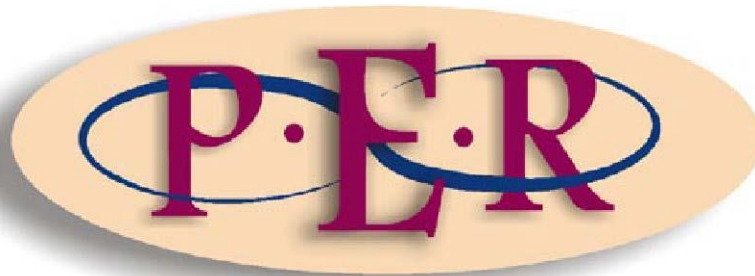


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REFLECTIONS ON HOW TO ADDRESS THE VIOLATIONS OF HUMAN RIGHTS BY EXTRACTIVE INDUSTRIES IN AFRICA: A COMPARATIVE ANALYSIS OF NIGERIA AND SOUTH AFRICA

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1 Introduction

Traditionally, human rights law protects the population against abuses of the state. Accordingly, states party to a human rights treaty have the obligation to respect, protect and fulfil human rights.¹ Nevertheless, in recent years the power of transnational companies (TNCs) has grown and some of them are stronger than the governments of the countries which host them.² As a result, they now constitute an important threat to human rights. From this perspective, extractive industries are involved in various human rights violations in various developing countries,³ including African countries. This raises questions of the human rights responsibilities of TNCs.⁴ For some,⁵ though "states are the sole source of authority and law in the international system" it does not follow that they "are the only subjects of

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¹ The *Maastricht Guidelines* adopted by a group of thirty experts in Maastricht from 22-26 January 1997 (*Maastricht Guidelines on Violations of the International Covenant on Economic, Social and Cultural Rights* (1997)). The objective of the meeting was to "elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies". See a 6 of the Guidelines.

² Olowu *Integrative Rights-based Approach* 269; also McCorquodale and Fairbrother 1999 *Hum Rts Q* 735-766.

³ Kinley and Tadaki 2003-04 *Va J Int'l L* 934.

⁴ See generally Addo *Human Rights Standards*.

⁵ The UN special representative of the secretary-general has noted that corporations have become "participants" in the international legal system, and thus, by implication, have the capacity to bear some rights and duties under international law. *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* UN Doc A/HRC/4/035 (2007).

international law".⁶ In other words, non-state actors are also the subjects of international law. In this regard, as a result of their influence, TNCs also have direct human rights obligations. The legal basis for such obligations can be found in the Universal Declaration of Human Rights (UDHR), which urges "every individual and every organ of society... [to] strive"⁷ to promote respect for human rights and ensure their recognition and observance. In this context "every organ of society" could be interpreted to comprise of various types of non-state actors including TNCs. For Henkin, the sentence is inclusionary and as such includes every person, companies, market and cyberspace.⁸ This view is strengthened by the UDHR, which compels "everyone" including TNCs to respect his/her/its duties to the community⁹ and forbids "any state, group or person" to hinder the realisation of the rights set out in the Declaration.¹⁰ According to Kinley and Takadi, this blend of provisions from the UDHR is the main basis of human rights obligations for non-state actors, including TNCs.¹¹ Nevertheless, it is important to note that the UDHR is non-binding, and even if it has developed into customary law, there is no evidence that the combination of provisions on which TNCs' obligations are based have reached such a standing.¹² Therefore, as noted by Kinley and Tadaki, "the duties that the UDHR imposes on TNCs may amount to ethical duties at best".¹³

The other legal basis of TNCs' human rights obligation can be found in various guidelines and other non-binding instruments at the global level.¹⁴ These instruments are not binding and are from the register of soft law, as they have a

⁶ Fauchald and Stigen 2009 *Geo Wash Int'l L Rev* 1029.

⁷ Preamble of the *Universal Declaration on Human Rights* (1948) (UDHR).

⁸ Henkin 1999 *Brook J Int'l L* 25.

⁹ A 29 of the UDHR; also Henkin 1999 *Brook J Int'l L* 25.

¹⁰ A 30 of the UDHR; see also Kinley and Takadi 2003-04 *Va. J. Int'l L* 949.

¹¹ Kinley and Tadaki 2003-04 *Va J Int'l L* 949.

¹² ICHRP 2002 http://www.ichrp.org/files/reports/7/107_report_en.pdf 74.

¹³ Kinley and Tadaki 2003-04 *Va J Int'l L* 949949.

¹⁴ The *OECD Guidelines for Multinational Enterprises* (1976), the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy Reform* (1977), the *UN Global Compact* (2000), the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003), and the *UN "Protect, Respect and Remedy" Framework* (2011) (*Ruggie Framework*).

limited impact. Commenting on the legal basis of TNCs' obligations, Kinley and Tadaki note that:

The current scope of what might be loosely called the international human rights law duties of TNCs is wide, but spread thinly and unevenly. It encompasses examples of supposed customary international law, treaty obligations, and so-called soft-law codes of conduct, guidelines, and compacts. The actual legal cover these initiatives provide is meager or non-existent. The legal (or quasi-legal) duties imposed on corporations have some potential authority, but as yet they remain ill-defined and ineffective. In short, the rudiments of an international legal framework may be discernible, but the legal content of the law is almost wholly absent.¹⁵

For others and those who seem to agree with Kinley and Tadaki, the TNCs' activities are significant for the enjoyment of human rights, but the fact that they lack international legal personae or the capacity to possess and enforce legal rights in international law exonerates them from human rights obligations.¹⁶ Therefore, the state in which TNCs operate remains the only duty bearer of human rights and should ensure that companies under its jurisdiction comply with human rights. This view is echoed by the *Maastricht Guidelines* in which the state's obligation to protect also compels the state to protect against the violation of human rights by third parties, including TNCs.¹⁷ This obligation reads as follows:

The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors.¹⁸

According to the *Velasquez Rodriguez* court case,¹⁹ which formulated the due diligence test, to be exonerated from its responsibility for human rights violations by private actors, the state must have taken reasonable or serious steps to prevent or

¹⁵ Kinley and Tadaki 2003-04 *Va J Int'l L* 949.

