgians said openly they would retain control of the economy.[397] The Belgians had a large army and police force with which to control the vast country which was the size of the whole of Western Europe and the Congolese were only privates and constables.[398]

Apart from a handful of NCOs in the army there were no local (Africans) trained officers.[399] When independence came, the soldiers and the policemen objected to being under the orders of "foreigners" and as a result revolt broke out which led to years of strife and instability.[400] Compounding this situation on the political scene, was the fact that with no experience of "democracy" people were often not willing to accept the apparent results of elections.[401] The Belgians had divided the country into provinces along tribal lines which proved a better way of control the counting and elections on a national basis were subject to rampant tribalism, leading to further instability.[402]

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[394] *Ibid.*
[395] *Ibid*; see also Tusalem R F (2016) "The Colonial Foundations of State Fragility and Failure" *Polity* Vol. 48, No. 04. 449-451.
[396] *Ibid.*
[397] *Ibid.*
[398] *Ibid*; see also First R (1970) *The Barrel of a Gun: Political Power in Africa and the Coup d'Etat* (first published by Allen Lane the Penguin Press and Republished in 2012 by Ruth First Papers Project) 78-79.
[399] *Ibid.*
[400] *Ibid.*
[401] *Ibid.*
[402] Campbell A (2008) "A Short History of the Congo (Democratic Republic-DRC) *Information Secretary, Christian World Service.* Available on https://www.cws.org.nz/files/A%20Short%20History%20of%20the%20Congo.pdf (accessed 1 July 2017).

Diab argues that apologists for Europe's colonial legacy and those afflicted with selective amnesia would like to believe, the reality is that Congo's colonial experience, as in so many other postcolonial states, has caused deep and lasting scars and thus handicaps the modern state.[403] Furthermore, Nzau aptly notes the situation of the DRC in 2010 and still today is a consequence of Belgian colonisation.[404] But, this link between European colonialism and the current turmoil in much of sub-Saharan Africa is not just a case of Africans looking for someone else to blame, as is so often claimed.[405]

In fact, the same link was explicitly made in the recent European report on development where it was asserted that the scramble for Africa is a natural candidate for the historical origin of the fragility plaguing many sub-Saharan African countries with the following consequences:[406]

(a) The first is their artificial character – the creation of colonial states introduced an element unrelated to the social, institutional and cultural characteristics of the colonised territories.
(b) The second is the extractive nature – the structure of state institutions was designed to transfer resources to the colonial power, not to foster local development.
(c) The third is their inherent extraversion – the state established tight economic links with the colonial power, in a relationship of political dependence.
(d) The fourth relates to indirect rule – a system of colonial administration initiated in the British Empire, but which was also used by Belgium and France in their colonies.

International outrage and one of the first major “human rights” campaigns in modern history led to the Belgian government taking Congo off Leopold's hands and annexing

[403] European Report on Development 2009, *Overcoming Fragility in Africa*, Robert Schuman Centre for Advanced Studies, European University Institute, San Domenico di Fiesole. Available on https://ec.europa.eu/europeaid/sites/devco/files/report-development-overcoming-fragility-africa-2009_en_5.pdf (accessed 15 September 2017) 50.
[404] *Ibid.*
[405] *Ibid.*
[406] *Ibid.*

it.[407] Although the worst human rights abuses ended, the main priority of the Belgian Congo, despite Belgium's earlier reluctance to enter the colonial game, remained the exploitation of the country's mineral wealth for the benefit of the Belgian economy.[408] During the period of direct rule, the European institutions and structures that were brought in took little account of local culture and conditions.[409] After independence, instead of reforming the state the local leaders simply took it over and thus alienated themselves from the population.[410]

The DRC is a civil law country and the main features of its legal system are still primarily based on Belgian law.[411] The DRC is party to the Cotonou Agreement which governs relations between the European Union and the developing countries in Africa, the Caribbean and the Pacific.[412] The agreement creates obligations for State parties to adhere to the Rule of Law and respect fundamental human rights.[413] The DRC is not unique in this precarious position where the destruction of the Africans' law has left only the coloniser's laws. For the African rulers, they parade the same colonial laws and primarily the so-called "the most wonderful" Constitutions in an attempt to remedy colonialism. The contention is made that it is impossible for the African to be independent whilst utilising the tools (Liberal Constitutionalism) of the very same oppressor.

On 18 February 2006 a new Constitution, ratified by the Congolese people in a referendum held in December 2006, came into effect.[414] The Constitution marks the entry of the DRC into a democratic era where respect for the rule of law and respect and promotion of rights would be the fundamental parameters of social and political life.[415] Despite the constitutional reforms in the DRC, the conditions of the Congolese

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[407] *Ibid*; see also Ya Kama L (2018) "The Hacked Hands of the Belgian Congo" available at http://en.lisapoyakama.org/the-hacked-hands-of-the-belgian-congo/ (accessed 01 July 2018).
[408] *Ibid.*
[409] *Ibid.*
[410] *Ibid.*
[411] Lopez C (2012) "Access to Justice: Human Rights Abuses Involving Corporations, The Democratic Republic of the Congo" *A Project of the International Commission of Jurists.* 4.
[412] *Id* 5.
[413] *Ibid.*
[414] *Ibid*; see also African Democracy Encyclopaedia Project, DRC: Constitution, available at https://www.eisa.org.za/wep/drc5a.htm (accessed 01 July 2018).
[415] *Ibid*; see also Johnson S P (2014) *King Leopold II's Exploitation of the Congo from 1885 to 1908 and its Consequences* (Honours Thesis, University of Central Florida Orlando, Florida) 65-66.

people have not changed and the MNCs continue the exploitative practices unabated even by the so-called constitutional democracy. The legal concepts governing companies in the DRC can be found in a series of decrees and ordinances compiled in the Civil Code and the commercial code.[416] The fundamental norm dates back to 1887 and was enacted as a Royal Decree by the Belgian King.[417] A number of decrees and laws focussing on aspects of business in the DRC have come afterwards but have not totally replaced the structure and fundamental concepts laid out by this old norm.[418] These norms are completely colonial and their new versions (Constitution) are meant to maintain colonial privilege.

The result of this utter dependence on colonial Belgian law is that the most likely cause of action against MNCs in relation to the Mining Code would relate to physical or economic displacement, loss or destruction of crops, environmental pollution, a reduction in access to water and contamination of water sources.[419] Despite numerous examples of such problems in Katanga, there are no known examples of affected communities having attempted to bring an action before a court of law seeking redress from a mining company.[420] This is because the DRC's judicial system is undergoing a process of restructuring in compliance with the mandate given by the 2006 Constitution.[421]

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[416] *Id* 6.
[417] *Ibid*; see also Kayihura D M (1974) *Corporate Governance and the Liability of Corporate Directors: the Case of Rwanda* (Doctoral Thesis, Utrecht University, The Netherlands) 40.
[418] *Ibid*; see also Democratic Republic of Congo: Policy, Plan and Priorities. The Poverty Reduction and Growth Strategy Paper (PRGSP) and the Government programme for the period 2007 – 2011 as detailed illustration of the PRGSP are the two documents guiding the economic and social development of the country, available at https://www.sadc.int/files/8413/9323/6347/DRC.doc (accessed 01 July 2018).
[419] *Id* 12.
[420] *Ibid*; see also Kayihura (note 406 above), All colonial Laws and Royal Decrees from Bruxelles were published in the Official Royal Journals of the Congo-Belge in Leopoldville. In Rwanda for example, the first specific domestic law to elaborate on the company's formation, functioning and procedures for its business and its dissolution was passed in 1988. It is not surprising though because, many business organisations that were really having the form and structure of a company were mostly state-owned companies. They were established by a special law which provides for the entire life of that company and consequently, there was no urgency in having a general law on companies. Besides, the colonial masters together with the Catholic Church highly dominated by the Belgians and the French were still dominating in all government spheres and thus, had all the interests to protect their domain. It should be noted that although the 1988 law was a domestic law, it had a lot in common with the French and/or Belgian company laws, with the exception that whereas the later had grown / evolved either due to some legislative amendments or through the judicial processes.
[421] *Ibid* 15.

Under the 2006 Constitution, three broadly defined jurisdictions co-exist:[422]

> "The ordinary jurisdiction (civil and criminal as well as labour matters), the administrative jurisdiction and the military jurisdiction. A *Conseil d'Etat* sits at the apex of the administrative justice system, while the Supreme Court will become a *Cour de Cassation* that would hear appeals from the ordinary courts and tribunals and the military justice. The Constitutional Court would hear appeals relating to jurisdiction from both the *Conseil d'Etat* and the *Cour de Cassation*. The system designed by the Constitution is complex and costly to implement and therefore, is likely to take a relatively long time to come into being. In the meantime, pursuant to article 223 of the Constitution, the current Supreme Court plays the role of Constitutional court and *Conseil d'Etat"*.[423]

The Constitution itself does not provide for special redress procedures that victims of a violation of constitutional rights may use.[424] The long and comprehensive catalogue of rights enshrined in the Constitution can only be enforced through procedures defined under ordinary legislation.[425] However, the Constitution establishes a Constitutional court, separate from the Supreme Court of Justice and provides for a "right to petition" the public authorities.[426] Under the Constitution individuals or communities may seek a remedy by petitioning the Congolese Government.[427] The petitioners may not be prosecuted as a result of taking such action.[428]

In principle, individuals or communities may petition national or regional authorities to take action to curb business activities by MNCs that harm rights and the environment. But these strategies rarely bear fruit and the redress may be limited to declaratory relief or suspension or cancellation of the MNC's operation (which could be challenged

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[422] *Ibid.*
[423] *Ibid.*
[424] *Ibid*; see also Mangu A M (2006) "The 2006 Constitution of the Democratic Republic of Congo" available at http://www.icla.up.ac.za/images/country_reports/drc_country_report.pdf (accessed 01 July 2018).
[425] *Ibid.*
[426] *Ibid.*
[427] *Ibid.*
[428] *Ibid.*

in court).[429] This was the case where the guarantees proclaimed by the Constitution were disregarded, in September 2006 when 29 villagers and local human rights activists in Bumba sent a petition to the government complaining of abusive logging by SIFORCO, the company reportedly filed a libel suit against the petitioners.[430]

The group had alleged that this foreign logging companies, with the collusion of the local authorities, had failed to protect the rights of the indigenous population and had violated the Constitution and the Forest Code.[431] In most instances, abuses by MNCs occur in the context of the different codes and therefore, require governmental administrative action.[432] There are few instances where the Government of the DRC was prepared to intervene to protect the rights of weak victims.[433]

Labour disputes, particularly abusive dismissals, are the cases most often brought to the attention of civil courts in Katanga.[434] However, most cases are settled through negotiations that sometimes bring about results that are not fully consistent with justice and human rights protection values.[435] Health and safety standards in many mining companies are generally regarded as inadequate and the behaviour of many managers and supervisors (both Congolese and foreign) may amount to gross negligence.[436] Abusive treatment of Congolese workers ranges from verbal aggression, bullying, beatings and in some cases extreme physical harm.[437]

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[429] *Ibid.*15.
[430] *Id* 16; see also Reynaers P (2011) "SIFORCO Involved in Violence and Human Rights Violations" *Greenpeace Africa* available at http://www.greenpeace.org/africa/en/News/news/SIFORCO-Involved-in-Violence-and-Human-Rights-Violations/ (accessed on 02 July 2018); Greenpeace International condemns the violence used against the forest community of Yalisika last month in SIFORCO's logging area in the territory of Bumba (Equateur Province), and calls for a thorough investigation into these atrocities. All liabilities must be formally established, including SIFORCO's role, the perpetrators punished and victims compensated. It was reported to Greenpeace that police and navy forces used excessive violence against local people from the Yalisika community in connection with a social conflict involving the logging company SIFORCO. Greenpeace, in collaboration with Réseau Ressources Naturelles (RRN) sent a team to the area to investigate.
[431] *Ibid.*
[432] *Ibid.*
[433] *Ibid.*
[434] *Id* 18.
[435] *Ibid.*
[436] *Id* 19; see also Elenge M M (2013) "Safety and Health in Mining in Congo (DRC) 94-102, available at https://gupea.ub.gu.se/bitstream/2077/32882/1/gupea_2077_32882_1.pdf (accessed 02 July 2018) in Elgtrand E K and Vingard E (2013) *Occupational Safety and Health in Mining: Anthology on the Situation in 16 Mining Countries* (University of Gotherburg).
[437] *Ibid.*

Local work-inspectors, police and even magistrates do not usually encourage Congolese employees to prosecute a company or foreign staff even for flagrant violations of workers' rights and Congolese law.[438] As a result, workers do not generally trust the police or judiciary to uphold their interests and would not in any event report incidents of abuse.[439] While disputes over non-payment of the minimum wage or other benefits involving private individuals and domestic staff are often resolved by the labour courts, this does not appear to be the case with disputes involving workers in Chinese smelters and processing plants.[440] Workers interviewed for a 2009 RAID study complained that they felt powerless and explained that lawyers were unwilling to take on cases *pro bono*.[441]

On 24 November 2009 the homes of some 500 families in the village of Kawama located about 20 kilometres outside of Lubumbashi were reportedly demolished without prior warning.[442] The operation, allegedly carried out by the mining company *Compagnie Minière du Sud Katanga* (CMSK) with the support of the police and the military, had been authorised by the Minister of the Interior of the Province.[443] CMSK alleged that minerals had been stolen from its concession by artisanal miners living in Kawama which it was trying to recover.[444] The operation saw the homes and belongings of long-term residents most of whom were engaged in agriculture destroyed.[445]

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[438] *Ibid*; see also Kelly A (2016) "Children as Young as Seven Mining Cobalt used in Smartphones, says Amnesty" *the Guardian,* available at https://www.theguardian.com/global-development/2016/jan/19/children-as-young-as-seven-mining-cobalt-for-use-in-smartphones-says-amnesty (accessed 02 July 2018). Amnesty International says it has traced cobalt used in batteries for household brands to mines in DRC, where children work in life-threatening conditions.

[439] *Ibid.*

[440] *Ibid.*

[441] *Ibid*; see also RAID (2009) "Chinese Mining Operations in Katanga, Democratic Republic of the Congo" 7, The field research in Katanga was carried out by Samentha Goethals of RAID with the assistance of Jean-Pierre Okenda of ACIDH (Action Contre l'Impunite pour les Droits Humains) and Raphael Mbaya of PADHOLIK (Plateforme des Activistes des Droits de l'Homme de Likasi) www.raid-uk.org (accessed 02 July 2018).

[442] *Id* 20.

[443] *Ibid.*

[444] *Ibid.*

[445] *Ibid.* In August 2010 villagers told RAID during a visit to the site that they had still not received any compensation and that they were living in temporary, precarious accommodation. Additional information dated October 2011 says that compensation had not been provided as yet. Some artisanal miners however had been given a payment by CMSK as an incentive to stop their illegal mining activities in the area.

An analysis and understanding of the reality and problems of justice and reparations in the DRC cannot overlook the role of the exploitation of natural resources in the generation and perpetration of armed conflict in the various regions of the country and in the perpetration of serious human rights violations which in certain cases amount to crimes under international law.[446] Along with the rest of Africa, the DRC lost a huge number of its strongest and best people to the slave trade which largely laid the foundations of the USA economy.[447] Campbell asserts that in a sense, the "African continent never fully recovered from that loss. The then European powers carved Africa up into colonies and extracted its resources for their own use and this was the basis of the industrial revolution and by extension of the African economy".[448]

In the 1950s and 60s most African countries achieved independence.[449] Many of them had previously had some form of self-government and thereafter, the people were getting used to elections and being governed by their own people.[450] Most of them had well-educated people and had university graduates in all the fields needed to run a country. However, the DRC had none of these skilled people.[451] There had never been an election until a few months before independence when local body elections were held.[452] In its whole history the DRC had fewer than 30 university graduates and most of them were priests trained by the Catholic Church.[453]

The situation in the DRC has not improved at all and it was reported in 2008 that nearly six million people have died as a result of conflict and conflict related causes in the

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[446] *Id* 26.
[447] Campbell A (2008) "A Short History of the Congo (Democratic Republic-DRC) *Information Secretary, Christian World Service.* Available on https://www.cws.org.nz/files/A%20Short%20History%20of%20the%20Congo.pdf (accessed 1 July 2017).
[448] *Ibid.*
[449] *Ibid.*
[450] *Ibid*; see also Authaler C and Michels S (2017) "Post-War Colonial Administration (Africa)" *1914-1918 International Encyclopaedia of the First World War,* available at https://encyclopedia.1914-1918-online.net/pdf/1914-1918-Online-post-war_colonial_administration_africa-2014-10-08.pdf (accessed 02 July 2018).
[451] *Ibid.*
[452] *Ibid.*
[453] *Ibid*; see also Jones O (2015) "Let's be Honest. We Ignore Congo's Atrocities Because it's in Africa" *The Guardian* 06 March, available at https://www.theguardian.com/commentisfree/2015/mar/06/ignore-congo-atrocities-africa-drc-horror (accessed 03 July 2018); For more than 100 years DRC has endured horror upon horror with barely any outcry. It wouldn't be allowed to continue elsewhere.

Congo since 1996.[454] Forty-five thousand continue to die each month.[455] Hundreds of thousands of women have been raped as a weapon of war.[456] What is at stake again is the mineral wealth, particularly in the Kivu Province which is the northeastern part of the country bordering Rwanda and Uganda.[457] Gold is the main object of mining operations which is mostly not extracted in the usual way by mining companies with machinery and trained operatives, by young men, boys really who work by hand to pan for the precious metal.[458] The conditions of these young men are man-made or put differently are made possible by MNCs together with the rebels and the governments and they sell it to middle men at low prices after which it is smuggled out of the country by others who take the biggest cut.[459]

At first sight it is difficult to understand why this situation is largely unreported and why very little has been done by the international community to put an end to it.[460] The answer lies to a great degree in the fact that the powerful MNCs which benefit from the illicit trade in minerals and especially in coltan have a hand in this.[461] The unbelievable explosion of the mobile phone industry around the globe could not be happening without the suffering and loss of the Congolese people.[462] It is in this vein that MNCs' complicity and disregard for rights is illuminated for profit's sake and rights never mattered when compared to colonial capitalism that fuels the world technological industries based largely in the Global North.