¹⁶ Skogly *Extra-national Obligations* 7; Acquaviva 2005 *Vanderbilt J Transnat'l L* 345; Deva 2003 *Conn J Int'l L* 1; Gotzmann 2008 *Queensland Law Student Review* 46.

¹⁷ A 6 of the *Maastricht Guidelines*.

¹⁸ A 18 of the *Maastricht Guidelines*.

¹⁹ *Velasquez Rodriguez Case* Inter-Am Ct HR (Ser C) No 4 (1988) Judgment of 29 July 29 1988. For more on this case, see Shelton 1989 *Fordham Int'l LJ* 1-34.

respond to an abuse by a private actor, including investigating and providing appropriate remedies. The standard established by the *Velasquez Rodrigues* case is in line with international human rights standards,²⁰ which urge a state party to a human rights treaty to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant [or treaty]".²¹

However, given that the clout of TNCs is usually stronger than that of the developing countries in which they operate, the examination of the TNCs' human rights obligations would include the need to interrogate the issues of TNCs extraterritorial responsibilities, which could be understood as "the obligation upon states to regulate the conduct of their domestic businesses when they operate internationally".²² Nevertheless, although interesting, the question of the extraterritorial responsibilities of TNCs will not be addressed in this article. This does not imply that we regard it as of less importance, but rather that the chosen focus for this article is on the host state's obligation to ensure the realisation of human rights.

Guided by traditional state obligations echoed by the *Maastricht Guidelines* mentioned earlier, the aim of this article is to explore the extent to which Nigeria and South Africa comply with their obligations to ensure that TNCs in extractive industries operating within their borders promote and respect human rights. The focus on domestic law is also informed by the fact that at international level, the responsibility of corporations for the protection and promotion of human rights is based on non-binding instruments (categorised as soft law) and is still developing.

Though there are various types of TNCs, the focus of this article is on extractive industries in Africa with special attention to Nigeria and South Africa. Extractive industries can be defined as "processes that involve different activities that lead to

²⁰ A 28 of the UDHR; a 2(1) of the *International Covenant on Civil and Political Rights* (1966) (ICCPR); a 21 of the *International Covenant on Economic Social and Cultural Rights* (1966) (ICESCR).

²¹ A 2(1) of the ICESCR.

²² Skogly *Extra-national Obligations* 7.

the extraction of raw materials from the earth (such as oil, metals, mineral and aggregates), and their processing and utilisation by consumers".²³ It is important to focus on extractive industries because over the past 10 years Africa's petroleum and mineral resources have been growing and have attracted various investors into the domain. Therefore, it is vital to explore legal avenues to ensure that these resources do not become a "curse" for the population or do not lead to conflicts, to poverty, ill health and inequality as a result of their extraction.²⁴

The next issue to address would be the reason for the focus on Nigeria and South Africa. With around 159 trillion cubic feet of proven reserves, Nigeria is the largest oil producer in Africa and among the top ten in the world.²⁵ Nigeria has an effective pumping capacity of about 900 million barrels a year. The oil sector represents over 40% of the country's Gross Domestic Product (GDP), which amounts to 95% of export receipts, and contributes over 80% of government revenue.²⁶

As for South Africa, the country enjoys international recognition as one of the world's largest producers of gold, platinum and chromium, and is the fourth largest producer of diamonds. Mining is vital for the country's GDP.²⁷ The importance of the oil and mining industries in these countries justifies the focus of the paper on Nigeria and South Africa in particular. In addition, the focus is informed by their rivalry as Africa's super powers and their strategic position as emerging economic powers.²⁸ It is hoped that the comparison between these countries will provide paradigms of best practice which could be followed by these two countries, and also by other African countries endowed with natural resources. The paper argues that these two African

²³ Sigam and Garcia *Extractive Industries* 3.

²⁴ Africa Progress Panel 2013 http://www.africaprogresspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf 8.

²⁵ C4C 2010
<http://www.nigerdeltabudget.org/Laws%20and%20Policies%20in%20Nigeria%27s%20Extractive%20Industries.pdf>.

²⁶ C4C 2010
<http://www.nigerdeltabudget.org/Laws%20and%20Policies%20in%20Nigeria%27s%20Extractive%20Industries.pdf>.

²⁷ NDI *Transparency and Accountability* 88.

²⁸ Adebajo *The World Today*; also Musawa *Premium Times*.

countries are yet to succeed in compelling TNCs to respect human rights, which is why there is a need to seek answers, solutions and a way forward.

In making its case, the paper is divided into five parts including this introduction. The second part presents an overview of the impact on human rights in Nigeria and South Africa of the activities of extractive industries. The third part examines national laws protecting local populations from the abuses of TNCs in the countries under investigation. In this part, it is argued that national laws do not protect human rights adequately. Hence, the fourth part of the paper offers suggestions on how to shield local populations from TNCs. The fifth and final part provides concluding remarks.

2 An overview of the violation of human rights by extractive industries in Nigeria and South Africa

This section is divided into two parts. The first part presents the structure of the extractive industries and the second part focuses on human rights violations by these industries in the countries under investigation.

2.1 The structure of extractive industries

Given that the article deals with oil and mining companies in Nigeria and South Africa respectively, the overview of their structure will follow the same pattern. In the oil industry, activities are threefold: upstream, midstream and downstream activities.²⁹ Upstream activities begin with the exploration stage, which consists of field analyses to determine the availability and quantity of oil. When the exploration produces a satisfactory outcome characterised by the presence of oil in the ground, then the development phase commences.³⁰ The latter entails the preparation of the

²⁹ Sigam and Garcia *Extractive Industries* 8. For more on the structure of extractive industries, see also Gratzfeld *Extractive Industries*; UNCTAD *World Investment Report*; CommDev 2012 <http://commdev.org/opportunities-and-challenges-extractive-industries>.

³⁰ Sigam and Garcia *Extractive Industries* 8.

ground, the building of roads, wells, and the installation of various items of equipment, as well as the construction of other infrastructure needed for commercial production. Subsequent to the development phase is the production phase, which consists of "commercial extraction from the ground" and ends only when commercial exploitation is terminated, when the field has to be restored to its initial state. In other words, when the upstream stage is completed, the buildings and other forms of infrastructure are removed and the exploitation of the area for agriculture and other livelihoods is encouraged and monitored.