Trefon and the World Bank assert that corruption, mismanagement, insufficient institutional capacity and fundamental governance deficiencies have contributed to the

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[454] *Ibid.*
[455] *Ibid.*
[456] *Ibid.*
[457] *Ibid*; see also Muraya J Ahere J (2014) "Perpetuation of Instability in the Democratic Republic of the Congo: When the Kivus Sneeze, Kinshasa Catches a Cold" *The African Centre for the Constructive Resolution of Dispute* Occupational Paper Series: Issue 1. 7.
[458] *Ibid.*
[459] *Ibid*; see also Kelly A (2016) "Children as Young as Seven Mining Cobalt used in Smartphones, says Amnesty" *the Guardian,* available at https://www.theguardian.com/global-development/2016/jan/19/children-as-young-as-seven-mining-cobalt-for-use-in-smartphones-says-amnesty (accessed 02 July 2018). Amnesty International says it has traced cobalt used in batteries for household brands to mines in DRC, where children work in life-threatening conditions
[460] *Ibid*; see also Jones (note 447 above).
[461] *Ibid*; see also Momo A M (2017) "President Trump's Threats in Coltan Supply Chain Due Diligence Stunt Congo's 2020 Nation Branding Vision" *World Scientific News* Vol. 69, 87-88.
[462] *Ibid.*

poor results in the lucrative mining and forestry sectors in the DRC.[463] Furthermore, Afoaku, Samndong and Nhantumbo provide that the local population in Katanga – the DRC's key copper and cobalt producing region – for example, has yet to benefit from the region's resources.[464] There is currently a large gap between what should be paid in mining and forestry tax revenue and what is actually recorded (World Bank, 2008), and this due in large part to lack of transparency and accountability and fraudulent practices by the MNCs and government agencies.[465]

According to Keen the idea that wars are not fought to win but to engage in profitable crime remains a fundamental premise of the current conflict minerals debate. The past half-decade has seen the emergence of a growing community of practice to address the detrimental impact of the so-called "blood minerals" on local and global markets.[466] Dozens of (non-)governmental organisations working on the so-called "resource wars" increasingly aim at fostering peace in such environments through the formalisation of access rights and the traceability of natural resources "from mine to market" and this is often in collaboration with commercial partners.[467] While the aim of these organisations is to curb human rights abuse and war financing as a result of the commodification of natural resources by armed actors, a growing body of research has started to fundamentally question the underlying hypotheses stemming from this dominant narrative and its integration into practical policy proposals.[468]

De Schutter aptly articulates the position of human rights language in the DRC by narrating a story of MNCs accountability in the Congo-Brazzaville in the following fashion:[469]

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[463] Haider H (2015) "Political Economy and Government in the Democratic Republic of Congo (DRC) *Governance.Social Development.Humanitarian.Conflict.* Available at The original report was published in December 2010: http://www.gsdrc.org/docs/open/HD735.pdf (accessed 02 July 2018. This update looked at literature from then onwards.
[464] *Ibid.*
[465] *Ibid.*
[466] Vogel C & Raeymaekers (2016) "Terr (it) or (ies) of Peace? The Congolese Mining Frontier and the Fight Against "Conflict Minerals" Antipode Vol. 00 No. 0 2016 ISSN 0066-4812, 3.
[467] *Ibid*; see also Cramer 2002; Goodhand 2005; Verbrugge 2014.
[468] *Ibid*.
[469] De Schutter (note 339 above).

Complaint in Belgium against the French parent company of the former Elf Group suspected of complicity in serious violations of international humanitarian law committed in Congo-Brazzaville On 11 October 2001, three plaintiffs from the Congo lodged a civil complaint in a Brussels examining court against Sassou Nguesso, President of Congo-Brazzaville, for war crimes, crimes against humanity, torture, arbitrary arrest and kidnapping in the Congo, but also against the French parent company of the multinational oil company Total (formerly Elf) for involvement in the abovementioned offences. The plaintiffs sought to establish Total's participation in these crimes by demonstrating the company's financial and logistical support to Sassou Nguesso's repressive military regime.

The complaint was the first in Belgium to draw links between the Belgian Law of 4 May 1999 establishing the criminal liability of legal persons and the former Law of 16 June 1993 (amended on 10 February 1999) on the repression of serious violations of international humanitarian law. The complaint cited absolute universal jurisdiction with no requirement for minimal ties with Belgium, or even the presence of suspects on Belgian soil. This approach created exceptional opportunities for prosecution. Multinational corporations that were either directly or indirectly responsible for serious violations of international humanitarian law abroad could be brought before Belgian courts, regardless of the location of the parent company's headquarters or other entities which depend upon the parent company.

The French company was primarily criticised for having provided helicopters to armed militias. The plaintiffs cited the public testimony of French deputy No.l Mamere submitted at a 28 February 2001 hearing before the 17th Criminal Chamber of the Tribunal de Grande Instance of Paris (in *Denis Sassou Nguesso v. Verschave FX and Laurent Beccaria*). Mamere spoke of ethnic cleansing operations carried out in the southern districts of Brazzaville between December 1998 and late-January 1999. "These facts are proven, there were witnesses. Families were massacred; young Lari men were systematically accused of being part of the ninja

militias (in opposition to Sassou Nguesso's Cobras). From January to August 1999, entire regions in the south were virtually erased. I have no figures to give you, because I do not know the exact magnitude of the support Elf (Aquitaine) provided to Sassou Nguesso. I think you will hear more evidence of frightening things, such as massacres carried out from the helicopters upon which it was easy to read the Elf logo[...] Clearly, Elf did not limit itself to supporting Sassou Nguesso, the company also assisted Lissouba. It helps those who can serve its interests. This company acts only according to its interests [...] Evidence [...] clearly demonstrates the role of what might be called the armed wing of France's African policy, the Elf Group."[470]

In the meantime, the Assize Court of Brussels has ruled in a case involving logistical support economic actors provided in the commission of war crimes. Between 9 May 2005 and 29 June 2005, Belgium held its second trial for war crimes committed 11 years prior during the Rwandan genocide. Two notable traders from Kibungo and Kirwa were sentenced to 12 and 9 years imprisonment for having participated in the preparation, planning and carrying out of massacres largely committed by the Interaham . genocide militias (Hutu extremists). After the killings broke out, claiming some 50,000 lives in the Kibungo region, the two traders made their trucks and supplies available to the militias for their murderous expeditions. The repeal of the Law of 16 June 1993 and its replacement by the Law of 5 August 2003 had no effect on the proceedings. Given that the accused were on Belgian soil, the prosecution should be carried out in accordance with the 1949 Geneva Conventions on war crimes.[471]

The illegal exploitation of resources in the Democratic Republic of the Congo by the British Company Afrimex Ltd On February 20th 2007, the non-governmental organisation Global Witness filed a complaint with the

[470] *Ibid.*
[471] *Ibid.*

British NCP against the UK-registered company Afrimex.[472] It cited its activities in the Democratic Republic of the Congo between 1998 and 2007 as violating the Guidelines.[473]

According to Global Witness, Afrimex had contributed to the conflict in the DRC not only by paying taxes to rebel forces (in Goma, DRC) but also in buying minerals (specifically, coltan and casserite) from mines in which both forced and child labour working under deplorable conditions of sanitation and safety existed. Afrimex could not furnish evidence of having conducted due diligence vis-.-vis its supply chain. Global Witness relied on the reports of the UN experts on the illegal exploitation of natural resources in the DRC, which outlined the pivotal role of the private sector in the exploitation of these resources and the resulting impact in the continuation of the conflict. The experts' report of April 12th 2001111 characterises the implicated companies as being "the engine of the conflict in the Democratic Republic of the Congo" having "prepared the field for illegal mining activities in the country." In October 2002, Afrimex appeared in Annex III of the UN experts' report, which listed those companies that were violating the Guidelines.[474]

The NCP accepted the complaint filed under the specific instances procedure. The relationship between the three companies Afrimex, Kotecha and SOCOMI Afrimex operates in the DRC through the Congolese company Kotecha, which in turn operates in conjunction with the Congolese business SOCOMI. The NCP noted in particular the link between the CEOs of the three companies. This link was both of a familial and commercial nature: two of them (the directors of Afrimex and Kotecha) were shareholders in Kotecha, whilst the director of Kotecha was also head of SOCOMI. A special commercial relationship existed between Afrimex and Kotecha - the latter being the main client of the former.[475]

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[472] De Schutter (note 339 above) 365, available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf (accessed 12 June 2019).
[473] *Ibid.*
[474] *Ibid.*
[475] *Ibid.*

According to the NCP, Afrimex had therefore the potential to exert a decisive influence on both Kotecha and SOCOMI in the DRC. Consideration of previous factors prior to the revision of the Guidelines The current version of the Guidelines came into force in June 2000. Thus any injurious acts having occurred before that date should not, in theory, be referred before the NCP. However, the UK NCP accepts the retroactive application of the Guidelines provided that the parties have consented. This was not the case with Afrimex. Even so, the NCP still declared that on this occasion it would take into account prior conduct in determining and assessing injurious events occurring after June 2000.[476]

The lack of due diligence and the principal ability of Afrimex to influence the actions of its commercial partners The British NCP determined that Afrimex had not properly exercised its capacity to influence SOCOMI. SOCOMI had paid taxes and levies on licenses to extract minerals to the rebel forces, contributing to the continuation of the conflict (the funds being used to purchase weapons). Afrimex did not encourage its business partners and suppliers (SOCOMI – Kotecha) to behave responsibly in line with the Guidelines. The NCP concluded that Afrimex failed to conduct sufficient due diligence vis-.-vis the supply chain: it had not taken the necessary steps to ensure that minerals were extracted in accordance with international standards (i.e. that mining activities should not involve forced or child labour, and that acceptable working conditions include provisions for health and safety). However, the charges relating to corruption were not upheld.[477]

Human rights impact assessments and the OECD Risk Awareness Tool In its recommendations the NCP referred to the need for companies to conduct human rights impact assessments. These assessments should be covered by company policy, which itself should exist as an official document – a requirement that Afrimex has now undertaken to complete. The NCP

[476] *Ibid.*
[477] *Ibid.*

also encouraged Afrimex to use the OECD's Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. The NCP's final declaration was at first greeted with enthusiasm. However, some six months later (in February 2009) Global Witness condemned Afrimex's failure to implement the NCP's recommendations; meanwhile it continued its mining activities in eastern DRC. In March 2009 the company responded in a letter addressed to the NCP in which it stated that this trade in minerals had ceased as of September 2008. Global Witness called on the NCP to ensure that its recommendations be implemented and that it investigates the new information provided by Afrimex.[478]

The illegal exploitation of natural resources in the Democratic Republic of the Congo before the Belgian NCP.[479]

In November 2004 a coalition of NGOs in Belgium (including FIDH) set in motion the specific instances procedure following a violation of the Guidelines by four Belgian companies that the NGOs suspected of being involved in the illegal exploitation of resources in the Democratic Republic of the Congo (DRC). The illicit trade was considered one of the principle factors in the ongoing armed conflict and a major obstacle to the country's reconstruction and development. Several UN experts' reports on the illegal exploitation of natural resources from within the DRC107 and a report of the Commission of Inquiry established by the Belgian Senate supported the NGOs' claims.[480]

The Belgian companies cited were Cogecom, Belgolaise, NamiGems, and the Belgian division of George Forest International. The Belgian company Cogecom (now bankrupt) was accused of violating Congolese law and breaching the Guidelines by importing coltan and cassiterite from the DRC

[478] *Ibid.*
[479] *Ibid.*
[480] De Schutter (note 339 above); see also UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth
of the Democratic Republic of the Congo, reports, April 12, 2001, S/2001/357 and addenda dated 13 November 2001, S/2001/1072, May 22, 2002, S/2002/565, October 16, 2002, S/2002/1146, October 23, 2003.S/2003/1027.

to Belgium, via Rwanda, and directly participating in the financing of the Goma rebel movement.[481]

The complaint against Banque Belgolaise (an affiliate of Fortis Banque, which maintained a strong presence in the DRC) condemned the firm for not having in place the necessary measures to prevent money laundering. This failure undermined efforts to achieve sustainable development, impeded the observance of the principles of good corporate governance and limited development and implementation of effective management systems that would foster mutual trust between the bank and the business group in which it was involved.[482]

More specifically, Belgolaise was implicated in facilitating the financial transactions of the Ugandan and Rwandan elite, who were also involved in exploiting the natural resources and other riches of the DRC. Belgolaise, in its legal capacity as a corporation, was indicted in Belgium in June 2004 for money laundering. The enquiry being conducted by the Belgian NCP was subsequently suspended, as was the investigation regarding Cogecom.[483]

As for the Belgian company NamiGems, which was actively involved in the diamond trade, it had allegedly breached both Article 10 of the DRC's Constitution (which states: "the surface and subsurface are, and remain, the property of the nation including mines, quarries, mineral springs and hydrocarbons") and Chapter 1, Åò 7 of the Guidelines affirming: "Governments have the right to prescribe the conditions under what multinational enterprises operate." NamiGems had alleged evaded tax, concealed income and smuggled diamonds from the DRC via Uganda to Belgium. In violating established standards, NamiGems had used unfair competitive practices that disadvantaged law-abiding purchasers that

[481] *Ibid.*
[482] *Ibid.*
[483] *Ibid.*

properly declared the value of their goods. NamiGems was also accused of indirectly providing funds to the MLC rebel group.[484]

Lastly, the NGOs heavily criticized the Belgian division of George Forrest International (GFI), which was actively involved in the exploitation of mineral resources. They denounced the following practices:[485]

(a) The failure to take action to ensure workplace health and safety in the plant at Lubumbashi (linked to the processing of radioactive minerals – in respect of Chapter IV, paragraph 4(b) of the Guidelines);
(b) Alleged conflict of interest, where the company was improperly involved in political affairs.
(c) Breach of contract, resulting in significant losses for the Congolese State;
(d) The failure to publicly disclose information.

On November 18th, 2005, following five meetings with the NCP (including three with the parties involved), the Belgian NCP (comprising of representatives from the federal and regional public authorities, in addition to three business and trade union organisations) issued a public statement. The declaration affirmed: “Forrest Group, in both its direct and indirect investment in the country, as well as in its joint ventures with other companies in which it has a minority role, has followed the Guidelines as far as was possible”. To reach this conclusion, the NCP noted that it had taken into account the discussions of the OECD on economic relations with countries with weak governance.[486]

The complaints against the other companies were all rejected. The filings against Belgolaise and Cogecom were rejected on the basis that the two companies were at the time subject to parallel proceedings. The complaint

[484] *Ibid.*
[485] *Ibid.*
[486] *Ibid.*

against NamiGems was dismissed for the lack of an investment nexus; the Belgian NCP also noting that the facts relating to the situation had changed since the original filing. The NCP nonetheless recommended to Forrest Group International that it provide 'reliable and accurate' information on environmental, social and financial matters and that it work to promote and support the Guidelines with its suppliers. The NCP also recommended that Forrest Group International assist the political authorities of the DRC in putting in place economic and industrial frameworks that take into consideration impacts on populations close to industrial sites."[487]

The NGOs, while welcoming the broadening of Forrest Group International's responsibilities toward the Guidelines to its subsidiaries and suppliers, regretted that the NCP had not taken up their recommendations to: "publish a list of the different suppliers to Forest Group International's various divisions; conduct environmental audits and studies of public health in the communities close to the cobalt processing plant at Lubumbashi; and mandate a review by an independent international body of the mining concession at Kamoto recently granted to Forest Group International in disputed circumstances".[488]

Whetho succeeds in illustrating the complexity of the MNCs in utilising local subsidiaries to avoid direct liability for human rights violations.[489] Moreover, the study demonstrated that the economic position of the Global South in relation to the historical structured dependence on the Global North which undermines economic equality and growth and seriously undermines the language of human rights. Whetho profiles the following MNCs namely; Afrimex (UK) Ltd,[490]

[487] *Ibid.*
[488] *Ibid.*
[489] Whetho A (2014) *Natural Resources, Profit And Peace: Multinational Corporations and Conflict Transformation in the Democratic Republic Of Congo* (PhD Thesis, University of KwaZulu-Natal, Pietermaritzburg, South Africa) 193-204.
[490] Afrimex (UK) is incorporated and headquartered in the United Kingdom (UK). It was founded in 1984. It is a resource-trading company privately owned by UK national, Ketankumar (or Ketan) Kotecha. The company's sole directors are Kotecha and his wife, Didi Ketan Kotecha. It trades mainly in cassiterite, coltan and wolframite. Between 1998 and 2005, Afrimex was the greatest coltan "trader in terms of volume [and] the second largest exporter of cassiterite from South Kivu, controlling more than 40% of the cassiterite from the province, while also buying minerals from mines in North Kivu" (Global Witness, 2007: 5). Afrimex also acts as a commissioning agent for other companies involved in mineral trade

(OECD, 2010: 48). Until 2008, Afrimex obtained its supplies of these minerals from Goma in eastern DRC primarily through comptoirs based in the region (Global Witness, 2008: 69). Specifically, it conducted its operations "in eastern DRC through the Congolese registered companies Société Kotecha158 and SOCOMI, both based in Bukavu" (Global Witness, 2009: 68). The company claimed in 2008 that it had terminated its business operations in the DRC (Global Witness, 2009: 68). Afrimex's claim has not been independently verified.

Amalgamated Metal Corporation PLC,[491] America Mineral Fields (now Adastra Minerals, Inc.),[492] Anglo-American PLC,[493] Anvil Mining,[494] Banro Corporation,[495]

[491] This company was established in 1929. It is incorporated and headquartered in the UK. A seven-member board of directors oversees the company's operations. It "is a worldwide supplier of raw materials and intermediate products, with a focus on non-ferrous metals, steel and construction materials for a broad range of industrial applications. Its geographic spread provides a balanced exposure to localised economic cycles" (AMC Group, n. d.: i. d.). The company has two operational divisions: "AMC Trading and AMC Industrial" (AMC Group, n. d.: i. d). It "operates through subsidiaries or associates in Europe, North America, Africa, Asia and Australasia" (Global Witness, 2009: 62). It conducts its predominantly resource trading operations in the DRC through its "principal subsidiary" – the Thailand Smelting and Refining Corporation (THAISARCO), whose profile is presented subsequently in this section. Amalgamated Metal Corporation PLC, operating mainly through its "principal subsidiary", is reportedly one the largest buyers of cassiterite from the DRC, mainly from the Kivu Provinces (Global Witness, 2009: 62).

[492] This is an American mining company incorporated in the UK. It was created in 1979. Jean- Raymond Boulle, a Mauritian-born British citizen, founded the company "in partnership with his brothers Franco and Bertrand" (Prunier, 2009: 140-141). Boulle owns several companies that conduct exploration and mining operations for cobalt, copper, diamonds, gold, nickel and platinum in Africa, North America and South America. George H. W. Bush, former United States President, was until 2006 a member of Adastra's international advisory board (Queyranne, 2006: i. d.). At that time, Mike McMurrough, a friend of former United States President, Bill Clinton, was the company's chair (Kern, 2007: 99). Listed on the London Stock Exchange and the Toronto Stock Exchange, Adastra Minerals (formerly America Mineral Fields) "engages in the acquisition, exploration, and development of mineral resource properties in Africa. It primarily focuses on cobalt, copper, zinc, and diamond minerals" (Business Week, 2012: i. d.). Its main investments in Africa are in Angola, the DRC and Zambia. The company's mining operations in the DRC are concentrated in Kolwezi (in the DRC's copper belt region), where it extracts cobalt and copper and in Kipushi and Solwezi (where it exploits zinc). In 2006, another MNC, First Quantum Minerals, acquired the company's properties and concession (Business Week, 2012: i. d.). The company reportedly had close links with the late President Laurent-Désiré Kabila and enjoyed sole rights to copper and zinc deposits in the DRC during the tenure of the late Congolese leader.

[493] Anglo-American PLC was founded in 1917. It is headquartered in the UK. Anglo-American PLC is listed (and its shares are traded) on the London and Johannesburg Stock Exchanges. The company describes itself as "one of the world's largest mining companies" (Anglo American, 2013a: i. d.). Its investments are geographically diverse; it conducts operations in Africa, Europe, and North and South America. Across its global operations, Anglo-American PLC mines copper, diamonds, manganese, nickel, niobium, iron ore, phosphates, platinum, and coal. It is the world's largest producer of diamonds and platinum and the fourth largest producer of iron ore. Its operating profit in 2012 was US$6.2 billion (Anglo American, 2013a: i. d.). Some of the copper, diamonds, and iron ore it produces for the international market are sourced from the DRC through a joint venture with Adastra Minerals Inc. (formerly America Mineral Fields).

[494] Anvil Mining, a Canadian company, was formed in 2002. A Chinese company, Minmetals Resources Limited, acquired Anvil Mining in March 2012. Prior to this acquisition, Anvil Mining's major shareholders were First Quantum Minerals, Deans Knight Management (both based in Canada), and Australia's Colonial First Estate (a financial services company). Anvil Mining was listed on the Toronto and Australia Stock Exchanges. The company was a copper producer. It had investments in the DRC, Philippines and Zambia. It began operations in the DRC in 2002, in the same year that it was established (Anvil Mining, 2011: i. d.). Anvil Mining considered the DRC as its "key focus for exploration" (JETRO, n. d.: i. d.). Its operations in the DRC were concentrated in the copper-rich Katanga Province, where it operated three mines. The three mines – "Kinsevere, Dikulushi and Mutoshi" – were located in the area that "traditionally produced more than 70% of the DRC copper mineral product" (JETRO, n. d.: i. d.). Anvil Mining's strategic investments in the DRC's copper belt zone made it a key economic actor in the DRC. The company was the largest copper producer in the DRC (JETRO, n. d.: i. d.). Moreover, its investment profile and contribution to mineral revenue enabled the company to enjoy government support.

[495] Banro Corporation (also operating as Banro Resources), is a Canadian company with connections to Malaysia and South Africa (by virtue of its registration in the two countries). Its major shareholders are Franklin Resources Inc., Tradewinds Global Investors LLC, Gramercy Funds Management LLC, JP

Cabot Corporation,[496] De Beers,[497] First Quantum Minerals Ltd,[498] Tenke Mining Corporation,[499] and finally Thailand Smelting and Refining Corporation

Morgan Chase & Co. (all four are American companies), and Canada's I. G. Investment Management Limited. Banro Corporation's profile states that it "enjoys strong support from institutional investors primarily in North America, the UK and South Africa" (Banro Corporation, n. d[a]: i. d.). It is listed on the Toronto and New York Stock Exchanges. It is primarily a gold mining company. The aim of the company is to create a large gold mining project in the DRC (Barradas, 2011: i. d.). Its main operations in the DRC are in the "gold belt" region in South Kivu and Maniema provinces (Banro Corporation, n. d[b]: i. d.). Banro Resources "holds exploration titles in three gold mining areas in South Kivu (Twangiza, Lugushwa, Kamituga) and one in the neighbouring province of Maniema (Namoya)" (Global Witness, 2009: 24). The company commenced operations in the areas in 1997. This followed the collapse of the state mining company, whose gold mining rights Banro Resources acquired. The conflicts in eastern DRC disrupted Banro Corporation's operations until 2004 when it resumed exploration (Global Witness, 2009: 24).

[496] Cabot Corporation is headquartered in the United States of America. It was established in 1882. Its top five shareholders are American companies that provide financial services: Fidelity Investments, Vanguard Group Inc., State Street Corporation, Royce & Associates and Wellington Management Company. Cabot Corporation prides itself as "a global specialty chemicals and performance materials company" (Cabot Corporation, 2012: i. d.). It operates in more than 20 countries. The company's main activities include the processing of rubber, carbon and precious metals. Its revenue from global operations in 2012 was put at US$3.3 billion (Cabot Corporation, 2012: i. d.). Cabot Corporation is a major buyer of tantalum. There is no company-specific information on Cabot Corporation's presence in the DRC, through either affiliates or subsidiaries. However, the UN Panel of Experts cited the company "for its indirect business ties and involvement in purchasing, trading and/or using coltan from the DRC", a charge that Cabot Corporation denied (OECD, 2004: i. d).

[497] De Beers was founded in 1888. The company is incorporated in two countries – the UK and South Africa. De Beers is owned and controlled by three parties: Anglo American [PLC] with 45% stake, the Oppenheimer family (40%) and the government of Botswana, which has 15% stake (Sguazzin, 2007: i. d.). It is the largest diamond company in the world. De Beers commenced operations in the DRC in 2004. The DRC has been described as "an extremely high priority" for De Beers (Mining Review.com, 2008: i. d.). In line with its objective "to accelerate diamond exploration in [the] Congo", the company stepped up its investment in the DRC after the country's 2006 elections (Sguazzin, 2007: i. d.).

[498] First Quantum Minerals Ltd is headquartered in Canada. It was co-founded in 1983 by British nationals Geoffrey Clive Newall and Martin R. Rowley. Its main shareholders are Hexavest Inc. of Canada, UK's Gulf International Bank, and two US-based companies namely, Aperio Group and World Asset Management Inc. First Quantum Minerals Ltd is listed on the Toronto and London Stock Exchanges. Its main business consists of "mineral exploration, development and mining" (First Quantum Minerals Ltd, 2012: i. d.). The company has investments in the DRC, Mauritania, Panama, Peru, Spain, and Zambia. First Quantum Minerals Ltd describes itself as "an established and rapidly growing mining and metals company", specialising in the production of "copper, nickel, gold, zinc and platinum group metals" (First Quantum Minerals Ltd, 2012: i. d.). Its main operation in the DRC involved cobalt and copper mining, which it suspended in 2009 over disagreements with the Congolese government. The disagreement arose after the Congolese government withdrew the company's mining licence as part of the government's effort to renegotiate the company's contract. The company rejected this move by the government, insisting that the purported revocation of its exploitation permit was in violation of the country's mining code and laws, which protected its investment (First Quantum Minerals Ltd, 2010: i. d). The Congolese government had its way despite the MNC's reservations, forcing the company to terminate its operations in the DRC. First Quantum Minerals Ltd subsequently instituted international arbitration proceedings against the DRC government. It is instructive to note that while the dispute with the Congolese government lasted, "First Quantum … received the support of the Canadian government which delayed, but ultimately failed to stop, approval by the World Bank and IMF for [US]$12.3 [billion] in debt relief to the DRC" (Ryan, 2010: i. d.).

[499] Until 2007 when Lundin Mining Corporation163 acquired it, Tenke Mining Corporation was headquartered in Canada. It was also listed on the Toronto Stock Exchange. Following its acquisition by Lundin Mining Corporation, Tenke Mining Corporation was de-listed from the Toronto Stock Exchange. The defunct resource-extracting company conducted business in Chile, Argentina (both in South America) and the DRC (Infomine.com, n. d: i. d).164 Its mining operations in these countries

(THAISARCO).[500] Whetho after the extrapolation of the mentioned MNCs which present a microcosm of a corporate web, state the finding which affirms the neo-colonial nature of global economy and its negation of the human rights language:[501]

> "This web serves as an analytical and practical frame that sheds light on some of the attributes on MNCs with connections to the DRC. Said differently, a few MNCs in the DRC which also form the web of global economy heavily present in the Global South for the same reason (political power, economic power, and legal hegemony) in the South Africa and Nigeria, highlights the natural resources that MNCs are attracted to, and the modalities for accessing those minerals. Against this backdrop, the following findings can be made:[502]

(a) The vast majority of MNCs with investments, affiliates/subsidiaries, operations (whether sole or joint venture arrangements) in the DRC are owned by individuals and/or entities from the Global North. Most of the MNCs are also headquartered in the Global North;

(b) These MNCs have extensive (sometimes, global) reach and connections;

(c) MNCs are attracted to a few strategic minerals that offer very high returns on investment;

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were concentrated in the cobalt and copper sub-sectors. In the DRC, Tenke Mining Corporation undertook cobalt and copper mining in the Katanga Province, where it controlled several mines. Tenke Mining Corporation was an important player in the mining business in the Katanga Province. Its economic influence in the copper belt zone was rivalled arguably only by that of Anvil Mining Corporation.

[500] THAISARCO was founded in 1963. As at the time of writing this thesis, it conducts operations as a subsidiary of Amalgamated Metal Corporation PLC. THAISARCO is "recognised worldwide as an industry leader in the manufacture of tin, tin alloys and tin related, added value products" (THAISARCO, n. d.: i. d.). It is "the world's fifth-largest tin producing company" (Global Witness, 2009: 59). The company deals in minerals that are used "in the manufacturing of tinplate for food and drink cans and other types of containers; in solder for the electronics and computer industries; in chemicals as organo-tin compounds for PVC stabilisers, fungicides and wood preservatives; and for use in bearing alloys and pewters" (THAISARCO, n. d.: i. d.). In addition, the company serves the aerospace automotive, defence, construction, marine, food processing, petrochemical and ceramics industries. It created a trading division in 2008 to handle supply chain aspects of its global operations. The UN Panel of Experts found that THAISARCO had bought minerals from *comptoirs* in the DRC (Global Witness, 2009: 7), prompting its inclusion in the list of MNCs with connections to resource-related conflicts in the country.

[501] Whetho A (2014) *Natural Resources, Profit And Peace: Multinational Corporations and Conflict Transformation in the Democratic Republic Of Congo* (PhD Thesis, University of KwaZulu-Natal, Pietermaritzburg, South Africa) 193-204.

[502] *Ibid.*

(d) The *comptoir* arrangement suits MNCs that deal in lootable resources as it minimises reputational risks when compared to direct presence in a resource rich conflict zone;

(e) Resource-trading MNCs largely favour supply chain arrangements that conceal illicit activities in general or the link between minerals and conflict in particular; and

(f) The use of affiliates or subsidiaries might shield the parent company from culpability in illicit activities in the supply chain.

These patterns influence or even shape the modus operandi and actual nature of MNCs activities and support base. For instance, companies owned by individuals and/or entities in the Global North (or those headquartered in the Global North) may feel insulated from the effects of MNCs actions in host environments and, as such, may not be concerned with issues pertaining to corporate accountability and responsibility.

However, the stakes that MNCs have in host environments may limit the saliency of headquarter location. In the DRC, both mineral-prospecting and resource-trading MNCs have (or had) high stakes in the country, which are crucial to furthering and realising the profit maximisation agenda of these MNCs. In a conflict zone, such (investment) stakes and the quest for profit maximisation often directly or inadvertently complicate, exacerbate and/or prolong conflict thus laying bare the connections of business to war.

Moreover, MNCs actions in the DRC highlighted the intricate linkages between natural resources and conflict in a manner that generated international concern and response. A significant response from the international community took the form of UN-sanctioned scrutiny of actors involved in the DRC conflict, especially their connections to the country's resources.

Finally, a report assessing access to justice in the DRC dealing with human rights abuses involving MNCs is instructive in demonstrating the lack of transparency and unwillingness of the public administration to take action[503]

> A government review of 61 mining contracts signed between 1997 and 2002 between DRC public enterprises and private companies, was conducted through arrêtes, decrees and instructions especially enacted or issued for such purpose. The review process was generally plagued by numerous delays and a lack of transparency. As a result of such review, a number of mining contracts were cancelled, including that of the Canadian company First Quantum Minerals, for its Kingamyambo Musonoi Tailings Project (KMT)104 for which project a liquidator was recently appointed. In August 2010, the Arbitration Tribunal issued interim measures restraining the Congolese authorities from executing the decision of the Kinshasa Court of Appeal (RCA 27.068/27.069), cancelling KMT's mine licence and prohibiting the transfer of the concession to a third party.
>
> For these reasons, communities who suffer negative environmental impacts as a result of mining activities face formidable obstacles to obtain redress. The Chef de groupement N'guba, for example, has struggled to obtain redress from Boss Mining (then owned by the AIM-listed Central African Mining and Exploration Company, CAMEC). In January 2009, Boss Mining allegedly dumped acid and copper residues in the Dikuluwe river in Kolwezi District, Katanga. When the river later flooded, it contaminated the soil, damaging the N'guba's community's crops. Boss Mining denied any responsibility.
>
> Despite having written to all relevant authorities, including the Mayor of Kolwezi and to the Traditional Chief, as of September 2009, no action had been taken to resolve the matter. Because Despite the evidence of corporate wrongdoing and/or complicity with State and armed groups'

[503] International Commission of Jurists "Access to Justice: Human Rights Abuses Involving Corporations in the Democratic Republic of the Congo" *A Project of the International Commission of Jurists* 41 and 48.

violations of human rights and humanitarian law, there is no judicial forum for these economic actors to be held legally accountable within the DRC, the prospects for such a forum seem somewhat remote given the incipient state of the judicial and legal system reforms in the country. Although labour and civil courts exist and theoretically provide avenues of redress, a combination of economic, social, political and security reasons make difficulties for those who have a claim to push it forward until obtaining satisfaction.

5.5 Conclusion

The three critically analysed African States reveal a common colonial-imperialist-capitalist history which despite their post-colonial status is still forming the structure of dependency of the Global South and Global North. The result of this historical problem being the periphery of human rights language to the centre of profit maximisation of the MNCs as located in the Global North and as a consequence of colonisation. This chapter set out to question the effectiveness of human rights language and its location in the colonial-imperial-capitalist paradigm of the Global North and the Global South.

South Africa in its recent history was founded by an MNC with its resulted racialised outlook on human rights as represented by colonial apartheid that had human rights but only applicable to people of European descent. Therefore, MNCs such as Cape Plc, African Rainbow Minerals Limited, Anglo American South Africa Limited, Anglo Gold Ashanti Limited, Gold Fields Limited, Harmony Gold Mining Company Limited, and Sibanye Gold Limited direct human rights violations should and can not be a surprise as human rights language disregard though not named started with the Vereenigde Oost-Indische Compagnie (VOC).

South Africa is touted as the gateway to Africa which in economic terms means it has the necessary economical infrastructure to support MNCs in the continent. Closely linked to this notion of gateway is also South Africa's image which serves as a beacon of human rights language due to its "triumph" over racism as represented by colonial apartheid. Indeed South Africa like many other former colonies have made some progress when it comes to opening up the economy for all in their states and using the

language of human rights to do so. The levels of accountability of human rights obligations by MNCs have slightly increased as judged by the R5 Billion silicosis settlement order.

However, the reality of human rights language in the main in South Africa has ended with moderate compensation which come after many years of contest by the MNCs. The human rights language appears to fail to arrive at a legal certainty on enforcing human rights standard against MNCs, in actual fact this cases were settled without utilising the language of human rights. For example, South Africa has failed to utilise human rights language to hold Lonmin accountable for its participation to the events that led to the death of 34 miners. The economy of South Africa is dependent on the colonial apartheid architecture that still dominates even in 2019 despite being a constitutional dispensation. Finally, in the *Baleni* case South Africans are still fighting the balance between the right to maintain their dignity through the land and the old-age MNC aggression in the quest for profit. This case has set an important precedent in ensuring that the rights of the people to consent to development is taken seriously. Moreover, the case can and has been decided without utilising the language of human rights.

Nigeria like South Africa in its recent history was founded by an MNC – the East India Company with its resulted racialised human rights language and economy. Ever since the arrival of MNCs, Nigeria has seen no peace despite its decolonisation as a result of persistent oil exploitation by the MNCs such as the Royal Dutch Shell that do not eradicate poverty for the Nigerian people. The most documented cases out of Nigeria is the *Wiwa* case which demonstrates how human rights language due to its history in the Global South has left the Ogoni people with moderate compensation which does not even have sustainable stamina for long term remedy for the people, the environment and most importantly the realisation of economic growth. The problem with human rights langauge broadly speaking in the Global South is that the actions of the MNCs are not a “mistake” but a general accepted behaviour of labour exploitation and disregard of the rule of law and remedied by compensation as evidenced in the *Securities and Exchange Commission* case.

The last country explored was the DRC, also founded by Leopold and his industrialised machinery which was Africans. The violent activities of MNCs as shown above has not being halted by the decolonisation of the DRC in actual fact for many Congolese the situation seems not to have changed. From the killing of Lumumba for declaring beneficiation to the failure of human rights language in the *Elf* case which displayed the most sophisticated web of MNCs for the sole purpose of evading human rights language. The DRC supplies 80 per cent of the raw materials on which the world's technology are based yet it is amongst the poorest countries.[504] Whetho did an excellent summary which showed fortune 500 companies that have been accused of human rights violations not only in the DRC but in the entire world - yet many of them have been held accountable by a court of law using the language of human rights.