The midstream phase/sector is made up of "assets and services that provide a link between the supply side and demand side of the value chain, and include the activities of storage and transportation of oil and processed products".³¹ Finally, the downstream stage deals with activities ranging from the refining or processing of hydrocarbons to the act of selling them to the consumers. This entails all activities from refining oil, selling wholesale to other industries, and retail sales at petrol stations.

In the mining sector, the industry structure can be divided into two main phases having to do with extractive activities and processing activities.³² The first phase is similar to that of the oil industry for it starts with exploration, then development and mining *per se* or the removal of mineral value in ore from the host rock or matrix. The specificity of the mining sector resides in the methods of extraction. Mining is characterised by two types of extraction methods. Extraction can be done either on the surface through an open pit or cast, or underground. The choice of method is generally informed by the size, shape and depth of the ore body because, as observed by Sigam and Garcia, "all operations involve the basic steps of ore breaking, loading and hauling to a mill for treatment".³³ The end of the exploitation is followed by decommissioning and the closing of the mine,³⁴ just as in the oil

³¹ Sigam and Garcia *Extractive Industries* 8.

³² Sigam and Garcia *Extractive Industries* 5; UNCTAD *World Investment Report*.

³³ Sigam and Garcia *Extractive Industries* 5.

³⁴ Lewis *et al Aboriginal Mining Guide*.

industry. To close this section on the structure of extractive industries, it is important to note that the main stakeholders of these industries are companies (private and public), government agencies, civil society organizations and the local communities.³⁵

2.2 *Violations of human rights by extractive industries in Nigeria and South Africa*

In their extractive activities, oil companies and mining companies in Nigeria and South Africa often disregard human rights. In the Niger Delta in Nigeria, the exploration and development phases are characterised by the lack of consultation with local populations.³⁶ This leads to the violation of the right to the participation of these populations. In addition, often during the development stage oil companies openly violate the right to land through expropriation, the displacement of populations and the disruption of their life. They also violate the right to food as the land taken is often used for food production. Besides food, other rights such as those to a safe environment, health and even life are also violated. These violations occur as a result of their working with machines and other equipment that pollutes the atmosphere and endangers health and even life.³⁷

These human rights violations are worsened during the production phase, which is characterised by frequent oil spills which pollute the air, springs, ponds, and rivers that provide these host communities with drinking water and aquatic life for fish farming.³⁸ Additionally, in the production phase gas is flared throughout the region around the clock, and some flares burn continuously with no certain period of abating. This ecological disaster is creating a human rights quagmire by exposing

³⁵ Sigam and Garcia *Extractive Industries* 5.

³⁶ Amnesty International 2005 <http://www.amnesty.org/en/library/asset/AFR44/022/2005/en/63b716d6-d49d-11dd-8a23-d58a49c0d652/afr440222005en.pdf>; also Pyagbara date unknown <http://www.refworld.org/pdfid/469cbfce0.pdf>.

³⁷ Amnesty International 2005 <http://www.amnesty.org/en/library/asset/AFR44/022/2005/en/63b716d6-d49d-11dd-8a23-d58a49c0d652/afr440222005en.pdf>.

³⁸ Amnesty International 2005 <http://www.amnesty.org/en/library/asset/AFR44/022/2005/en/63b716d6-d49d-11dd-8a23-d58a49c0d652/afr440222005en.pdf>.

the indigenous people to harm, resulting in poor health and the loss of livelihoods. The oil spills also destroy the agrarian livelihood of the communities, as they deprive people of the land on which they rely to produce food, and the people's lifestyle, which depends on farming and fishing, can no longer be sustained. As yet, the TNCs do not offer either alternative vocations or suitable jobs as palliatives. In fact, extractive industries are capital intensive and as a result their contribution to employment creation is limited, as they employ only about 1 per cent of the global workforce.³⁹ The extraction of oil in the Niger Delta has caused widespread grievances of astronomical proportion.⁴⁰

Another area of concern is the labour market in the oil industry. In this sector, workers are easily laid off with little or no compensation. Unlike the situation in developed and capital exporting countries of Western Europe and the United States, where TNCs and their home governments provide unemployment benefits, Nigerian workers who become unemployed have no social security to cushion the effect of a recession.⁴¹

Besides the violation of environmental, socio-economic and labour rights, even the right to life is threatened or life is simply taken away. In fact, as a result of the human rights violations described above, indigenous host communities generally protest against extractive industries, and this leads to torture, cruel and inhuman treatment by the Nigerian police and military under the pretence of protecting the oil facilities from the protesters.⁴² In their repressive duties, armed mobile police usually use tear gas and gun fire to disperse the protesters,⁴³ and sometimes kill them. In 1998 an oil company, Chevron Nigeria Limited, was taken to court in America for

³⁹ OECD 2008 <http://www.oecd.org/newsroom/40556222.pdf>.

⁴⁰ Idemudia 2009 *Conflict Security and Development* 307-331.

⁴¹ The average Nigerian worker is responsible for the welfare of a much larger number of dependants than his European and American counterparts.

⁴² Amnesty International 2005 <http://www.amnesty.org/en/library/asset/AFR44/022/2005/en/63b716d6-d49d-11dd-8a23-d58a49c0d652/afr440222005en.pdf>.