All of these findings are not incidental or as the Global North would have it "the African's corruption and incompetence" but a clear plan of the coloniser and perfectly executed during both colonisation and post-colonial. Therefore, the problem is not just Africa's political elites but colonisation and worse, the Africans' colonial economic structures that still favours the imperial-capitalist Global North. Arguably, it is with the African constitutions that have legitimised the theft of lands, resources, religion, and culture by the biggest agents of colonialism which are the MNCs.

[504] Nathan D and Sarkar S (2012) "Blood on your Mobile Phone? Capturing the Gains for Artisanal Miners, Poor Workers and Women" *Capturing the Gains Briefing Note 2*, 1-6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990229 (accessed 02 July 2018); see also Turak N (2017) "The Cobalt Curse: Supply Risk and Inequality in the DRC" *FDiIntellegence* available at https://www.fdiintelligence.com/Locations/Middle-East-Africa/Congo-DRC/The-cobalt-curse-supply-risk-and-inequality-in-the-DRC (accessed 02 July 2018).

CHAPTER SIX

THE ASSESSMENT OF AFRICAN EPISTEMOLOGY AS A SOLUTION TO HOLDING MNCs ACCOUNTABLE

6.1 Introduction

MNCs have had devastating results in the Global South such, as destruction of culture, commodification of legal services, nature, and most importantly African epistemology. Further, the preceding chapters have demonstrated the inability of human rights language to hold MNCs accountable and simultaneously dismantle colonial structures and systems which is the root cause of Africa's continual problems in dealing with MNCs from the Global North and growing the economy of the African Continent specifically in the Global South.

Therefore, this chapter will undertake to answer the last question of the thesis which is whether an African epistemological outlook cannot provide a viable, sustainable and effective solution to the problem of human rights violations by MNCs? It is under the Afrocentric episteme hypothesis that this chapter is argued in recommendations terms to demonstrate how MNCs can be held accountable for their human rights violations. Furthermore, the thesis has argued in multi-inter and trans-disciplinary fashion that the issue of MNCs is not isolated from the colonial-imperial-capitalist structure of the Global North, therefore, it is necessary to adopt a holistic approach to dealing with human rights language in the Global South.

To this end, this discourse begins with an ideological positioning because history has demonstrated that it is not just a matter of race or power, but of ideology which in turn informs the structure of accountability of MNCs or of polity in general. In addition the word "rights" will be preferred over "human rights" because it has been argued that human rights language like many other fashionable terms such as "social justice", "transformative constitutionalism" and "constructive capitalism" are respectively argued as obfuscating serious colonial structures and systems that has made holding the machineries (MNCs) of the Global North extremely difficult to regulate. Therefore,

Botho-Ubuntu-Maat[1] forms the ideological bases upon which MNCs can be held accountable not only because it is the suitable philosophical bases but because similar to capitalism that results in untold inequality and decay of strong legal reform – Botho provides a strong epistemological foundation for jurisprudence that may engender accountability for rights violations by MNCs.

An arguments was made earlier about the operating parameters of human rights language (colonial-imperial-capitalist) with regard to the Revised Treaty which is worth repeating in this chapter because it centres the argument about the inefficiencies of human rights language. Therefore, the creation of a binding treaty at an international, regional and ratification of these documents would be a significant start. This will form a basis upon which member states can capacitate its promotion and protections of its peoples and economies against MNCs. However, this particular treaty is still created within the global colonial-imperial-capitalist human rights language, the results as demonstrated by TWAIL, CRT, Post-colonial theory, Dialectal Utility and Political Economy will only moderately change as it has been for the last 74 years of the UN and regional human rights system.

The theoretical framework set up an important basis from which the argument herein in their normative form offer an important element that may align the issues of business and human rights within the context of the Global South with a serious and deliberate enforcement mechanism within the Global South paradigm. This is so because the epistemology and ontology that forms the basis of law highly influence the outcome of the practice (regulatory framework) which means that, for example, in line with Dialectal Utility theory, the usage of human rights language to hold MNCs accountable has not translated into reality for the Global South and the problem is the language itself in the main and not the peripheral issues such as corruption or maladministration.

Therefore, the argument herein is predicated on the understanding that human rights language is ineffective and that the root cause of the lack of enforcement of it is its inherent defect at conception based on power relations between the Global South and

[1] Wiredu K, Abraham W E, Irele & Menkiti I A (2004) *A Companion to African Philosophy* (Blackwell Publishing Ltd, USA, UK, Australia) 49.

the Global North. For example the veto power of the five permanent members makes a mockery of a “democratic process amongst equals”. Therefore, when one argues for enforcement of human rights standards against MNCs - is arguing from a past-present-future considerations of what it will take for the Global South to hold MNCs accountable. This can take the form of decolonising the colonial-imperial-capitalist structures and systems which will have the result of engendering MNCs accountability because MNCs source of power would be debased.

The assertions made also breaks the legal tradition ever so slightly labouring under the understanding that law-economy-politics always share a symbiotic relationship that maintains privilege, power, exploitation and disregard of human rights. Moreover, the argument must be understood from using the term enforcement of human rights (rights) as not derived from the UN’s conventional understanding but a broad phraseology that includes the episteme and ontology of societies especially in the Global South given its history of epistemicide by the Global North. Hence holding MNCs accountable would hinge upon a multiplicity of factors such as a proper epistemological such as Botho to Thought Leadership as a way of ensuring efficacy and better regulatory framework in promoting and protecting rights in the Global South.

There is a need for the development of African epistemology with respect to challenges facing the continent especially MNCs because of their big impact on day to day conditions of people and their livelihood. In this chapter this epistemological development will be firmly grounded by work that has matured in other discourse such as political economy, African philosophy and political thought to name but few. The important factor is that this theoretical underpinnings will be contextualised for the purposes of enforcement of rights standards against MNCs primarily and the language of human rights generally.

Therefore, an exploration of the philosophy-principle-yardstick of Botho in relation to how MNCs can be modelled becomes the centre of holding MNCs accounatble. The reason for Botho is that it remains the only legitimate value-action-norm system that can ensure the realisation of a better and more united Africa putting the interests of the masses first before profit as it has been the case with the current ideology of MNCs.

The structure of this chapter therefore begins firstly with the analysis of Botho as a framework for the ethical decision making process with regard to the socio-legal-political in Africa. Secondly, it is thought leadership for the economic independence of Africa and its ethos on how to regulate any institution including MNCs and thirdly, is decolonising political economy of Africa and offering an alternative paradigm to economic regeneration of Africa and finally important thoughts on the imperatives for Africa in order to realise rights for all. This outlook is important because the realisation of rights and capacity to hold MNCs accountable needs all this imperatives in place or else the *status quo* will always remain especially within the structure of neo-colonialism and capitalism.

6.2 Botho as a Framework for Ethical Decision Making with Regard to Socio-Political-Legal in Africa

Botho is the root of African philosophy.[2] Botho which means *Motho ke Motho ka Batho* is a value system that should underlie the thinking of individuals, communities, states, continents and the world. This virtue-principle-system provides a systematic cognitive process that puts the good as an outcome of everyone affected by decisions of individuals, communities and organisational such as MNCs. Botho (the good) is placed at the centre of the decision making process on all levels and it is the all-encompassing none selective or non-discriminatory (whether based on class, gender, and race) criterion to be utilised. Characteristically, it is not selfish nor does it take advantage of the power relations amongst negotiating parties on the contrary, it has a win-win inherent and completeness as its traits.

The principle of Botho is discussed on four levels that constitute the fabric of decision making in the African context in relation to MNCs, namely, individual decision-making, group decision-making, national decision-making and regional decision-making. However, before the commencement of this discussion of this concepts, it is necessary

[2] Ramose M B (2002) *The Philosophy of Ubuntu and Ubuntu as Philosophy* in Coetzee &Roux A P J *Philosophy From Africa: a Text with Readings* (Oxford University Press, South Africa) 230.

to consider the existing literature on decision making process under various circumstances.

It is important to contrast the Eurocentric philosophical decision making process with that of Africa beginning with Bryant's theory (the liberal Eurocentric deduction process) on Critique, Explore, Compare, and Adapt (CECA) decision making processes which broadly correspond to the identification of information needs, active and passive data collection and situation updating, comparison of the current situation to the conceptual model, and adaptation to aspects of the battlespace that invalidate the conceptual model or block the path to goal completion.[3] This was the preferred method as compared to the Observe–Orient–Decide–Act (OODA) decision making process which prescribes a cycle of data gathering, picture building, decision, and action.[4]

Furthermore, Heyse quotes James March where he distinguishes between two fundamentally different types of decision-making processes: consequential (rational) and appropriate.[5] Consequential decision making is an ''administrative organisation'' because of its shared assumptions about instrumental rationality, maximising behaviour and consequentiality.[6] On the other hand, appropriate decision making refers to a consideration process in which organisational members make decisions by behaving as expected in a given situation.[7]

Moreover, Maharaj elucidates on the formal system of organisational decision making which adheres to the Toronto Stock Exchange (TSX) and New York Stock Exchange guidelines.[8] The informal system concerns itself with the reception and sharing of knowledge among board members and between board members and management.[9] Piiparinen, on the other hand, discusses the Cube model which demonstrates that

[3] Bryant D J (2006) "Rethinking OODA: Toward a Modern Cognitive Framework of Command Decision Making". *Military Psychology* Vol.18, No. (3), 183.
[4] *Ibid.*
[5] Heyse L (2013) "Tragic Choices in Humanitarian Aid: A Framework of Organizational Determinants of NGO Decision Making". *Voluntas.* Vol. 24, 70.
[6] *Id* 72.
[7] *Id* 73.
[8] Maharaj R (2009) "Corporate governance decision-making model: How to nominate skilled board members, by addressing the formal and informal systems". *International Journal of Disclosure and Governance*. Vol. 6, 112.
[9] *Ibid.*

decisions are usually generated by a combination of various social and psychological mechanisms linking different planes of reality.[10] Although Bhaskar contends that the Social Cube derives from his Transformational Model of Social Activity, it seems to be underpinned by his former tutor Rom Harré's stratification of "ways of being" into physical, personal, and social beings.[11] Lastly, Erskine discusses on the analysis of Geospatial model which consists of four distinct constructs, including information presentation, task-characteristics, user-characteristics and decision-performance.[12]

The literature above provides persuasive arguments on decision making in other conditions but certainly does not fit the African ethos of governance and practical African epistemology. The four mentioned role players (the individual, community, organisation and state) in the decision making process can only function on the basis of Botho on all aspects of the chain of command. Any factors that are prioritised (profit, individual gains, slave labour, etc.) instead of the dignified, communal good and individual well-being (Botho) are bound to breed the prevailing colonial project which only benefits the MNCs from the Global North. The Botho principle informs the entire process of decision making which means that whether one uses CECA, TSK, Social Cube or Geospatial thought process, if it is not engulfed by Botho then the result will most certainly be disastrous.

Botho as the legitimate source of the value system in Africa, is best placed to resolve the issue of business and rights specifically as it pertains to holding MNCs operating in Africa accountable. The issue of effectively dealing with the rot of MNCs' operations can only happen through the ethical decision making process of Botho. This move will serve the following purpose:

(a) The restoration of African pride even in the conduct of business by MNCs;

[10] Piiparinen T (2006) "Reclaiming the Human Stratum, Acknowledging the Complexity of Social Behaviour: From the Linguistic Turn to the Social Cube in Theory of Decision-making". *Journal for the Theory of Social Behaviour*. Vol. 36, 426.
[11] *Ibid.*
[12] Erskine M A., Gregg, D.G., Karimi, J. and Scott, J.E (2014) "Business Decision-Making Using Geospatial Data: A Research Framework and Literature Review". *Axioms*. Vol.3 :(10-30).

(b) The alignment of African epistemology and the everyday running of MNCs;
(c) A legitimate value system of governance that prioritise the common good od everyone and equality;
(d) Effective dispute resolution that is based on reconciliation of parties in an MNCs; and
(e) Rationale decision making process that has the people first and not maximisation of profit as championed by the Global North.

Therefore, the proper utilisation of the principle of Botho will yield unmeasurable benefit for how MNCs conduct themselves and are held to a communal system of conscience (Botho) that puts the common good of the employees, communities, shareholders and directors accountable for their actions. This notion puts the human together with other humans responsible for creating a legal framework for MNCs to function in a way that puts people in equal positions with respect to their skills. Therefore, the exploitation of peoples as seen through the history of the Global South by the Global North MNCs would cease to exist as Botho does not prejudice on race, gender and class.

It is therefore argued that Botho as a foundational epistemology of holding MNCs accountable would greatly assist as this is an ever evolving principle that calls upon the human race to always move towards being more human in dealing with one another. This will certainly break the heavy yoke of colonial-imperial-capitalist that is still permeates through global economy as controlled by MNCs. The law as super-imposed by colonial powers and MNCs of the Global North would have to be abolished with simultaneously creating legal regime which are informed by this way of doing and way of being. The current dispute concerning MNCs must also be decided based on this principle and not on the “market” ‘s perception of what is right or wrong. Which means that the rights of the people and justice must at all material times trump the profit and economic benefit that may accrue as a result of rights violations by MNCs.

In summation the issue of human rights language becomes obsolete because Botho when practiced and allowed to inform how people in Africa conduct their dispute resolution would prevent some of the egregious rights violations as they have

happened many centuries and decades ago when Africans in particular were seen as raw materials and recently in South Africa with Marikana Massacre. This will also break the umbilical-cord of colonial-imperial-capitalist that has adversely affected Africa despite its post-colonial cloak.

6.3. Thought Leadership for Africa's Independence

Botho as employed on enforcement of rights against MNC cannot function without the support of an effective leadership from the AU and then after the respective states in the continent. Therefore, it is imperative that Africa determines the type of leadership it requires based on Botho. However, the question of leadership in Africa arises in earnest because the African spirit was stolen in the aftermath of those tall ships cresting the horizon, driven by the wind and the power of what seemed to be an expression of manifest destiny.[13] Something was surrendered, something was abandoned and something was drained from the Africans' blood, on the day that the proud leaders of Africa became the led.[14] This is the spirit of African leadership Africans have lost in this age when the sacrifice of the self gives way too easily and too often to the sacrifice of others.[15] Moreover, the spirit of Botho was taken away from the African and now she is left with liberal constitutional dispensations and capitalist economy that is adversely affected her people.

It is against this backdrop, therefore, that the issue of leadership and thought leadership becomes important in a so-called "postcolonial" Africa in relation to holding MNCs accountable. It is important to remember that even though MNCs are an entity on their own with recognised rights and duties – they are still a creation and always directed by the human will. Thus, there is a need to assess the difference between a leader and a thought leader and the one suitable for Africa's renewal in relation to steering accountable MNCs that will be for the people and not to just select few peoples at the top of the food chain. Following is the analysis of leadership –

[13] Mbeki T (2006) Address of the President of South Africa, Thabo Mbeki, at the Launch of the African Leadership Initiative, Sandton Convention Centre, Johannesburg, 13 July 2006.
[14] *Ibid.*
[15] *Ibid*; Mwambazambi K and Banza A K (2014) "Developing Transformational Leadership for Sub-Saharan Africa: Essential Missiological Considerations for Church Workers" *Verbum et Ecclesia* 35(1), Art. #849, 1-9, available at http://dx.doi.org/10.4102/ ve.v35i1.849 (accessed 02 July 2018) 1-2.

advantages and disadvantages, thought leadership after which the conclusion is drawn.

6.3.1 Leadership

A leader or leadership in its simplistic term describes an action of leading a group of people or an organisation (MNC) or the ability to influence others to follow. This is typically described as Leader-Follower perspective of leadership which Haruna states to be the essence of leadership in sub-Saharan Africa which is construed narrowly in terms of transactions and exchanges between individual leaders and their so-called followers.[16] Prevalent between 1960s-1990s in the Nationalist thinking whilst proclaiming African renaissance, the leader-follower perspective, placed[s] the responsibility for leadership in the hands of the "leader".[17]

The critique against this mode of leadership or a leader is the discovery of empirically validated laws which purportedly make leaders be and do everything because somehow they must possess or learn extraordinary abilities.[18] This method negates the Batho participation in decision making process that robs the people of being heard especially the common person in the large corporate structure of MNC. Furthermore, Early and Peterson state that after decades of work on training and education for international work assignments, scholars have not experienced success and mastery of this challenge of singular narratives of leader-follower relationship.[19] Thus, a leader would subscribe to a role of leadership that puts emphasis too heavily on the individual rather than the people or community.

Moreover, any persistent state of dysfunction may be a hangover of its colonial history, but bad leadership essays daily make colonialism a lame excuse and a wooden

[16] Haruna P F (2009) "Revising the leadership paradigm in Sub-Saharan Africa: A study of Community-based leadership", *Public Administration Review,* Vol. 69, No. 5. 941.
[17] *Ibid.*
[18] *Id* 943.
[19] Earley P C & Peterson R S (2004) "The elusive cultural chameleon: cultural intelligence as a new approach to intercultural training for the global manager" *Academy of Management Learning and Education* 3(1) 113.

apology for the grotesque incompetence of visionless leaders.[20] The absence of good leadership is litany in honour of anarchy.[21] This method of leadership also relegates women to the periphery on the pretext that they do not have leadership potential and that their leadership behaviour differs from traditional male leaders.[22] Furthermore, gender differences are exacerbated by race where Africans and Coloured women (in the South African context) face stereotypes rooted in their historical employment as maids in the homes of white employers.[23]

Notably, a leader is replete with gender prejudice and this is attested to by Hofstede who argues that leadership itself is gendered and is enacted within a gendered context which treats masculinity/femininity as mutually exclusive and competing with one another ending up with masculinity winning in most instances.[24] Gender differences are exacerbated by race with Black and Coloured women facing stereotypes rooted in their historical employment as maids in the homes of white employers.[25]

It is argued in the discipline of organisational management that the diverse groups found in most African organisations demand that managers move away from dependency on kith and kin or a '*wa kwetu*' (Swahili) mentality to the deliberate recruitment of diverse employees and appreciation of their differences in order to gain a competitive edge.[26] Nyambegera found that the culture of white managers was congruent with Western or Eurocentric management whereas the culture of Black managers differed greatly.[27] The Black managers in her sample were more Afro-centric in their approach to leadership.[28] The Afro-centric model is centred in the concept of Ubuntu.[29] This assertion reiterated by Littrel and Nkomo where they provide that Ubuntu is not a leadership style but a philosophy of African humanism, which

[20] Ogbunwezeh F (2006) "African poverty as a failure of leadership" Available at: http://www.segun.bizland.com/ogbunwezeh3.htm (accessed 31/10/2016).
[21] *Ibid.*
[22] Littrell R & Nkomo S M (2005) "Gender and race differences in leader behaviour. Preferences in South Africa" *Women in Management Review* 20(8) 562–580.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid*.
[26] Nyambegera S M (2002) Ethnicity and human resource management practices in sub-Saharan Africa: the relevance of the managing diversity discourse. *International Journal of Human Resource Management* 13(7):1077–1091.
[27] Littrell (note 48 above).
[28] *Ibid.*
[29] *Ibid.*

values collectivism and group-centeredness in contrast to individualism.[30] Having analysed the leader and its short-comings the essay proceeds to interrogate the prospects of a thought leader.

6.3.2 Thought Leadership

Thought leadership attempts to mend the wounds of incorrect leadership to that which espouses Botho. Thought leadership in its mainstream understanding means the informed opinion of leaders and the go-to people in their field of expertise. They are trusted sources who move and inspire people with innovative ideas; turn ideas into reality and know and show how to replicate their success. Thus, a thought leader, would be someone who possesses the requisite skills, expertise, experience and discipline to lead with Botho as the foundational value. Gumede describes thought leadership as that which orientation which is underpinned by unconventional ideology that is historically nuanced, culturally sensitive and contextually grounded or differently thought leadership is different and encompasses intellectualism.[31]

Gumede advances the notion of "*the trio"* where he asserts that thought leadership without a liberated mind is futile and that higher levels of consciousness based on comprehensive understanding of phenomena make for a better thought leader.[32] Building on this definition of a thought leader in Africa is the concept of force as the Community.[33] It is the way of African leadership, the Great Way of the African ancestors that the community as a whole must survive so that the survival of every individual in the community can be assured.[34] This emphasises Community-based leadership which is the idea that leadership should be communal and thus focus on communities and organisations generating ideas together, learning together, growing

[30] Littrell (note 48 above); see also Khoza, 1994; Booysen, 1999a; Mbigi, 1997.
[31] Gumede V (2015) "Exploring the role of thought leadership, thought liberation and critical consciousness for Africa's Development" *Africa Development*, Volume XL, No. 4, pp. 91-111; another definition is that Thought leadership – distant from and more critical than other forms of leadership – has to be about 'leadership that is based on progressive ideologies, beliefs, orientations with significant pragmatic and impact appeal.
[32] *Ibid.*
[33] Mbeki (note 39 above).
[34] *Ibid.*

and developing together and constructing the meaning of the community's shared existence.[35]

This is why the African traditional model of leadership is the collective which is made up of men and women who are, firstly, equals among equals, and secondly, first among equals, who must serve the needs and aspirations of individuals without ever allowing those needs and aspirations to rise above the best interests of the community.[36] The Imbizo or Lekgotla is the vigorous cut and thrust to which even the humblest of burrow-dwellers is cordially invited.[37] Thus, thought leadership centres Botho as indispensable to progression and advancement of the African and the African Continent. Thus, a thought leader whose base is an African ethos understood from the language of Batho and not the abhorrent white interpretation of Ubuntu, will appropriately resolve the material and intellectual deficiencies in African leadership.

Former President of South Africa, Mr Thabo Mbeki points out that leadership begins from within, with the rediscovery of what each person can contribute, and what all people can achieve together for the benefit of the community, of the people and of the nation.[38] It is also argued by Gumede that African thought leadership must be able to produce not only a critical but also a conscious African citizenry that is grounded in pan-Africanist philosophies and driven to implement the African renaissance agenda.[39]

A leader is devoid of the primary traits that are all encompassing of the needs and context of African leadership and the principle of Botho that characterise it. In contrast to the former, a thought leader provides the necessary mental capacity upon which race, patriarchy, gender, and class as obstacles towards a better African can be destroyed through African philosophy, values and ancient principles.

This thinking is affirmed by Gumede who contends that Africa needs more thought leaders who will dig into the archives of history, explore the diverse and rich cultural

[35] Haruna (note 42 above); see also Bolden and Kirk 2006.
[36] Mbeki (note 39 above).
[37] *Ibid.*
[38] *Ibid.*
[39] Gumede (note 57 above).

landscapes of the continent before colonial intrusion and adapt with contemporary scholarship and ideas that have been championed by Africans to get the continent out of the current socio-economic doldrums as well as the political quagmires.[40] Furthermore, Mbeki states that Africans must seize the opportunity to re-examine, to re-interpret, and to reconnect the Africa we once were with the Africa we can and must become.[41]

Finally, thought leadership is the most persuasive argument upon which Africans have a duty to build together the Africa of entrepreneurs, the scientist, the artist and the visionary.[42] This falls squarely on how MNCs if led properly with thought leadership this can change the fabric of society to a better position. Africans must bring back the Africa that lies within it; the Africa that gave the world civilisation; the Africa whose high priests of knowledge taught the Greeks mathematics, philosophy, medicine and the alphabet.[43] Moreover, the education of the citizenry across the continent is a condition *sine qua non* for the rise, sustenance and nourishment of good and responsible governance in Africa and this can only be achieved through the agency of Botho by thought leaders.[44]

6.3.3 Decolonisation of African Political Economy

The discussion below directly deals with question two and three on the thesis – highlighting the colonial-imperial-capitalist structure that has enabled MNCs from the Global North to monopolise natural resource of Africa to the detriment of the African Continent. Thurow unwittingly opines in a rather post-colonial language (past tense) that "in the modern world, MNCs offer the best opportunities for empire building.[45] The nation-state forbids making of war on the neighbouring clan, the days of colonial empire are over, expanding one's national boundaries by conquest is rare and nuclear weapons make conquering the world goal not worth pursuing.[46] Even the family now

[40] *Ibid.*
[41] Mbeki (note 39 above).
[42] *Ibid.*
[43] *Ibid.*
[44] Ogbunwezeh (note 46 above).
[45] *Ibid.*
[46] *Ibid.*

offers fewer opportunities to exercise leadership and power".[47] Meyer's position has drastically changed given the US-North Korea nuclear threats.[48]

Ndlovu-Gatsheni succinct diagnosis of colonialism commences by stating that: "Conceptualisation of issues is not considered an anathema as this approach helps in thinking through complex African socio-economic and political realities.[49] He also revolts against the tendency of reducing African intellectuals and academics into mere 'hunters and gatherers' of raw data and 'native informants' who collect and provide empirical data that is then processed in the West into theories and concepts that are consumed in Africa. He sees great value in theorizing about the African predicament as a form of production of knowledge by African intellectuals and academics for use by Africans in Africa. He asserts, is a light that assists in avoiding ill-focused, positivistic, shallow and prescriptive narratives divorced from complex historical, discursive and epistemological terrains that reproduce political and economic crises and problems that bedevil Africans today".[50]

Therefore, it is important to understand political economy from its African narrative and to determine the agency if any of African states in shaping economic growth for the continent in relation to MNCs. To continue with his summation, Ndlovu-Gatsheni sought to understand the role of colonialism of power (a global neo-colonial hegemonic model of power that articulates race and labour, as well as space and people in accordance with the needs of capital and to the benefit of white European people) in shaping the complex history of the African postcolonial present.[51] It is a 'present' which is 'absent' because what exists is not what Africans aspired for and struggled to achieve.

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[47] Meyer W H (1996) "Human Rights and MNCs: Theory Versus Quantitative Analysis" *Human Rights Quarterly* Vol. 18, No. 2, 373.
[48] Friedman U (2018) "How King Jong Un Seized Control of the Nuclear Crisis: and slowed down talk of war in Washington (6 MARCH) available at https://www.theatlantic.com/international/archive/2018/03/kim-jong-un-south-korea/554888/ (accessed 06 June 2018).
[49] Ndlovu-Gatsheni S J (2013) *Coloniality of Power in Postcolonial Africa Myths of Decolonization* (Council for the Development of Social Science Research in Africa, CODESRIA, DAKAR) x.
[50] *Ibid.*
[51] *Ibid.*

Politics on the one hand refers to activities that relate to influencing the actions and policies of a government or getting and keeping power in a government.[52] On the other hand economy refers to an entire network of producers, distributors, and consumers of goods and services in a local, regional, or national community.[53] Economy is the system of trade and industry by which the wealth of a country is made and used.[54] Thus, the amalgamation of politics and economy has given rise to what is termed political economy. However, this political economy has been shaped to a large degree by colonial-imperial-capitalist phenomenon.

Africans and other people of the Global South who experienced 'darker' manifestations of modernity which included processes such as the slave trade, mercantilism, imperialism, colonialism and apartheid aspired for a new humanity in which species of the human race would coexist as equal and free beings.[55] These 'darker' manifestations are as a direct result of how MNCs as representative of colonial expansion have operated and still continue to operate with minimal accountability.[56] African nationalism and decolonisation were thus ranged against all the dark aspects of modernity including underdevelopment and epistemic violence.[57] It is notable though that what emerged from the decolonisation process was not a new world dominated by new humanist values of freedom, equality, social justice and ethical coexistence.[58] African people found themselves engulfed by a 'postcolonial neo-colonised world' characterised by myths of decolonisation, illusions of freedom and economic growth.[59]

The term 'postcolonial neo-colonised world' best captures the difficulties and unlikelihood of a fully decolonised African world that is free from the snares of the

[52] Politics definition, available at http://www.merriam-webster.com/dictionary/politics (accessed 12 August 2017).
[53] Economy definition, available at Business Dictionary http://www.businessdictionary.com/definition/economy.html (accessed 10 August 2017).
[54] *Ibid.*
[55] Ndlovu-Gatsheni (note 75 above).
[56] Thio L (2009) "The Historical Origins and Contemporary Evolution of International Human Rights" *SAcLJ* Vol, 2. No 1, 287; most of the world in 1945 was living under colonial rule and Winston Churchill was determined not to give up Britain's colonial possessions. The US was saddled with Negro problems in the South and Stalin faced criticism for the closing of the Soviet society.
[57] Ndlovu-Gatsheni (note 75 above).
[58] *Ibid* xi.
[59] *Ibid.*

colonial matrix of power and the dictates of the rapacious the Global North's power through its MNCs and its military.[60] The current configuration of the world is symbolized by the figure of America at the apex and that of Africa at the bottom of the racialised and capitalist hierarchies of the world order.[61] Such dark aspects of European modernity as the slave trade, mercantilism, imperialism, colonialism and apartheid bequeathed to Africa a convoluted situation within which the 'postcolonial' became paradoxically entangled with the 'neo-colonial', to the extent that the two cannot be intellectually approached as mutually exclusive states of being.[62]

During the Scramble for Africa in the late nineteenth century, European powers divided Africa and its resources into political partitions at the Berlin Conference of 1884-85.[63] By 1905, the African soil was almost completely controlled by European governments, with the only exceptions being Liberia (which had been settled by African-American former slaves) and Ethiopia (which had successfully resisted colonisation by Italy). Britain and France had the largest holdings, but Germany, Spain, Italy, Belgium, and Portugal also had colonies. As a result of colonialism and imperialism, Africa suffered long term effects, such as the loss of important natural resources like gold and rubber, economic devastation, cultural confusion, geopolitical division and political subjugation.[64] Europeans often justified this using the concept of the White Man's Burden, an obligation to 'civilise' the peoples of Africa through introduction of trade."[65]

The White Man's Burden manifested itself with the romantic anecdote of historical development where there was a shift from foraging to domesticated food production, which was closely linked to the beginnings of African metallurgy and the emergence of major exchange systems within the continent.[66] It is this form of development which is referred to as the African domestic economy, in contrast to the contact economies arising around the commercial frontiers connecting pre-colonial Africa with the outside world and the colonial and post-colonial economies resulting from the European

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[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*
[63] Decolonisation of Africa available at http://www.saylor.org/site/wp-content/uploads/2011/04/Decolonization-of-Africa.pdf (accessed 05 August 2017).
[64] *Ibid.*
[65] *Ibid.*
[66] Austen R A (1987) *African Economic History*: The Dynamics of Subsistence African Domestic Economies in Historical Perspective (James Currey Ltd and Heimann Educational Books Inc) 9.

occupation of African the territory signified by MNCs such as British East India Company, Hudson's Bay Company and Dutch East India Company.[67]

From the perspective of both Westerners and the vast majority of African people, the underlying logic of the transition from foraging to domestication seems so self-evident such that it does not require any explanation.[68] Foraging represents savagery which is said to signify the fact man still in a state of nature; domestication represents civilisation which signifies the movement from nature to culture.[69]

Most historical studies on the African economy begin at a point closer to the present, often dating from the beginnings of international trade.[70] While such an approach is frequently berated as ethnocentric, if not colonialist and racist, it pervades the work of even liberal and radical revisionist historians.[71] The problem is less one of ideology than of technology 'introduced' by the MNCs, the inadequacy of the research tools of archival and field-work social science for comprehending economic transformation in a remote and non-literate African past.[72]

Any attempt to identify the major determinants underlying contemporary African realities and, in particular, to identify those forces which provide the dynamic for uneven development as a continental process, must first assess the structure of Western capitalism's interest in Africa.[73] Such a focus suggests in turn two hypotheses of crucial significance, first, there has been a broadening of Western capitalist interests in the underdeveloped world in general due to more direct involvement of MNCs in

[67] *Ibid*; see also Ratner S R (2001) "Corporations and Human Rights: A Theory of Legal Responsibility" *The Yale Law Journal* Vol. 111, 453.
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] Dlovu-Gatsheni (note 75 above) noted that African history is dominated by a climate of interventionist global neoliberal imperialism which increasingly manifests its violent character through the military invasion of Iraq, bombardment of Libya, imposition of sanctions on Zimbabwe and the military invasion of Afghanistan. Violent invasions of weaker countries by the United States of America (USA) and its North Atlantic Treaty Organization (NATO) partners, are often justified as humanitarian interventions to introduce democracy and human rights, dethrone dictators, eradicate terrorism and restore order within those states characterized by United States as outposts of tyranny and part of 'the axis of evil'. But, the military interventions, rhetorically premised on the noble 'right to protect', seem to be selective and guided by the West's permanent strategic interests rather than genuine global humanitarian concerns.
[72] Ndlovu-Gatsheni (note 75 above) vii.
[73] Austen (note 92 above) 46.

such industrialisation as it takes place in the peripheries.[74] This relative shift of emphasis away from the pattern of classic "extractive" imperialism (whose drive was postulated primarily upon the guaranteeing of supplies of raw materials and of outlets for the sale of manufacturing goods in the underdeveloped world) has been reinforced by the sharp decline in profitability and attractiveness of the agricultural sector to overseas interests.[75]

The Southern Africa complex centred around industrial South Africa and Rhodesia (now Zimbabwe) and including South West Africa, Angola, Mozambique, and the quasi-Bantustans of Swaziland, Lesotho, and Botswana – is by far the most important region with respect to the above criteria, since it is characterised by relatively developed industrial structure and exceptional mineral wealth.[76] Concomitantly, the scope of Western capitalist involvement in the area is vast indeed.[77] This is because European MNCs became the principal agents for the exploitation of the colonial territory.[78] Of course this is a familiar story and bears only limited repetition here.[79] Britain, with over £1,000 million invested in the Republic of South Africa and £200 million in Rhodesia, remains the major investing capitalist country in the area.[80] Countries like Gabon, the Congo, Nigeria, and Zambia are endowed with known mineral resources of great importance to the world economy and therefore of special concern to international capitalism.[81]

There are numerous ideological alternative modes of approaching political economy such as socialism, communism, economic democracy, participatory economics and resource-based economy and collaborative commons. An economist, Perroux defines socialism as a conviction that man's creative potential can only be fully realised in a society which transcends the cultural centrality of "possessive individualism" and in

[74] *Ibid.*
[75] *Ibid.*
[76] *Id* 49.
[77] *Ibid.*
[78] Ratner S R (2001) "Corporations and Human Rights: A Theory of Legal Responsibility" *the Yale Law Journal* Vol. 111, No. 3, 453.
[79] Austen (note 92 above) 46.
[80] *Ibid.*
[81] *Ibid.*

which a signal measure of economic and social equality, and the precondition for genuine political democracy, is guaranteed.[82]

Neo-colonial political economy can be summarised by an account put forth by Acemoglu, Johnson and Robinson, where they view protection of private property as the best course of action to take.[83] They define good institutions as corresponding to social organisation that ensures that a broad cross-section of the society has effective property rights.[84] They refer to this cluster as institutions of private property.[85] Such institutions contrast with extractive institutions where the majority of the population faces a high risk of expropriation by the government, the ruling elite, or MNCs.[86]

Institutions of private property, therefore, require not only effective property rights for a large segment of the society, against both state expropriation and predation by private agents but also relative political stability to ensure continuity in these property rights and effective constraints on rulers and political elites to limit arbitrary and extractive behaviour.[87] Botswana's success is attributed to the following reasons:

(a) Botswana possessed precolonial tribal institutions that encouraged broad-based participation and placed constraints on political elites.[88]
(b) British colonisation had a limited effect on these precolonial institutions because of the peripheral nature of Botswana to the British Empire.
(c) Upon independence, the most important rural interests, chiefs and cattle owners, were politically powerful, and it was in their economic interest to enforce property rights.

[82] Arrighi G & Saul J S (1973) *Essays on the Political Economy of Africa* (Monthly Review Press, United States of America) 11.
[83] *Ibid.*
[84] Acemoglu, D, Johnson, S & Robinson, and J. (2003) *An African success story: Botswana, in In search of prosperity: analytical narratives on economic growth* (edited by D Rodrik. Princeton: Princeton University Press) 7.
[85] *Ibid.*
[86] Momoh Z (2016) "Multinational Corporation (MNCs) and Corruption in Africa" *Journal of Management and Social Sciences* Vol. 5, No. 2, 81.
[87] Acemoglu (note 110 above).
[88] *Id* 33.

(d) The revenues from diamonds generated enough rents for the main political actors, increasing the opportunity cost of, and discouraging, further rent seeking.
(e) Finally, the post-independence political leaders, in particular Seretse Khama and Quett Masire, made a number of sensible decisions.