⁴³ Cayford 1996 *Africa Today* 183-189.

being directly involved in two incidents that resulted in the shooting and killing of protesters in the Niger Delta.⁴⁴

Like their Nigerian counterparts, South African extractive industries are often accused of violating human rights. The only difference is that in South Africa the culprits are mining companies. Like what happens in the exploration and development phases in Nigeria, communities living on prospective mining sites do not participate meaningfully in the decisions affecting their lives. Olaleye observes:

The consultative process which precedes communities' relocations is often insufficient and therefore deficient. The practice is such that almost all the government officials, legal advisors and mine managers who facilitate relocation processes were secretive in disclosing information to affected people. Not all the terms, conditions and implications of the relocation process were thoroughly explained to the affected communities.⁴⁵

This is simply the violation of the right to the meaningful participation of the local population in decisions affecting their communities. Meaningful participation entails the right to receive appropriate information which informs the decision of the consulted person on a specific question.⁴⁶ In this context, "prior informed consent" is the minimum standard needed for participation to be meaningful.⁴⁷

In mining, the development stage also causes human rights violations similar to those described in the oil sector. This stage is characterised by encroachment on the rights to land, food, a safe environment, a livelihood and "local communities lifestyles" in general.⁴⁸ Furthermore, the extraction or mining phase also destroys the environment. In this regard, the extraction of the mineral destroys or modifies the landscape as result of erosion during the extraction. The Rustenburg Environmental Coalition (RECO), a coalition of forums in the area of Rustenburg harbouring mining companies, observes:

⁴⁴ *Bowoto v Chevron Texaco Corp* 312 F Supp 2d 1229, 1233 (ND Cal 2004); for more on this case, see Kaeb 2008 *Nw J Int'l Hum Rts*, also Human Rights Watch 1999 <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf>.

⁴⁵ Olaleye "Corporate Governance Practices" 37.

⁴⁶ Kamga 2011 *De Jure* 390; Kamga and Fombad 2013 *JAL* 210.

⁴⁷ Kamga 2011 *De Jure* 390.

⁴⁸ Sigam and Garcia *Extractive Industries* 14.

[A]reas where communities are living are unhealthily and dangerously surrounded by shafts and open casts [and that] certain sections of the community had to be removed from where they were originally located to other further places in order to make way for the mine.⁴⁹

Still in terms of environmental disaster, mineral extraction also creates air, soil and water (underground and surface) pollution. It is been reported that the discharge of a colourless gas known as sulphur dioxide, the emission of dust into the air and unplanned discharge into rivers by Lonmin mine has exceeded acceptable limits.⁵⁰ Furthermore, mining is a water-intensive activity. In fact, in its 2010 social development report, Lonmin mine identified the "inability to secure an adequate supply of water to sustain and expand [their] operations" and the "loss of sustainable fresh water for their operations and communities"⁵¹ among their challenges. It follows that as a result of mining activities, populations are deprived of the human right to water.

Overall, as revealed by a perception study in the form of a survey on Lomin,⁵² the local mining communities harbouring the workers and their families are extremely disappointed by the mining operations. Tahlita, a Community Organiser, observes:

The thing is, we are now living in poverty. After Uranium One has come here, the safety of our children, of our family, and of our community are all more at risk. In the past, we had land for our children. But now the mine has taken our land, and we don't have anything.⁵³

Similarly Dineo, a worker at the mining company Uranium One South Africa, complains: "I have seen no progress in my life, and instead all I see is the company taking away my health and my life".⁵⁴

⁴⁹ Olaleye "Corporate Governance Practices" 37.

⁵⁰ Bench Marks Foundation 2013 http://www.bench-marks.org.za/press/lonmin_report_print.pdf.

⁵¹ Bench Marks Foundation 2013 http://www.bench-marks.org.za/press/lonmin_report_print.pdf.

⁵² Bench Marks Foundation 2013 http://www.bench-marks.org.za/press/lonmin_report_print.pdf.

⁵³ Uranium Network date unknown <http://www.uranium-network.org/index.php/component/content/article?id=259>.

⁵⁴ Uranium Network date unknown <http://www.uranium-network.org/index.php/component/content/article?id=259>.

These complaints suggest that human rights have been encroached upon by mining companies. This was confirmed by the South African Human Rights Commission, which noted that in the Bushveld region, the site of most of the platinum deposits in the world, there have been massive violations of human rights by mining companies.⁵⁵

There are other violations of rights found in the South African mining labour structure. In the mining sector, the labour structure is still informed by apartheid policies characterised by "the primitive recruitment strategy which is based on the abundant but controlled availability of cheap labour and its racial and exploitative characteristic".⁵⁶ As a result of this arrangement, a strike in the mining sector may lead to massive numbers of dismissals,⁵⁷ and the use of tear gas, rubber bullets and even real bullets by the police, as observed in Marikana in 2012. In this case, on 16 August 2012 a strike at Lonmin Marikana Platinum Mines led to the police opening fire and killing 36 mineworkers.⁵⁸ Subsequently, the President of the Republic of South Africa, Mr Jacob Zuma, ordered the establishment of a Commission of Inquiry to address the issue. While waiting for the findings of this Commission, the reality is that living in mining environments or working in the mines has been very "dehumanising".⁵⁹

What has emerged is that in Nigeria and South Africa the oil and mining industries are guilty of not giving enough attention to human rights. A commentator correctly

⁵⁵ SAHRC *12th Annual Report 2007/2008*.

⁵⁶ Mathlako 2012 *The Thinker* 11.

⁵⁷ In 1986, 30 000 workers of Impala mine went on strike for better pay, and 25 000 of them were fired. In 1991, strikes at Gencor's mine in Bophuthatswana also led to a massive number of dismissals.

⁵⁸ De Waal 2012 <http://www.dailymaverick.co.za/article/2012-08-23-marikana-what-really-happened-we-may-never-know>; also Naidoo 2012 <http://thinkafricapress.com/south-africa/marikana-massacre-wake-call-south-africas-leaders>.

⁵⁹ Mathlako 2012 *The Thinker* 12.

notes that: "[t]here are various instances on our continent, of private actors exploiting natural resources with complete disregard for basic human rights".⁶⁰

3 The protection of citizens against the power of TNCs in Nigeria and South Africa

This section examines the legal protection of people from the abuses of extractives industries in Nigeria and South Africa.

3.1 *Nigeria's legal architecture for ensuring that the oil industry respects human rights*

As stated in the introduction, under international law states have the primary responsibility to promote, protect and fulfil human rights.⁶¹ Therefore, in line with this obligation, states must ensure that companies operating within their territories comply with international human rights standards. In order to do so, Nigeria and South Africa adopted a Constitution and various laws and policies.

The 1999 *Nigerian Constitution* provides for the right to life⁶² and the right to property.⁶³ However, the protection of the right to life seems not to apply when the violator is an oil company because, as shown earlier, this right has been violated by TNCs without any consequences.