In direct contrast is Ghana, where Nkrumah and his Convention Peoples' Party (CPP) lacked such a coalition and, in the absence of institutional limits, posed a threat to other groups.[89] The CPP, therefore, quickly became locked into an antagonistic relationship with other tribes, particularly the Ashanti.[90] The resulting political instability led to the collapse of democracy and highly inefficient income redistribution. Our reading of this suggests that the lack of economic interest of Nkrumah and the CCP in promoting development (as emphasised by 1981) was less crucial than this political instability which was exacerbated by the long divisive impact of the Atlantic slave trade and colonialism on indigenous political institutions.[91]

The thesis started with Ndlovu-Gatsheni's account of Africa and it ends with him. However before his powerful conclusion is regurgitated, there are few mechanisms that Africa can employ to put an end to global capitalism and its dwarfing of political economy in Africa.[92] Amongst economic giants in Africa, notably South Africa and Nigeria, there is limited economic policy space to create independent economic growth. Thus, political economy is closely and intricately linked to global capitalism such that by itself it can never be detached from the African gravy train.

There are pragmatic steps that Africa needs to take in order to deal effectively with the Global North's MNCs for their violations of rights and this steps include but not limited to the following:

(a) Stop consuming dangerous substance (dumping of commodities) and any other products that has been dumped in the Continent.

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[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid*; see also Ojo E O (2015) "The Atlantic Slave Trade and Colonialism: Reasons for Africa's Underdevelopment?" *European Scientific Journal* Vol. 11, No. 17, 109.
[92] Ndlovu-Gatsheni (note 75 above) vii.

(b) Africa needs to leave the United Nations; and all its organs including; and also Bretton Wood Institutions.
(c) Employ protectionist mechanism to grow their own industries and to a large extent only employ skills and resources within the continent.
(d) Create technology within the African context that is geared towards capacitating the continent.
(e) Strengthen African Economic integration.
(f) Strengthen African communitarianism and its regulation of society.
(g) Remove all colonial legal regimes including the current constitutional democracies that makes a mockery of poor Africans and their illusion of voting power that has not seen a single just post-colonial state.
(h) Develop a deep rooted African epistemology based on African values, such as Ubuntu.

Now, the implication for the global north is the following:

(a) Collapse of capitalism and hopefully with all its remnants;
(b) Collapse of the market and its currency that has no legitimacy;
(c) Re-negotiations of economic and legal regimes that hold capitalism together;
(d) Eradication of the enforcement of “legal” trade agreements through military might;
(e) Eradication of the Global North’s effect of regime changes through-out the continent;
(f) If all proceeds accordingly, there may be a glimmer of hope for all humanity in the creation of a new order based on equal participation of the human kind in all aspects of life that affect them wherever they may be in the world.

Taken together, the coloniality of power, the coloniality of being and the coloniality of knowledge constitute a formidable global coloniality that stands as a bulwark on the path of the African people's struggles and initiatives to create African futures because

of the monopoly of MNCs and their influence over most if not all African states.[93] While the coloniality of power is mainly about modern forms of domination, control and exploitation (power), coloniality of knowledge is about epistemological colonisation of the mind and the imagination, coloniality of being is about denial of the very humanity of African people, their inferiorisation and dehumanisation.[94] In short, the coloniality of power, being and knowledge reinforce each other in the production and sustenance of global coloniality. In combination, they inhibit the release of the African genius which is needed as they fight and strive to create African futures,[95] based on the ability to effectively regulate MNCs of all kinds irrespective of where they are located in the Global North or Global South.

To be released from the control and power of the Global North and their MNCs, the African genius requires intensification of simultaneous processes of decolonisation of the modern world system that are not limited to the political realm, but extend to the epistemological and ontological realms in which coloniality is also causing havoc as well as deimperialisation of the modern global order.[96] There is need for genuine socialisation of the global power structures in the direction of destructuring the asymmetrical power relations inscribed in the modern world through imperial/colonial designs.[97] The spirit and language of liberation informing the socialisation of the modern global power should be uncompromisingly anti-Eurocentrism, anti-subject-object paradigm, anti-imperial, anti-colonial, anti-racist, anti-patriarchal, and anti-fundamentalism and anti-hegemonic.[98] Arguably it is only after this genuinely decolonial struggle has been won that African people can be able to create the African future within a pluriversal future in which diverse but common futures are possible.[99] Thus, Africa needs to reimagine itself distinct, autonomous and with absolute full bargaining power at the international level especially with regard to the economy as controlled by MNCs in the Global North.

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[93] Ndlovu-Gatsheni S J "Global Coloniality and the Challenges of Creating African Futures" *Strategic Review for Southern Africa,* Vol. 36, No. 2. 199.
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid*; see also Baez C, Dearing M, Delatour M, and Dixon Multinational Enterprises And Human Rights, 8 U. *Miami Int'l & Comp. L. Rev*. 183 (2015) available at: http://repository.law.miami.edu/umiclr/vol8/iss1/5 (accessed 05 June 2018) 256.
[97] Ndlovu-Gatsheni (note 75 above).
[98] *Ibid.*
[99] *Ibid.*

6.3.4 Alternative paradigm for economic development in Africa

The African Economic Integration, Economic Communalism and the New African Order are interrelated but distinct phenomenon that can break the cycle of colonialism. In line with the above concepts Gumede gives a compelling account of the future of the Continent, as he states that there is no going back; Africa and Africans have a better sense now of what has essentially gone wrong in Africa and the overall global South.[100] Africa and Africans have been misled for many decades.[101] In response to the hypocrisy of those that have advised Africa for many decades, Africa has embarked on a new journey and will continue to address the multiple challenges of leadership, institutions and development.[102]

To achieve those objectives, Africa should be guided by Sen's argument that "we have to go through doubts, questions, arguments and scrutiny to move towards conclusions about whether and how justice can be advanced".[103] Africa in its many faces must pursue its own paradigm for economic and social development and should rethink the policies that underpin these efforts.[104] The structures of many African economies need significant transformation in order for African countries to construct democratic developmental states.[105]

The economic principles find its solace in this Global North upon which the argument advanced rejects. It is said that to achieve developmental success, strategies and lessons from the Global South may assist the African countries. These are:

(a) Orthodox versus Heterodox Policies.

The ability of a country to compete successfully requires capability.

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[100] Gumede (note 57 above) 37.
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*

(b) Diversity can serve as catalyst for adopting favourable developmental policies; and
(c) Human development is the ultimate goal of economic growth.

It is noted however, that import substitution policies failed in many developing countries primarily because such policies created rent-seeking activities which resulted in inefficiencies and eventual collapse of the protected firms.[106] Since many of the IS strategies are no longer feasible under WTO rules, strengthening the business environment generally, especially infrastructure provision, has now become critical.[107] Extensive infrastructure networks ranging from; road connectivity, electricity service, telephony, potable water, etc. – to improve the business environment and labour productivity substantially enhanced Costa Rica's development following market reforms.[108] These improvements attracted FDIs which played a huge role in the country's industrial diversification and technological upgrading.[109]

6.3.4.1 Factors necessary for Africa's economic regeneration

Having regard to the words of the great leader Bantu Biko asserting that "Black man you are on your own", the interrogation of Africa's' past-present-further and a way that enables Africans to be completely in charge of their destiny becomes necessary.[110] History is the best indicator and history tells of empires that have divided and pillaged the African continent. Notably Africans in their deeds think that their coloniser will save Africa. It is noted, though, that rhetorically, one may be convinced of the Africa rising narrative. African Economic Integration is a fundamental vehicle which Africa can use to emancipate itself from its masters and achieve its economic success. Although the strategies proposed are simple they are effective.

The detractors of African integration capitalise on the fundamental flaws which are inherent within African economic integration, exemplified by the lack of financial as

[106] Fosu A (2013) *Achieving Development Success: Strategies and Lessons from the Developing World*. WIDER Studies in Development Economics (Oxford, Oxford University Press) 2.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] Slogan coined by Steve Biko for the South African Student's Organisation, SASO, available at https://thisisafrica.me/7-quotes-from-steve-biko/ (accessed 02 June 2018).

well as infrastructural capacity. What will determine the success of African integration is the complete eradication of colonialism. Failure for Africans to own their continent is the source of their problem and not the so called dictators even though there may be merit to some leaders. However, the fundamental inherent flaw in African integration is that its economy is very colonial and no African state owns 80 per cent (generously speaking) of its resources.

Economic communalism refers to ownership of all the means of production by Africans and no other continents since the people must share in the wealth of its nation and participate in the making of wealth. The African is reduced to a mere servant in his/her own house as a result still clings to his masters with no disruption of its economic slavery, which he/ she protects mightily by coming up with neoliberal economic policies. The fact of the matter is that Africa is not bold enough to challenge the empires of the North and East, arguably, there can never be any economic growth that benefits the African if the African is not in charge. It is amazing that the African protects decisions and the coloniser's structures even though the African was not a party when those decisions where taken.

The new African order comprises the creating of a new consensus with Africa's masters. This means the redrafting of every bilateral agreements that Africa has ever made, as reform has never worked for anyone. Notably, people have painstakingly attempted to ensure that Africa has a seat at the eating table. Put differently, Africa is worse than a puppy that receives crumbs under the table of its owner. A typical example in this regard is the recent African Growth and Opportunity Act (AGOA)[111] agreement that South Africa was forced to swallow because it does not have any bargaining power to reject unfair trade agreements.[112]

[111] The African Growth and Opportunity Act (AGOA) is a United States Trade Act, enacted on 18 May 2000 as Public Law 106 of the 200th Congress. AGOA has since been renewed to 2025. The legislation significantly enhances market access to the US for qualifying Sub-Saharan African (SSA) countries. Qualification for AGOA preferences is based on a set of conditions contained in the AGOA legislation. In order to qualify and remain eligible for AGOA, each country must be working to improve its rule of law, human rights, and respect for core labour standards.

[112] South Africa: "New Threat to AGOA Benefits" *ENCA/ANN* The United States poultry industry has warned that South Africa could once again lose its trade free access for many exports to the market if South African poultry and pork producers get a court injunction to block US chicken imports.

The African must disengage from the coloniser's laws, economic structures, technology and the coloniser's culture. Only when this is achieved can the African begin to rebuild herself/himself and be completely free to live like a human being. Any attempt to complicate the issue of African independence with economic concepts and legal jargon only waste time and still leave the African with little growth.

However, the systematic approach to this work begins, it would be proper to note the following positions that Africa usually adopts in attempting to eradicate social ills towards fostering economic development and sustainable economic growth. The following introductory synopsis is taken from the Declaration on Employment and Poverty Alleviation in Africa.[113] The principles contained in the said Declaration is representative of the broad themes that illuminate the African thinking (intentional or coerced) with regard to empowerment or emancipation of Africans at all levels including poverty eradication, economic growth and quality education.

It is highly problematic that postcolonial Africa still perceives itself from a dependency perspective which is compounded by the rhetoric of sovereignty and independence that has yielded no sustainable growth for the Continent. Amongst other issues, the dependency thought begins by stating that Africa is deeply concerned that the previous commitments made by the development partners in global forums relating to new and additional resource allocation, debt relief and cancellation, increased FDIs flows and harmonised Official Development Assistance (ODA) have not been fully met.[114]

There is thus grave concern that FDIs do not give room for meaningful participation and control of the economy by indigenous people.[115] The conviction is that such additional resource transfers are imperative to complement Africa's own efforts to meet the Millennium Development Goals (MDGs) of halving poverty by 2015 to achieve long term sustainable development goals.[116] There is thus stress on the

[113] Draft Declaration on Employment, Poverty Eradication and Inclusive Development in Africa, available https://www.au.int/web/sites/default/files/newsevents/workingdocuments/27983-wd-draft_declaration_-english.pdf (accessed 19 March 2018).
[114] Article 26 Preamble of the Declaration on Employment and Poverty Alleviation in Africa, 2004.
[115] *Id* 27.
[116] *Id 28.*

importance of the World Solidarity Fund established by Resolution 55/210 of the General Assembly of the United Nations to promote employment and to fight against poverty in the world and in Africa in particular.[117]

There is thus a need to support the continuing efforts made by our Governments, social partners and civil society organisations to promote the decent work development agenda of the International Labour Organization (ILO).[118] Additionally, there is also need to develop integrated economic and social policies and effect reforms at national, regional and continental levels to address structural constraints to investment and entrepreneurship and thus promote private-public partnerships which will encourage corporate social responsibility and create an enabling environment for increased production and decent employment opportunities to achieve socio-economic development.[119]

Arguably there is need to developing and implement strategies that give young people in Africa a real chance to find decent and productive work and encourage African Member States to support, and adopt the Youth Employment Network (YEN) Initiative and implement its recommendations therein with the support of the UN, ILO, the World Bank and other competent agencies as well as development partners.[120] There must, therefore, be an increase the domestic financial, human and material resources and also seek external support and resources from development partners and Africans in the Diaspora to fight poverty and its different manifestations[121]

It is thus imperative to enhance the capacity of the Regional Economic Communities (RECs) to promote the productive employment dimension within the framework of regional and inter regional cooperation.[122] The capacity of the African Union Commission must be strengthened with human and financial resources with the support of relevant and competent organisations and agencies in the Commission's endeavour to support Member States at their request in the development of national

[117] *Id 29.*
[118] *Id 30.*
[119] *Id* 2.
[120] *Id* 8 (b).
[121] *Id* 11.
[122] *Id 12.*

plans of action for the implementation of the strategies for the promotion of productive employment and poverty alleviation.[123]

Dialogue with the development partners in the true spirit of partnership for an international enabling environment, promotion of a fair globalisation, fair trade including the removal of subsidies, and financial rules to support Africa's development must be pursued.[124] This would require the call upon the States to urgently honour their commitments to attain the level of ODA of 0.7 per cent of their GNP and thus improve the terms of trade to increase market access of Africa commodities and industrial products as well as levels of Foreign Direct Investment (FDI) flows, debt relief and cancellation and repatriate illegally acquired funds stashed in foreign banks to their countries of origins and other measures to support Africa's development efforts and poverty alleviation.[125]

Notwithstanding the above clear failings by the international (Global North) to exercise economic justice on the African continent and the numerous regional failings of the economic theories that are largely if not wholly informed by the "international", Africans still attempt to grow their economy within the same parameters created to pillage the Continent over 367 years ago.

6.5 Thoughts on imperatives that Africa must adopt in order to create conditions for the enforcement of human rights standard against MNCs.

The enforcement of human rights standards against MNCs can be achieved through African episteme but cannot be effectively achieved through the current human rights language that has been argued through-out the thesis as been shaped by colonial-imperial-capitalist paradigm in favour of the Global North. Enforcement of human rights standards against MNCs in the Global South should be and is predicated upon the understanding of a racial contract between the Global North and Global South. Therefore, enforcement has imperatives that will engender a legal system that has the

[123] *Id 13.*
[124] *Ibid.*
[125] *Ibid.*

at its core the understanding of African history's episteme and its subsequent epistemicide in order to deal with question of power dynamics and colonial structure that has shaped the impunity of MNCs.

To the above extend one must therefore, remember that Africa was standing for time immemorial with the exception of the last three and half centuries. Therefore, "past African rising" begins because as Mbeki notes that: "Something in the African spirit was stolen in the aftermath of those tall ships cresting the horizon, driven by the wind and the power of what seemed to be an expression of Manifest Destiny. Something was surrendered, something was abandoned and something was drained from our blood on the day that the proud leaders of Africa became the Led".[126]

The spirit of African Leadership has been lost in this age when the sacrifice of the self gives way too easily and too often to the sacrifice of others."[127] The "past African rising" saw the emergence of Pan-Africanism thought leadership of Kwame Nkrumah, Bantu Biko, Mangaliso Sobukwe, Frantz Fanon, Chinua Achebe, Patrice Lumumba, Muamar Gaddafi, Thomas Sankara and Marcus Garvey, to name but just a few. All these leaders had one common dream to crystalise into a united Africa that would determines its own destiny from an African centred thought leadership. Put differently, they saw an independent Africa free of its masters and prosperity solely reliant and deeply rooted in the African ethos. These leaders believed unequivocally in Africa and her African (Black) Consciousness.

Africa presents a paradox, which is manifested by the fact that Africa is the richest continent in terms of natural resources, yet it is the poorest and most underdeveloped as the majority of its population live on less than US$2 per day.[128] This gives rise to existential African rising which refers to the present reality of thought leadership or lack thereof that affects the material existence of the Africans. The present leaders in the main have turned back the clock of strong thought leaders that saw hope in the

[126] Mbeki (note 39 above).
[127] *Ibid.*
[128] Ngambi H (2011) "RARE leadership: An Alternative leadership approach for Africa" *International Journal of African Renaissance Studies* Vol. 6, No 1. 6. See also Global Competitiveness Index 2010.

socio-economic growth of the Continent and not only hope but real sustainable economic performance based on African Consciousness.

Although African's persistent state of dysfunction may be a hangover of its colonial history, it needs to be conceded that bad leadership essays daily make colonialism a lame excuse and a wooden apology for the grotesque incompetence of visionless leadership.[129] The major trouble with Africa today is that felons who should be inhabiting maximum security prison yards, are the ones occupying the seats of power; residing in the government houses across Africa masquerading as leaders.[130] Without being overly diagnostic, suffice it to say the fruits of the tree nourished by the blood of Lumumba, Bantu and Sobukwe are a pipe dream for many Africans today. This now leads us to Imagined African rising which is dedicated to how thought leadership can rise notwithstanding the fact that less than 2 per cent the of youth in Africa do Agricultural studies.[131]

Mbeki argues that "we have a duty together to build the Africa of the entrepreneur, the scientist, the artist and the visionary; we must bring back the Africa that lies within us; the Africa that gave the world civilisation; the Africa whose high priests of knowledge taught the Greeks mathematics, philosophy, medicine and the alphabet.[132]" Mbeki's argument in this regard instil a sense of hope in the Africa rising narrative because despite the challenges of corruption and presidents who refuse to vacate their long presidency, there is renewed calls for a decolonised education in Africa, Nationalisation, and Gender equality which, most importantly, the youth is calling for. Littrell and Nkomo points out in their study that African (black) managers are more Afro-centric in their approach to gender and race differences leadership.[133] The Afro-centric model is centred in the concept of Ubuntu.[134]

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[129] Ogbunwezeh (note 46 above).
[130] *Ibid.*
[131] "African Rising? From Resource Potential to Shared Prosperity" the Africa Centre, Africa's Embassy to the World. *Africa Centre Debate Series No 1, New York, 22 September 201,* available on http://www.un.org/africarenewal/sites/www.un.org.africarenewal/files/Africa%20Rising_16.09.2014NEW.pdf *(*accessed 10 October 2017) 15.
[132] Mbeki (note 39 above).
[133] Littrell (note 48 above) 566.
[134] *Ibid*; see also Khoza, 1994; Booysen, 1999a; Mbigi, 1997 who describes Ubuntu as not a leadership style but a philosophy of African humanism, which values collectivism and group-centeredness in contrast to individualism.