The other provisions that cover people in areas of extractive industries are the rights to a safe environment, water, land, forest and wildlife,⁶⁴ adequate means of livelihood, adequate opportunities to secure suitable employment, cultural life,

⁶⁰ Uranium Network date unknown <http://www.uranium-network.org/index.php/component/content/article?id=259>.

⁶¹ A 6 of the *Maastricht Guidelines*.

⁶² S 33(1) of the *Constitution of Nigeria* of 1999 (the *Constitution*).

⁶³ S 43 of the *Constitution*.

⁶⁴ Directive Principles of State Policies 20.

health, safety and welfare.⁶⁵ It is important to note, however, that these provisions are located in the non-binding Directive Principles of State Policies (DPSP) in Chapter II of the *Constitution*. The non-binding aspect of the DPSP is highlighted by section 6(6)(c) of the *Constitution* in these terms:

The judicial powers vested in accordance with the foregoing provisions of this section ... (c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles.

This provision was taken from the 1979 *Constitution* and integrated into the 1999 *Constitution* and has consequently been used in judgements. In a Lagos High Court decision on 18 July, 1980, Justice Agoro stated the following:

In any event, it seems to me that the Directive Principles of State Policy in Chapter II of the Constitution have to conform to and run as subsidiary to the Fundamental Rights under Chapter IV of the Constitution. If there is no infringement of any Fundamental Right there can be no objection to the State acting in accordance with the directive principles set out in Chapter II subject of course to the legislative and executive powers conferred on the State.⁶⁶

In an ensuing Lagos High Court decision on 22 August 1980, a similar decision claimed that Chapter IV's fundamental human rights provisions were superior to Chapter II's provisions.⁶⁷ This position was upheld by the Court of Appeal on 22 July, 1991 when it held that under the *Nigerian Constitution*:

[L]egal rights popularly called civil rights ...elevated to the level of fundamental rights... are ordinarily enforceable and justiciable in our courts... [and that] [t]here are other rights which may pertain to a person which are neither fundamental nor justiciable in the courts. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution.⁶⁸

⁶⁵ Directive Principles of State Policies 17(3).

⁶⁶ *Archbishop Okogie v The Attorney-General of Lagos State* 1981 1 NCLR 218 232.

⁶⁷ *Adewole v Governor of Lagos State* 1981 1 NCLR 262 282-287.

⁶⁸ *Uzouku v Ezeonu II* 1991 6 NWLR (Pt 200) 761.

However, the non-justiciability of Chapter II of the *Nigerian Constitution* is not absolute. Indeed Chapter II of the *Constitution* would be justiciable if it is so provided by any other disposition of the *Constitution*.⁶⁹ In this regard, section 1 proclaims the supremacy and highlights the binding nature of the entire *Constitution*; section 13 compels "all organs of the states to conform to, observe and apply the provisions of this Chapter [Chapter II] of this Constitution"; section 224 guarantees the conformity of the "programme, aims and objects of a political party with the provisions of Chapter II of this Constitution" and Item 60(a) of the Exclusive Legislative List compels the "authorities for the Federation or any part thereof - (a) To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution". All of these provisions simply turn the DPSP into a fully-fledged Bill of Rights. Ibe, who shares this view, argues that it may be wrong to claim that section 6(6)(c) of the *Constitution* provides unequivocally that economic, social and cultural rights are non-justiciable.⁷⁰ In fact, the view that the non-justiciability of Chapter II of the *Nigerian Constitution* is not absolute was upheld by the court in the *Federal Republic of Nigeria v Anache*.⁷¹ In this case, the court pointed out that since section 6(6)(c) is qualified by the phrase, "save as otherwise provided by this Constitution", the justiciability of Chapter II is not completely shut out.⁷²

Similarly, in *Olafisoye v Federal Republic of Nigeria*,⁷³ the court was called upon to establish whether or not the National Assembly is competent to make laws for the peace, order and good governance of Nigeria, pertaining to abolishing corrupt practices and abuse of power under section 15(5)⁷⁴ (as provided in Chapter II; combined with other provisions of the *Constitution*). In this case, the Supreme Court

⁶⁹ Ch 6(c) of the *Constitution*.

⁷⁰ *Federal Republic of Nigeria v Anache* 2004 14 WRN 1 (Nigeria).

⁷¹ *Federal Republic of Nigeria v Anache* 2004 14 WRN 1 (Nigeria).

⁷² *Federal Republic of Nigeria v Anache* 2004 14 WRN 1 (Nigeria).

⁷³ *Olafisoye v Federal Republic of Nigeria* 2005 51 WRN 52 (SC) 52.

⁷⁴ Note, however, that in *Olafisoye v Federal Republic of Nigeria* 2005 51 WRN 52 (SC) the Supreme Court adopted the literal rule in statutory interpretation and held that the provisions of s 6(6)(c) of the *Constitution* are clear, that s 15(5), (one of the sections under ch 2) is not justiciable

confirmed the possibility of the justiciability of Chapter II, if the *Constitution* turns a section(s) of Chapter II into a justiciable one in these terms:

The non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words, "except as otherwise provided by this Constitution". This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the Courts.⁷⁵

The courts have also held that Chapter II is justiciable whenever its implementation leads to the violation of fundamental rights in Chapter IV, especially on the right of the private sector to establish private schools, to impart ideas and information,⁷⁶ and where the statutes enacted to actualise Chapter II's provisions are challenged.⁷⁷

The other instance for the protection of the DPSP to be applied can be found in the statutory arrangement which domesticates the *African Charter on Human and People's Rights*.⁷⁸ Accordingly, the *African Charter* is part and parcel of Nigerian law and all its provisions including economic, social and cultural rights are justiciable. This was the view of the Nigerian Supreme Court in *Abacha v Fawehinmi*.⁷⁹ In this case, the court held that "... the African Charter, which is incorporated into our municipal law, becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts".⁸⁰

Nevertheless, the court remained cautious in pointing out that incorporated international national treaties cannot supersede the Constitution. Ibe explains as follows:

⁷⁵ *Olafisoye v Federal Republic of Nigeria* 2005 51 WRN 52 (SC), as quoted by Aborisode "Imperatives of Justiciability" (on file with the authors).

⁷⁶ *Archbishop Okogie v Attorney General of Lagos State* 1981 1 NCLR 281; *Adewole v Alhaji Jakande* 1981 1 NCLR 281.

⁷⁷ *AG Lagos State v AG Federation* 2003 15 NWLR (Pt 842) 113 175; *Attorney General of Ondo State v Attorney General of the Federation* 2002 FWLR (Pt 111) 1972 2144.

⁷⁸ *African Charter on Human and People's Rights (Ratification and Enforcement) Act*, CAP 10, LFN 1990.

⁷⁹ *Abacha v Fawehinmi* 2000 6 NWLR (Pt 600) 228.

⁸⁰ *Abacha v Fawehinmi* 2000 6 NWLR (Pt 600) 228; also Ibe 2010 *AHRL* 209.

[T]he Court was careful to clarify that such treaties with international flavour did not, by virtue of incorporation into domestic law, assume a status higher than the Constitution. Interestingly, the Court unwittingly liberalised access to courts for violations of economic, social and cultural rights by agreeing that once incorporated into domestic law an international treaty without specific procedural provisions could be enforced by recourse to the Fundamental Rights Enforcement Procedure Rules made pursuant to Chapter IV of the 1999 Constitution.⁸¹

This suggests that to claim economic, social and cultural rights based on international treaties and the incorporation of the treaties into national law is not the defining factor, but that the ability of the applicant to link the claim to Chapter IV dealing with fundamental rights is.⁸² Put differently, the domestication of international treaties dealing with economic, social and cultural rights does not provide an absolutely safe passage for the protection of the DPSP in Nigeria.

Notwithstanding the possibilities afforded to the courts to ensure the justiciability of the DPSP, the judiciary in general remains reluctant to ensure a consistent protection of the rights contained in Chapter II of the *Constitution*. This is illustrated by the case of *Badejo v Federal Ministry of Education and Ors*.⁸³ In this case, after scoring 293 marks the applicant was not afforded the opportunity to be interviewed for admission into Government Colleges on the ground that her final mark was inferior to the 295 needed for girls from her state of origin. Nevertheless, other candidates from the so-called educationally disadvantaged states were invited to the interview with a mark below 293. The applicant approached the court on the grounds that she was discriminated against. Her case was dismissed by the High Court on the grounds that she had no *locus standi*, but it was reviewed by the Court of Appeal. Nevertheless, the Court of Appeal did not find that her right to education was violated as the latter was crafted into the DPSP. This led Aboride to claim that in *Badejo v Federal Ministry of Education and Ors*:

⁸¹ Ibe 2010 AHRLJ209.

⁸² Ibe 2010 AHRLJ209.

⁸³ *Badejo v Federal Ministry of Education* 1990 LRC (Const) 735 (Nigeria Court of Appeal, Lagos).

The Supreme Court failed to use the opportunity to declare the right of citizens to education (a Chapter II provision) and link the right to education to the right to life (a Chapter IV fundamental rights provision).⁸⁴

Even though this case was not directly linked to the effects of extractive industries, it set a precedent that judges could follow in enforcing rights violated by these industries. The court could have emulated its Indian counterparts, who were able to "read in"⁸⁵ the right life in the right to education.⁸⁶ This means the Indian Courts were able to interpret the right to education as an element of the right to life, which is justiciable in the *Constitution*. Such an approach in Nigeria would have been useful to protect the rights to land, food, environment and livelihood often encroached upon by extractive industries. Unfortunately, unlike the Indian judiciary, which shows courage in its activism and consistently "gives teeth"⁸⁷ to the DPSP by finding a nexus between these Directives and fundamental rights, the Nigerian judiciary plays "politics rather than law" on the issue of the justiciability of the DPSP.⁸⁸ This unpreparedness of the judiciary to take on its responsibility hinders the implementation of the rights included in the DPSP.

The only avenues for the protection of rights included in the DPSP seem to be the African Commission and the Economic Community of West African States (ECOWAS) court of justice. The prospects for the successful protection of rights at the African Commission on Human and Peoples' Rights (the Commission) are illustrated by the case of *SERAC v Nigeria*.⁸⁹ In this case, SERAC brought a communication to the commission against the Federal Republic of Nigeria. The facts of the case exposed how the extraction of oil on Ogoni land disregarded the human rights of the local communities. The African Commission found for the applicant and held that "Governments have a duty to protect their citizens, not only through appropriate

⁸⁴ Aborisade "Imperatives of Justiciability" 12.

⁸⁵ For more on "reading in", see Liebenberg *Socio-economic Rights Adjudication* 383; Currie and De Waal *Bill of Rights Handbook* 204.

⁸⁶ *Francis Coralie v Union Territory of India* 1981 1 SCC 608; *Mohini Jain v State of Karnataka* 1992 AIR SC 1858.

⁸⁷ Bilchitz 2001 *SALJ* 484-501.

⁸⁸ Aborisade "Imperatives of Justiciability" 16.

⁸⁹ *SERAC v Nigeria* 2001 AHRLR 60 (ACHPR). For more analysis of this communication, see Olowu *Integrative Rights-based Approach* 152-156, Kamga 2011 *De Jure* 387-389.

legislation and effective enforcement, but by also protecting them from damaging acts which may be perpetrated by private parties". It found the Federal Republic of Nigeria in violation of rights to freedom,⁹⁰ life and integrity of the persons,⁹¹ property,⁹² health,⁹³ family,⁹⁴ wealth and natural resources⁹⁵ and environment⁹⁶ as provided for by the *African Charter on Human and Peoples' Rights*,⁹⁷ which has been domesticated in Nigeria since 2004.⁹⁸

At the ECOWAS court, the positive prospect for the realisation of rights included in Chapter II of the *Nigerian Constitution* is illustrated by the case of the Socio-Economic Rights and Accountability Project (SERAP) in *SERAP v Nigeria and Universal Basic Education Commission*.⁹⁹ In this case, the court found the Nigerian government guilty of the violation of the right to education. In reaching this finding, the court rejected the government's argument that education (provided for in national law)¹⁰⁰ is merely a prerogative of government policy under the non-justiciable DPSP and ordered the government to make adequate arrangements for compulsory and free education for every Nigerian child.¹⁰¹ It is important to note that the prospects of rights being protected by the ECOWAS Court of Justice are good, because unlike the situation when taking a case to the African Commission, there is no need to first exhaust local remedies¹⁰² before approaching the court.