The most compelling argument for Africa rising was advanced 53 years ago when Nkrumah argued that "Africa is one continent, one people, and one nation and that it is on this basis that the new Africans recognise themselves as potentially one nation, whose dominion is the entire African continent."[135] Therefore, Africa rising will largely depend on the youth looking inwards into their African epistemology and more importantly drawing on the thinking and pragmatism of Sankara, Garvey, and Gaddafi. Imagined African rising relies on young leaders who appreciate African economic integration, free mobility and efficient government and most importantly the disruption of colonial capitalism.

Thought leadership based on Botho is fundamentally indispensable to the creativity and innovation that must fuel the Africa rising narrative. Africa does not lack hands because many of its youth are unfortunately unemployed; Africa does not lack arable land; Africa is rich in mineral resources and Africa is relatively educated. Now the question remains – to imagine Africa rising what would it take" the answer is two pronged which needs to be executed simultaneously, firstly is the regaining of African Consciousness and secondly is the complete eradication of capitalism. This is in line with Agenda 2063 of the AU which sees an integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance.[136] An Africa with a strong cultural identity, common heritage, shared values and ethics.[137]

Africa rising narrative on an ideological basis begins with Africa rededicating itself to the enduring Pan African vision of "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena".[138] For Africa to rise, it needs to meet the demands of the 21st century. This means that the youth equipped with education that is informed by African knowledge must create an African economic system and engineering social polity order. Furthermore, the African must see herself completely independent of her master's

[135] Nkrumah K (1970) *Class Struggle in Africa* (International Publishers) available at https://thisisafrica.me/10-quotes-from-kwame-nkrumah/ (accessed 30 July 2018).
[136] "Agenda 2063 Africa We Want" available at https://au.int/en/agenda2063 (accessed 20 November 2019).
[137] *Ibid.*
[138] *Ibid.*

economic model, law, polity, culture, language, and social ordering and this must be undertaken simultaneously with the eradication of colonial capitalism without any concession.

Imagined African rising relies on ancient knowledge of the great Africa from its Egyptology, the Khoi, the San, Timbuktu manuscript and the centrality of Africa in making the world. Thus, a sustained Africa rising is deeply rooted in Bantu (Steve) and Garvey's words that emphasises the emancipation of Africa from mental slavery so that the Africans can free their minds.[139] This is because a people without the knowledge of their past history, origin and culture is like a tree without roots.[140] Africa is rising I assert not because of its colonial capitalist economic ranking but because of the African spirit that lives in all Africans. This is best articulated by Nkrumah in his assertion that "I am not African because I was born in Africa but because Africa was born in me."[141]

Africa is rising in the hands of the decolonised youth of the great African continent and fortified with the *aluta continua* knowledge which is informed by thought leadership. Thought leadership is what is going to sustain the rise that fuels the African youth to industrialise, nationalise and create efficient governance systems that are totally reliant on African knowledge.

It is important to define African Renaissance in order to contextualise its significance for the African masses. Africa's own African Renaissance ideologues, Cheik Anta Diop and Thabo Mbeki define this concept by asserting that "the African Renaissance is the concept that African people and nations shall overcome the current challenges confronting the continent and achieve cultural, scientific, and economic renewal" or put differently, Mbulelo Mzamane asserts that "African Renaissance in proper historical context is essentially the rise of Africans universally, on the continent and in

[139] Marcus Garvey & Bantu Biko, available at Marcus Garvey, https://www.biography.com/activist/marcus-garvey; Bantu Steve Biko, available at Slogan coined by Steve Biko for the South African Student's Organisation, SASO, available at https://thisisafrica.me/7-quotes-from-steve-biko/ (accessed on 02 June 2018).
[140] Marcus Garvey, available at https://www.biography.com/activist/marcus-garvey (accessed 20 November).
[141] Nkrumah K, available at https://thisisafrica.me/10-quotes-from-kwame-nkrumah/ (accessed 30 July 2018).

the diaspora, from slavery, colonialism, segregation, apartheid and neo-colonialism".[142]

The second key decision which is the mental liberation or psychological renaissance reflects the notion that "being black is not a matter of pigmentation but that being black is a reflection of a mental attitude".[143] The philosophy of Black Consciousness, therefore, expresses group pride and the determination by the blacks to rise and attain the envisaged self.[144] Thinking along this lines of Black Consciousness makes the black man and woman see herself/himself as a being, complete in herself/himself and not as an extension of a broom or additional leverage to some machine.[145] Aristide argues that psychological renaissance is intended to stimulate mental growth on a path towards an African Renaissance.[146] And, on that path, one can draw insight from African life, African values, Africa's history and a psychohistorical analysis of European colonialism in Africa.[147]

The third key decision is the practice of African religion and spirituality which Olupana, a professor of indigenous African religions, describes as simply acknowledging the beliefs and practices that touch on and inform every facet of human life and thus, making impossible for African religion to be separated from the everyday or mundane.[148] The revival of the African religion and spirituality must be amongst the priorities in the renewal of being an African. The African religion is the source of African's ancient practical wisdom of what our forefathers have bestowed upon this current generation.[149] The Spirituality of Africans with its overly matriarchal expression through woman as divine vessels, herbalist, and healers is the complete and sufficient refuge for Africans. Thus, the centring of divinity ensures stability and most importantly

[142] Mzamane M B "Where there is no vision the people perish: Reflections on African Renaissance" available on https://www.unisa.edu.au/Documents/EASS/HRI/working.../mzamane-vision.doc (accessed 25 August 2017).
[143] Biko (note 136 above).
[144] *Ibid.*
[145] *Ibid.*
[146] Aristide J B (2006) "The Psychological Renaissance" *The International Journal of African Renaissance Studies,* 1(1) 164.
[147] *Ibid.*
[148] Jacob Olupona interviewed by Anthony Chiorazzi (Harvard Correspondent) "The Spirituality of Africa" Harvard Gazzete. October 6, 2015.
[149] Awolalu J O (1976) "What is African Traditional Religion?" *Studies in Comparative Religion*, Vol. 10, No, 2. World Wisdom, Inc. available at www.studiesincomparativereligion.com (accessed 26 August 2017) 1.

a legitimate innate strength. Akan tells of an African saying *Onyame boo obiara yie* ("God created every human being to be good").

The fourth key decision entails the overhauling of the current educational paradigm to that of African education. African education conforms to W.E.B Du Bois conception of education which is a system of education which he describes as "not one thing, nor does it have a single definite object, nor is it a mere matter of schools. Education is that whole system of human training within and without the school house walls, which moulds and develops men."[150] Therefore, the process of learning by Africans (lessons) under the tree, fire wisdom and the tutelage of the elders, still has a value even in the 21st century and more importantly its moral and legitimacy to Africans. Thus, African education speaks to the values that inform the African outlook such as *suban* (good character), *honam mu nni nhanoa*, (humanity has no boundary), and *onipa ye fe sen sika* (the human being is more beautiful than gold), etc.[151]

The fifth key decision is African economics, through African Economic Integration (not the prevailing capitalist market economy). This view is advanced because the psychological impediment of Africans with respect to economics simply put has to do with the colonial constructed belief that Africa and Africans are unable to create, unite and manufacture goods and services for themselves. This inferiority has been internalised. For example, a diamond extracted in the Democratic Republic of Congo is regarded as authentic as opposed to the diamond which took a detour at Antwerp. Therefore, belief in Africanness is pivotal. However, the practical steps involve infrastructural building, energy capacitation and farming through-out the continent by Africans with African resources, designs and minds. The African integration must speak to the realisation of Marcus Garvey's version of African Union which aims to prosper all humanity.

[150] Du Bois WEB (2002) *Du Bois on Education* (AltaMira Press, England) 86.
[151] Stanford Encyclopaedia of Philosophy available at https://plato.stanford.edu/entries/african-ethics/ (accessed 30 August 2017).

CHAPTER 7

CONCLUSION and RECOMMENDATION

7.1 Introduction

The thesis sought to answer three fundamental question utilising TWAIL, CRT, Post-colonial theory, Dialectal Utility and Political Economy as a tools of analysis; firstly, is human rights language the appropriate mechanism upon which MNCs can be held accountable for violations of rights? Secondly, to what degree does colonial legacy and global capitalism affect the enforcement of human rights standards against MNCs in the Global South? Finally, whether an African epistemological outlook cannot provide a viable, sustainable and effective solution to the problem of human rights violations by MNCs?

TWAIL and Post-colonial Theory has been instrumental in locating the discourse of business and human in its proper context of colonial-imperial-capitalist structure that still persist and has permeated (infiltrated) within the language of human rights at the UN, Regional and Domestic spheres. Following, from the said structure, TWAIL theory has allowed the critical study of business and human rights within the dependency syndrome between the Global South and the Global North which adversely affect the Global South.

CRT has went a step further, by not only focusing on the colonial-imperial-capitalist structure but to simultaneously centre race as a large factor in how MNCs from the time of their inception in the form of Dutch East Company (VOC) structured their activities on race. The manifestation of this MNCs activities has transcended time and space in that even today in 2019, practices such as exploitation of Non-Europeans in supply chain of MNCs are still the norm more than the exception.

Dialectal Utility Theory, has illustrated that the effectiveness of human rights language is first masking real rights that ought be properly pursued in order to hold MNCs accountable, however, the language has yielded moderate result that in real terms have not changed in any significant fashion the colonial-imperial-

capitalist structure that still marginalises the Global South and its ability to combat MNCs' exploitative practices.

Lastly, Political Economy Theory has demonstrated that global economy has not transformed after the decolonisation of the Global South as evidenced in Chapter 4 of the thesis. It takes economic freedom, independence, and growth (in short money) to provide human rights generally and to have capacity to enforce rights against MNCs, therefore, the Political Economic Theory has demonstrated the undermining of the human rights language in that, global economy me is predicated on the colonial-imperial-capitalist structure that has benefited the Global North and impoverished greatly the Global South.

Based on the above explanation the following conclusion and followed by summation of the recommendation that was discussed in chapter six, will elucidate the findings of the thesis within the parameters of the three questions that was dealt with from chapter two to chapter six. The findings beginning with chapter one to chapter six is explained below:

7.2 CONCLUSION

Chapter one has demonstrated the intersection of business and human rights and the chronology of the development of the human rights language within the context of MNCs. This chapter exposed three major problems concerning the enforceability of human rights standards against the MNCs; firstly, the employment of human rights language as a vehicle through which enforcement of human rights standards against MNCs is undertaken; secondly, the human rights language and how they still operate within the colonial dependency syndrome between the Global South and Global North which impacts the enforceability of human rights against the MNCs; and finally, the neglect of the African episteme in solving African problems especially emanating from the actions of MNCs.

Chapter one set the scene by providing theoretical framework that has proved instrumental in analysing the of human rights language not only as a legal enquiry but past-present-future discourse within the Global South and the Global North. The

Dialectal Utility theory (amongst other theories such as Post-colonial Theory and Critical Race Theory) which refers to the usage of language as a tool of analysis of power, race, politics, economy and the law in their interrelatedness. Thus, the human rights language in this study is assessed from its inception, ideological, geographical, and effectiveness particularly in the Global South as juxtaposed to the Global North. Chapter one also in its background evidenced the problems of human rights language and the inherent international legal framework deficiencies that cannot be cured by the superficiality (non-binding human rights instruments specifically dealing with MNCs) of the UN mechanisms and institutions. Therefore, chapter one laid the foundation for contextual critic of business and human rights and how MNCs can be held or not be held accountable within the human rights language discourse.

From chapter two to chapter five, the thesis answers the first question which critics the human rights language by utilising multiplicity of theoretical framework that steeps the enforcements of human rights against MNCs within the relationship between the Global South and Global North which is shaped by colonial-imperial-capitalist dialectic. Chapter two is divided into two parts: Part A focuses on critical analysis of relevant human rights documents, which includes specific documents dealing with business and human rights instruments such as the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Part B deals with the literature review on business and human rights. The purpose of this chapter, therefore is to gauge not only the current discourse but also to assess the current regulatory framework and their effectiveness in promoting and respecting rights by MNCs.

Part A's findings are that, generally, the language of human rights has had considerable traction from the Global South because of its promise "independency" from colonial-imperialism-capitalism. At the centre of this language was also equality amongst peoples of the world at its basic level and equality of institutions such as UN Regional Groups and States. In the context of MNCs, the traction for human rights language in the Global South was predicated upon the hope for fair and equitable trade between the Global South and Global North. This is explained by the rapid adoption of UN human rights instruments.

The problems however as exposed in chapter two is that notwithstanding the first step of having adopted and ratified human rights instruments at all levels, the benefits of this legal framework has had moderate gains for the Global South particularly in the realm of holding MNCs responsible and accountable for rights violation. The general human rights instruments such as the International Bills of Human Rights have proven inapt to hold MNCs accountable. The findings in chapter two showed the inception of human rights language which did not centre the plight of the Global South's struggles with the human rights violation from MNCs. In actual fact the human rights language despite the centuries of struggles of independence in the Global South, did not become relevant to the conscience of the Global North - until a Global North genocide (Holocaust) even though genocides have been perpetrated by the Global North.

One of the significant finding is that MNCs operating in the Global South have not operated within the rule of law nor have they attempted significantly to eradicate the problems of illiteracy, poverty, slave labour, exploitation of natural resources, and economic colonisation as is always the mantra before major deals are signed by governments of the Global South and the Global North's MNCs. It is conceded that MNCs do not have a duty to improve socio-economic rights but they do have a duty not to become obstacles for peoples in the Global South to achieve their socio-economic goals which in turn significantly reduces their reliance on the Global North MNCs and engender strong civic society activism. Therefore, despite the more than 70 years of attempts by the UN to attain accountability from MNCs through human rights instruments and programs, the world is still extremely far from achieving such peace and respect of rights.

Part B analysed the literature on the past-present-future of business and human rights language. This part illustrated that the current development of human rights language has neither diagnosed nor emphasised the root cause of MNCs' conduct that resulted from the dehumanisation of Africa by the MNCs for the over three centuries (367 years in the case of South Africa). Whether one adopts a moderate approach by stating that MNCs' intricate link with colonial-imperial-capitalist which was the "events of the time" and since the decolonisation of Africa, MNCs have stopped their exploitation of the world - the discourse in this chapter has revealed that the operations of MNCs have continued to exploit the Global South with the only difference being that the

exploitation is not as affront as before the 1960s. The results of this misdiagnosis has allowed the development of business and human rights language largely stuck on MNCs' accountability without any firm commitment on creating a treaty. And as the study has shown that the problem of enforcement human rights standards is contingent on global capitalism and its negation of the Global South as only consumers of its products produced by MNCs from the Global North. However, even if the dialogue is about the creation of a treaty which is on its Revised Draft in 2019 - the problem of business and human rights language is not just a matter of a treaty which is conceded that it may be a good start however that would not assist in the economic independence of the Global South which would lead to strengthened state institutions that will be able to withstand the power of MNCs - because many of the problems emanate from colonial legacy which is pivotal to the maintenance of Global North's dominance over the Global South.

In summation, chapter 2 's the findings have shown in relation to question one and two of thesis that the human rights language as informed, structured and sustained by colonial-imperial-capitalist has made the utilisation of the current legal framework less optimal in the protection of rights due to the dependency syndrome (power relations) between the Global South and the Global North.

Chapter three has elucidated on the redundancy of the regional human rights system as an attempt at universalisation of human rights language emanating from the UN which Donnelly has rightly pointed out as not engendering effective implementation of rights particularly in the Global South. In the same breath, it must also be noted that in the European Union the measures taken to hold MNCs accountable where fairly effective due to its strong socio-economic standing and greater legal implementation. The trickle-down effect of human rights language as envisaged by the victorious states of World War II's engineering of the world hegemony under Eurocentrism. Therefore, the disparity between relative success in the European Union and the relative weak MNC accountability in the African Union can be explained fairly well when one has regard to the AU 's continued marginalisation as a result of the colonial-imperial-capitalist trifactor. The event that clearly amongst many other findings in chapter three that demonstrates the inefficiency of human rights language is the Rwandan genocide which the UN watched literally when the Hutus where killing Tutsis, with little to no

intervention from the UN to prevent the genocide.[152] Moreover, this trifactor has allowed a deliberate and systematic practice which safe as the fallacy of human rights language and state sovereignty was undertaken plainly before decolonisation but now is still happens but far more subtle – this is the practice of Illicit financial flows[153] through which Global North MNCs have robbed the Global South of the crumbs it usually obtains.

The findings pertaining to the OAS through case law demonstrated a progressive usage of the human rights language in few instances with the protection of indigenous peoples of the Global South in the Americas being explicit. All the cases highlighted took place in Latin America, this shows a pattern of extreme exploitation by the MNCs much as in Africa which is fuelled by colonial history and its pervasive stronghold even after the decolonisation of the Global South. This is because MNCs have shown together with the government leaders in the Global South the disregard for human rights language and mostly in regard to the masses of the inhabitants of the Global South (so-called indigenous people).

The ATCA especially in the US had played an important role in allowing aliens to bring human rights violations committed by US MNC before a US court. The findings are that the decisions of the courts differ in interpretation as to whether there is jurisdiction to hear some matters or not as it had been the case where matters are allowed to be heard and sometimes matters are rejected for lack of jurisdiction based on the notion that holding companies are not responsible for the actions of their subsidiary. For example, the *In Re South African Litigation[154]* case illustrate clearly the phenomenon of the past-present-future of colonial human rights protection as but an ineffective tool with no real interest in the disruption of the unlawful gains of colonialism benefiting the Global North. This case was dismissed by the Supreme Court in the United States of America. Furthermore, the call for disinvestments shows the lack of appreciation of

[152] McGreal C (2015) "What's the Point of Peacekeeping when they don't Keep the Peace?" *The Guardian* available at https://www.theguardian.com/world/2015/sep/17/un-united-nations-peacekeepers-rwanda-bosnia (accessed 02 July 2018).
[153] Mbeki T (2011)"Illicit Financial Flows: Report on the High Level Panel on Illicit Financial Flows from Africa" *Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development,* 9.
[154] *In Re South African Apartheid Litigation United States District Court S.D New York 56 F. Supp. 3d 3311 or In re South African Apartheid Litigation* available at http://business-humanrights.org/Links/Repository/1024200/link_page_view (accessed 12 June 2018).

human rights language and complicity of MNCs in the host countries they operate in. Arguably, if the government is murdering people, banks and automotive MNCs should not be supporting such governments.