⁹⁰ A 2 of the *African Charter on Human and Peoples' Rights* (1981) (*African Charter*).

⁹¹ A 4 of the *African Charter*.

⁹² A 14 of the *African Charter*.

⁹³ A 16 of the *African Charter*.

⁹⁴ A 18(1) of the *African Charter*.

⁹⁵ A 21 of the *African Charter*.

⁹⁶ A 24 of the *African Charter*.

⁹⁷ Adopted by the OAU in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986.

⁹⁸ *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, CAP A9, LFN 2004.

⁹⁹ *SERAP v Federal Republic of Nigeria & Universal Basic Education Commission* (ECOWAS) case number ECW/CCJ/APP/0808 of 27 October 2009.

¹⁰⁰ S 15 of the Nigerian *Child's Right Act* of 2003; s 2 of the *Compulsory, Free Universal Basic Education Act* of 2004.

¹⁰¹ *SERAP v Federal Republic of Nigeria & Universal Basic Education Commission* (ECOWAS) case number ECW/CCJ/APP/0808 of 27 October 2009.

¹⁰² According to a 56(5) of the *African Charter*, communications should be sent to the African Commission "after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

However, very few people understand the mechanisms of the regional and sub-regional bodies. People are poor and cannot afford lawyers, and as a result they are unable to take cases to the regional and sub-regional bodies to claim their rights. Hence the continuous violation of rights by extractive industries in Nigeria. Furthermore, taking a case to the African Commission requires patience and perseverance as it is compulsory to exhaust all local remedies first, which in itself is very challenging. In spite of these challenges, civil society organisations should educate citizens on the various avenues available to them to challenge human rights violations by the extractive industries in Nigeria. The analysis of the justiciability of the DPSP shows the challenges faced by ordinary people when they go up against the might of extractive industries in Nigeria. Although these Directives contain opportunities to shield people from TNCs, these opportunities often do not benefit the poor, especially because of the unpreparedness of the judiciary.

Nevertheless, besides the constitutional framework the government has enacted laws and regulations to protect citizens against the violation of human rights by the extractive industries. The laws and policies adopted include the *Oil Pipeline Act* of 1956, amended in 1965, the *Minerals Oil (Safety) Regulation* of 1963, the *Petroleum (Drilling and Production) Regulation* of 1969 with amendments in 1973, 1979, 1995 and 1996, the *Nigeria National Petroleum Corporation (NNPC) Act* of 1977, the *National Environmental Standards and Regulations Enforcement Agency Act* of 2007, the *Environmental Impact Assessment Act*, CAP E12, LFN 2004, the *Harmful Waste (Special Criminal Provisions) Act*, CAP H1, LFN 2004, the *National Oil Spill Detection and Response Agency Act* of 2006, the *Nigerian Criminal Code Act* CAP C38 Laws of the Federation of Nigeria 2004, and the *Nigeria Extractive Industries Transparency Initiative (NEITI) Act* of 2007.

The common points found throughout all these laws is that they compel the holder of a licence of the oil industry to seek the consent of the land owner(s) or occupants before starting his or her activities on the land, and to avoid unnecessary damage to

the land, buildings and crops.¹⁰³ In case of damage, compensation must be paid to the owner of the premises.¹⁰⁴ Furthermore, any person(s) whose land or interest in the land may be injuriously affected by the grant of a licence is empowered to lodge verbal or written notice of objection.¹⁰⁵ Nevertheless, the protection of land owners is flawed because there is no clarity on the amount of damages to be paid to an owner of the land when his or her rights are violated.¹⁰⁶ Furthermore, there is no clarification on the outcome or how to follow up on the verbal or written notice of objection of a complaint from a land owner who suffered injury due the granting of licence.

The other concerns with these laws are that some of them, especially the *Minerals Oil (Safety) Regulation* of 1963, are outdated. This piece of legislation should be commended for providing good oil field practice. However, it is informed by international texts such as the *Institute of Petroleum Safety Codes*, the *American Institute Code* and the *American Society of Mechanical Engineers Codes*, which are not always relevant to local environmental realities.¹⁰⁷ Therefore, there is a need to adopt new laws fully adapted to the Nigerian context.

Some laws also hinder the protection of human rights. For instance, the *Nigerian National Petroleum Company (NNPC) Act* of 1977 hinders effective legal action against the corporation because according to its provision no action can be instituted against the corporation without one month's prior notice of intention to sue being served to it by the intending petitioner or his/her representative. Moreover, members of the board and employees of the corporation cannot be sued for their action and negligence before a period of 12 months after the commission has

¹⁰³ The *Oil Pipeline Act* of 1956 as amended in 1965, and the *Petroleum (Drilling and Production) Regulation* of 1965.

¹⁰⁴ S 6 of the *Oil Pipeline Act* of 1956 as amended in 1965.

¹⁰⁵ S 9 of the *Oil Pipeline Act* of 1956 as amended in 1965.

¹⁰⁶ C4C 2010
<http://www.nigerdeltabudget.org/Laws%20and%20Policies%20in%20Nigeria%27s%20Extractive%20Industries.pdf>.

¹⁰⁷ C4C 2010
<http://www.nigerdeltabudget.org/Laws%20and%20Policies%20in%20Nigeria%27s%20Extractive%20Industries.pdf> 4-6.

expired, before the act or the neglect.¹⁰⁸ The Coalition for Change (C4C) correctly argues that this law imposes "a strict statutory limitation of action, unduly insulating the board or an employee from legal action that may be brought against them".¹⁰⁹

Moreover, the legal architecture protecting the rights to a safe environment, water, air and land, forest and wild life has not produced the expected results. In short, the Nigerian government does not respect its human rights commitments as found by the Commission in the *SERAC v Nigeria* case. The finding of the Commission clearly shows that even though the Nigerian legal landscape contains numerous laws relating to the exploration and exploitation of oil, these laws are yet to make a difference in peoples' lives.