Finally with respect to chapter three's finding in relation to the questions and objectives of the thesis – the issue of the effectiveness of human rights and its framing within the colonial-imperial-capitalist trifactor means that despite "good" intentions of people and institutions the language of human rights as is currently conceived has and will not yield much fruits for the Global South. This is because the regional human rights language is informed by the ideology of the Global North of constitutional liberalism that only benefits the Global North. Further, the epistemology of the Global North as informed by a capitalist system has resulted in untold inequality in the world and economic marginalisation that has mostly negatively impacted the Global South.

Chapter four which introduced a mutli-inter and trans-disciplinary approach to the topic of human rights and business sort to demonstrate the impact of global structures that are often diametrically opposed to the language of human rights, namely; global economy, international trade, corruption, and global economy to name just a few. The language of human rights was created within a colonial-imperial-capitalist structure or paradigm. The impact of this particular structure is that human rights is often sacrificed for profit and the maintenance of empires of the Global North. Therefore, what chapter four has demonstrated in relation to the language of human rights especially in the Global South is that because of the multiplicity of factors such as the legacy of colonialism, weak legal systems and political instability - the integrated systems fundamentally undermines and exposes the inefficiency of human rights language.

Moreover, this chapter also demonstrated that MNCs through their sheer power and also the state power (political, economic and military) from which this MNCs come from has prioritised global control of resources and that enforcement of human rights is the list of their priorities either through "necessities" and/or by design. This is demonstrated by the exploitative conduct of the MNCs primarily in the Global South which by all accounts cannot be construed as "mistake" but as a colonial-capitalistic economic ideology championed by the Global North. For instance the structural

globalisation that promotes capitalism encourages exploitation of peoples in the Global South which was demonstrated to mirror that during colonial times.

Corporate governance, international trade, foreign direct investment, and corruption have one factor in-common which is maximisation of profit for MNCs and the preservation of power to the political elites. The intricacies of this world order is interdependent, interrelated and capitalistic in ideology. The international trade regime as propagated by the WTO, GATTs and IMF have resulted with untold economic inequality in the Global South which hampers the ability of state to enforce human rights standards against the MNCs because the human rights language can and has not been propagated to disrupt the levers of colonial-imperial-capitalist structure. Moreover, the integrated systems are amongst the most important structures of the modern world that informs the relational power, economy and the law. From globalisation to corruption, this concepts have informed and relying on historical continuum of colonial-imperial-capitalist, they dictate the relationship between the Global North and the Global South.[155]

MNCs incorporated in the Global North by virtue of their historical legacy of colonial-imperialist-capitalism have set up systems of globalisation, international trade and competition, to name just a few, which in their operation are antagonistic to the puffing of human rights language whilst exalting them at the same time. Thus, Chapter Four's finding is that the quest for the Global North's competitiveness and international trade regimes (Bretton Woods institutions) has rendered Africa specifically and the global

[155] Austin G (2010) "African Economic Development and Colonial Legacies" *International Development Policy* I *Revue internationale de politique de development*, Vol. 1, 35; Colonial rule facilitated the import of capital into this capital-scarce continent. But only in mining, and to some extent in "settler" and "plantation" agriculture, did this happen on a large scale. The survey by Herbert S. Frankel (1938) of external capital investment in white-ruled Africa remains the only comprehensive study for the colonial period. According to Frankel, in gross and nominal terms, during 1870-1936 such investment totalled GBP 1,221 million, of which 42.8% was in South Africa. This meant GBP 55.8 per head in South Africa, but only GBP 3.3 in the French colonies and GBP 4.8 in British West Africa. Public investment constituted 44.7% of the grand total and almost 46% of the non-South Africa total (Frankel 1938, 158-60, 169-70). Governments, and to some extent mining and plantation companies, invested in the transport infrastructure required for the development of, mainly, the export-import trade. In Nigeria and Ghana Africans also took a leading role in building motor roads and pioneering lorry services (Heap 1990). In institutional terms the colonial period saw the eventual abolition of human pawning, with its replacement by promissory notes and, in those areas of West Africa where it was possible, by loans on the security of cocoa farms. It also saw the introduction of modern banking, but the banks were much more willing to accept Africans' savings than to offer them loans, partly because of the colonial governments' non-introduction of compulsory land titling (Cowen and Shenton 1991).

South generally, heavily indebted and without any legal (human rights language) or even moral recourse to withstand the onslaught of MNCs.

Chapter Five's analysis revealed that South Africa, Nigeria, and the Democratic Republic of Congo have been seriously plagued by human rights violations at the hands of MNCs. The significance of this analysis is that from South Africa so-called "best Constitution" in the world to the DRC's weakest legal framework, MNCs still practise slave labour with the complicity of the political elites.[156] These three countries serve as a microcosm of the Global South state of affairs where despite the so called Constitutions, the conditions of the Africans in the hands of the MNCs still remain the same if not worse given South Africa's minimum wage of R3500.00 per month which no human being can survive on.

Beginning with South Africa, chapter 5 has demonstrated that the recent history of South African which span for 342 years has been shaped by colonial-imperial-capitalist paradigm which dictated the legal regime. This journey of South Africa with its tumultuous encounters led to many resistance to the biasness of the human rights language, for instance Orange Free State had its Bill of Rights and European Settlers recognised a whole range of human rights but this was not afforded to all peoples. Therefore, when one aligns the racial economy, racial political structure, segregated residence and segregated educational system for Europeans and non-Europeans which still persistence even today - the finding in chapter five clearly shows that it is not about the strong regulatory framework of South Africa but the totality of what it means to be in a position as a sovereign state to hold MNCs accountable.

South Africa's long struggles with MNCs' violations of human rights which was very much intertwined with colonial-imperial-capitalist structure beginning with the *Lubbe v Cape Plc* to the *In Re South African Apartheid Litigation* and finally *Ex Parte Nkala*

[156] Uwa O G, Lanrewajuu A S and Ojeme S (2014) "Globalisation and Africa Crisis of Development in the 21st Century" *International Journal of Humanities and Social Science* Vol. 4, No 4, 278-279; see also The Global Slavery Index 2016, available at https://www.globalslaveryindex.org/findings/ (accessed on 02 July 2018); The 2016 Global Slavery Index estimates that 45.8 million people are subject to some form of modern slavery in the world today. The Index presents a ranking of 167 countries based on the proportion of the population that is estimated to be in modern slavery; see also Isaacs L (2016) "Modern Slavery Shock in South Africa" *IOL* available at https://www.iol.co.za/news/south-africa/modern-slavery-shock-in-sa-2028907 (accessed 02 January 2018).

and Others - the latest case which was decided in 2019 through a settlement agreement. These cases though seemingly monumental with respect to holding MNCs accountable, they still leave serious legal questions that have yet to be answered, the first question aptly relevant to this study is that, was the invocation of human rights language made to decide on the liability of the mining MNCs included in the settlement. If the answer is no – then the argument that has been made in this paper is appropriate in that human rights language is an inapt tool to deal in enforcing human rights standards against MNCs. Finally, South Africa gained its constitutional democratic independence in 1994 which gave way to the current constitutional order. However, this constitutional dispensation as it was demonstrated in the pattern of inequality continues irrespective of race is in government.

Nigeria similar to South Africa was systematically and structurally in its recent history shaped by colonial-imperial-capitalist system. Global North MNCs have dominated the economy of Nigeria with its human rights violations for the same reasons of race and the negation of non-Europeans. Chapter five has demonstrated amongst many other things that irrespective of Nigerian's legal system - MNCs such as the Royal Dutch Shell as demonstrated by cases such as; *Wiwa et al v. Royal Dutch Petroleum et al* and *Securities and Exchange Commission v. ABB Ltd* which had violated human rights and then after spend protracted process to fight their victims and then settle out of court with less than desirable settlement amounts. The pattern is similar to that of South Africa is the lack of legal certainty on the enforcement of human rights standards against MNCs which may set a precedent for accountability.

Leopold II's Belgium Congo was a bastion of colonial-imperial-capitalist system that showcased its race based exploitation through violence of the Congolese people for the benefit of Global North MNCs. The Global North's disregard for human rights of the people of Congo was well documented during Patrice Lumumba's just struggle for independence, where the tri-factor of colonial-imperial-capitalist supported by Belgiam for the rich copper region of Katanga was the main objective. These has elucidated the web of law-economy-politics as the totality of hegemonic structure that exist today and it is in this dialectics that the language of human rights in relation to MNCs has had little impact for the peoples of the DRC or the Global South in general. Therefore, from the killing of Lumumba for declaring beneficiation to the failure of human rights

language in the *Elf* case which displayed the most sophisticated web of MNCs for the sole purpose of evading human rights language. The DRC supplies 80 per cent of the raw materials on which the world's technology are based yet it is amongst the poorest countries.[157] Whetho did an excellent summary which showed fortune 500 companies that have been accused of human rights violations not only in the DRC but in the entire world - yet many of them have been held accountable by a court of law using the language of human rights.

Chapter Six articulates arguments upon which framed in recommendation terms undertakes a holistic solution for the respect of rights and economic independence utilising African epistemology. The rationale for this approach is based on the premise that Africa's problem has in the main caused by colonialism and the solution of decolonisation is multi-faceted. Therefore, the thesis employed Botho as the foundation of all actions in both public and private spaces together with African consciousness as one of the strongest decolonising tool.[158] The argument made in chapter six provides not only an ethical yardstick but a legal value system that is adequate in holding MNCs accountable. Moreover, this way of knowing will enable a holistic formulation and implementation of rights that is representative of the fullness of the community without hierarchy of needs (e.g. capitalism which puts profit before human life and well-bieng).

It is important to conclude the entirety of the questions of human rights language, the legacy of colonialism on holding MNCs accountable for their human rights violations with the . It is the tri-factor of law-economy and politics that has made a singular legal regime inapt for holding MNCs accountable because of the economic dependence of the Global South on the Global North – not to mention a liberal political structure that has often maintained the ill-gotten power and wealth of the Global North nations. It has been and appears to be for the foreseeable future that MNCs are very faithful to

[157] Nathan D and Sarkar S (2012) "Blood on your Mobile Phone? Capturing the Gains for Artisanal Miners, Poor Workers and Women" *Capturing the Gains Briefing Note 2*, 1-6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990229 (accessed 02 July 2018); see also Turak N (2017) "The Cobalt Curse: Supply Risk and Inequality in the DRC" *FDiIntellegence* available at https://www.fdiintelligence.com/Locations/Middle-East-Africa/Congo-DRC/The-cobalt-curse-supply-risk-and-inequality-in-the-DRC (accessed 02 July 2018).

[158] Some of the recommendations in this chapter are derived from questions framed at the Thabo Mbeki Leadership Institute dealing with African Political Economy and Thought Leadership.

the capitalist and imperial system and would do anything to resist the tendency to make them deviate from their age – long tenets.[159] By their very nature, MNCs have as their prime the maximisation of profit at the lowest possible cost - in actual fact it is this feature that gave rise to MNCs.[160] Moreover, according to Gilpin, the term MNC for a long time was largely a euphemism for the foreign expansion of America's giant oligopolistic MNCs and now the Chinese MNCs.[161] The point being made here is that America took the lead in this neo-colonialism in the form of MNCs.[162]

However, during the last two or three decades of the last century, American dominance was challenged and now there exists serious competition among the MNCs of many nations in almost all the world markets.[163] In the last decades of the 20th century Japan has proved to be the country that gives America the greatest challenge.[164] But in the 21st century China has shown all the signs of dominance in the global market especially on the African continent. The sad reality about Africa is that it is not its MNCs that are driving their economies but empire after empire come to exploit the continent for their own growth. By African MNCs, one assumes that this would be MNCs that are ideologically African centred otherwise the result would be disastrous as it has been the case for the last three and half centuries.

The main reason for holding the position that MNCs are the vehicle of neo-colonialism derive from the type of relationship that exists between the MNCs and their home governments.[165] Taking America as an example, it has been observed that there are complementary interest between the MNCs and the United States government.[166] Therefore, US policies have continued to encourage MNCs' expansion abroad and not only that but also offered protection to them.[167] An example of this is the stance of the

[159] Osuagwu G O & Obumneke E (2013) "Multinational Corporations and the Nigerian Economy" *International Journal of Academic Research in Business and Social Sciences* Vol. 3, No. 4, 362.
[160] *Id* 360.
[161] *Id* 363.
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid*; see also Ohno K (2006) *The Economic Development of Japan: The Path Travelled by Japan as a Developing Country* (GRIPS Development Forum, Japan) Vol. 74, 178-179.
[165] *Ibid*; see also Steinbockova M (2004) *Multinational Corporations and Nation-State: Partners, Adversaries or Autonomous* (Diploma Thesis, Masaryk University in BRNO) 22-24.
[166] *Ibid.*
[167] *Id* 363.

American government any time there is conflict between the youths of the Niger-Delta and the oil companies of US nationality in Nigeria.[168]

Equally important in this regard is that the MNCs are the most veritable mechanism to spread abroad the US ideologies especially that of the free enterprises system.[169] In all these, the home countries of the MNCs are doing indirectly to Africa what Europe did directly during the colonial period namely, the exploitation and the oppression of their peripheral states by milking them of their all-important raw materials transferring same to their respective nations for economic development and thereby systematically under-developing the periphery states.[170]

The mission of conquest has never ended, and this is corroborated by the realisation that although the Dutch East India Company may have ceased to be called *VOC,* certainly the immoral, unlawful, unprovoked, illegal and dehumanising practices of colonial MNCs have not ceased. The Marikana massacre of South Africa is the case in point where people still die for a living wage.[171] In actual fact for as long as so-called human rights language is still seen and implemented through the liberal Eurocentric paradigm – there may be no real change to the material existence of many of the people on the Global South.

To prove the above point, one must have regard to John Ruggie's Guiding Principles which have been lauded as some type of breakthrough for holding MNCs accountable. Amongst many things the Guiding Principles state that as part of their duty to protect against business-related rights abuse, host States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected must have access to effective remedies.[172] Now this principle are somehow to a fair extent been incorporated into the Open-Ended Intergovernmental Working Group (OEIGWG)

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[168] *Ibid.*
[169] *Id* 364.
[170] *Ibid*.
[171] Marikana Massacre 16 August 2012: available at www.sahistory .org.za/article/marikana-massacre-16-august-2012 (accessed on 12 February 2018).
[172] Ruggie J (2011), "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy' framework. "Report of the Special Representatives of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 22.

which is hoped may lead to a treaty. The argument is made that this will still not greatly assist because the problem does not only or fundamentally lie with law per se but a particular type of law and its obfuscation of the need to equally promote and protect peoples irrespective of whether they are from the Global South or Global North.

Today, MNCs seem to capture the state and rule the world - the more it seems reasonable to address them directly instead of the supposedly powerless governments.[173] Since the notion of MNCs as forming of private government has gained credibility under conditions of globalisation, not only do scholars attribute a great deal of power to MNCs, the agents of political consumerism also do so and accordingly address their claims directly to them.[174]

In the current structure of the world, where resources and benefits are concentrated in the hands of very few in the Global North, it is not a "comfortable" world for everybody.[175] Furthermore, to sustain it is to breed future insecurity as the mass of the poor strives to get a share of the riches concentrated in the hands of the few MNCs in the Global North.[176] It is clear that globalisation benefits those who have the capacity to harness it but can be very detrimental to those whom it finds not prepared and most African States are not prepared, especially in terms of having the requisite capacity.[177]

7.3 RECOMMENDATIONS

Many have diagnosed the African situation and have given solutions. In reality, however, there is neither complex diagnoses nor a complex solution. Therefore, what remains for Africans is the creation of a "New Consensus" and the destruction of the old master/servant relationship. The New Consensus is two-fold, the first phase is

[173] Holzer B (2007) "Framing the Corporation: Royal Dutch/Shell and Human Rights Woes in Nigeria" *J Consum Policy* Vol 30. 282.
[174] *Ibid*.
[175] *Id* 92; see also Oxfam International Report (2018) "Richest 1 Percent Bagged 82 Percent Wealth Created Last Year-Poorest Half of Humanity got Nothing, available at https://www.oxfam.org/en/pressroom/pressreleases/2018-01-22/richest-1-percent-bagged-82-percent-wealth-created-last-year (accessed 02 July 2018); Eighty two percent of the wealth generated last year went to the richest one percent of the global population, while the 3.7 billion people who make up the poorest half of the world saw no increase in their wealth, according to a new Oxfam report released today. The report is being launched as political and business elites gather for the World Economic Forum in Davos, Switzerland.
[176] *Ibid.*
[177] *Ibid.*

cutting the umbilical cord of our stepfathers of the last three and half centuries and beginning to look inward. This thinking finds itself in the knowledge of the resilience, creativity, and innovation of the Africans up and until its disruption in the 1600s. The African has led a scientific life that was advancing. Therefore, I see no reason why this advancement of this great continent can be thwarted by three and half centuries as compared to the self-awareness of time immemorial, superiority and humanity. All of this African greatness was as a result of operating with Botho.

Now a vexing and pertinent question would be whether there could be a solution for the holding MNCs accountable through the enforcement of human rights standards in such a way that will ensure less people suffering at the hands of the MNCs? The answer is yes, because the thesis has demonstrated that no real solution can ever be found anywhere else for African problems if not by Africans themselves with no one else in the room but Africans using *Ubuntu*.

Africa must decide for herself what type of conditions she needs to create in order to prosper. The vision and trajectory of the continent rest in all of its inhabitants based on its epistemology and ontology that has been championed by millenniums of rich philosophy. The last resort would be to form a New Consensus on the basis of equal partnership in the global arena with a 80/20 ratio on all resources of Africa to the benefit of Africans as a good gesture to humanity and not the flexing of power by Africa. It is only when the Global South and Africa specifically provide African Solution to African problems that MNCs would succumb to its *Ubuntu*.

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