3.2 The South African legal architecture for ensuring that mining industries respect human rights

In South Africa various laws and policies have been adopted to shield communities against the heft of mining companies. The legal framework includes the 1996 *South African Constitution*, the 2004 *Mining Charter*,¹¹⁰ and the *Minerals and Petroleum Resources Development Act 28 of 2002* (MPRDA), which urge mining companies to develop social and labour plans (in consultation with the local communities) and to submit an annual report to the department of Minerals and Energy. The September 2010 amendments to the *Mining Charter* contain positive developments. They request mining companies to "implement measures to improve the standards of housing and living conditions for mineworkers, prevent or mitigate adverse environmental impacts, and provide for the safe storage and disposal of residual waste and process residues".¹¹¹

¹⁰⁸ S 12 of the *Nigeria National Petroleum Corporation (NNPC) Act of 1977*.

¹⁰⁹ C4C
<http://www.nigerdeltabudget.org/Laws%20and%20Policies%20in%20Nigeria%27s%20Extractive%20Industries.pdf> 9-10. 2010

¹¹⁰ The September 2010 amendments of the *Mining Charter* of 2004 contain many clauses to protect people against mining companies.

¹¹¹ Clauses 2.7 and 2.8 of the *Mining Charter* of 2004.

Another piece of legislation that contains positive developments is the *National Environmental Management Act* 107 of 1998, which urges mining companies to develop an environmental impact assessment and an Environmental Management Plan which can be drawn up only after consultation with local communities. The 1994 *Black Economic Empowerment (BEE) Act*, which was expanded by the *Broad-Based Black Economic Empowerment (BBBEE) Act* of 2003 with the aim of advancing people disadvantaged by apartheid,¹¹² is also a valuable piece of legislation used to empower people in the mining sector, among others.

The point of entry into the area of the *Constitution* useful to protect people against TNCs is in section 25 on the right to property. Section 25(1) of the *Constitution* underlines that property rights cannot be violated unless the alienation occurs under a law of general application as provided under section 36. As pointed out by the Bench Marks Foundation, this suggests that "the law of [general application] does not target named or easily identifiable individuals or groups".¹¹³ In the same vein, section 25(1) of the *Constitution* also forbids the arbitrary deprivation of property.

However, under section 25(2), a property may be expropriated in terms of law of general application for "(a) a public purpose or in the public interest and (b) subject to [adequate] compensation". Interestingly, section 25(4) stresses that the notion of public interest entails "the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources..." In the mining sector, the law of general application used for expropriation is the MPRDA.

The law seems to target two specific communities, namely commercial farmers and rural communities. Hence the contention that it is not a law of general application,¹¹⁴ but a tool often used to deprive specific groups of their livelihood. In fact, this piece of legislation often provides a platform on which the state and the mining companies

¹¹² For more on this see Gen N 112 in GG 29617 of 9 February 2007 entitled the *Codes of Good Practice on Black Economic Empowerment*.

¹¹³ Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

¹¹⁴ Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

collude to violate the right to property of commercial farmers and rural communities. This was illustrated by *Alexkor Ltd and the South African Government v the Richtersveld Community*.¹¹⁵ In this case, Alexkor and the state were of the view that there is no basis to claim the rights of aboriginal title or ownership based on indigenous title in South Africa. On 14 October 2003 the Constitutional Court disagreed with this argument and found that the Richtersveld community had a right to ownership of the land under discussion (including its minerals and precious stones) and the exclusive beneficial use and occupation of the land.¹¹⁶ This decision was in line with the *Restitution of the Land Rights Act 22 of 1994*,¹¹⁷ which underlines that land belongs to the indigenous community. As correctly observed by Benchmarks, Alexkor Ltd's decision "surely contradicts the ease with which mining corporations are pushing traditional communities off their land using the instrument of the MRPDA."¹¹⁸

It could be argued that the heft of the mining companies has forced the state to change the original objective of the MRPDA, which was to make sure that all South Africans become the rightful owners of the country's natural wealth, with the state playing a monitoring role.¹¹⁹ Based on the original objective of the MRPDA, Bryan and Hofmann argue that "South Africa's mining code and related legislations encourage the diversification of mine ownership to include historically disadvantaged groups, as well as job creation and industrial development".¹²⁰ However, this argument does not consider the weight of transnational mining companies who influence or decide how laws and codes can be used in the country when their interest is at stake.

¹¹⁵ *Alexkor Ltd and the South African Government v the Richtersveld Community* 2004 5 SA 460 (CC).

¹¹⁶ *Alexkor Ltd and the South African Government v the Richtersveld Community* 2004 5 SA 460 (CC) para 9.

¹¹⁷ S 2(1) of the *Restitution of the Land Rights Act 22 of 1994*.

¹¹⁸ Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

¹¹⁹ Preamble of the *Minerals and Petroleum Resources Development Act 28 of 2002* (MPRDA); NDI *Transparency and Accountability* 80. Also summary of the Mining Charter at DME 2004 http://www.dme.gov.za/minerals/mining_charter.stm5.

¹²⁰ NDI *Transparency and Accountability* 20.

Furthermore, not only are TNCs able to manipulate laws, they are also able to shift the organisation of national institutions in their favour. For instance in the past, the Department of Environmental Affairs and Tourism was in charge of environmental control and regulation over the mining industry and the department had fair prospects of protecting the environment from the impact of mining. However, as a result of intensive pressure exerted on government by these companies, issues related to environmental protection have been re-allocated to the Department of Minerals and Energy, which is more tolerant of the impact of environmental disasters caused by these industries.¹²¹To achieve this re-allocation, these industries used intensive pressure and more specifically "effective investment boycotts".¹²²

What has emerged is the failure of article 25 of the *Constitution* to protect people's right to property against the power of transnational mining companies and the ability of TNCs to manipulate and influence state institutions in their operations. This has led to the failure of the Department of Minerals and Energy to monitor, control and regulate the extractive industry. This failure could be interpreted as an illustration of the power of the industry in the country. This power is detrimental to peoples' rights in and around mining sites.

The 1996 *South African Constitution* includes a Bill of Rights¹²³ which protects fundamental rights (including the rights to dignity,¹²⁴ life,¹²⁵ health,¹²⁶ a safe environment,¹²⁷ and property¹²⁸) that are vital to the protection of human rights in the mining sector. As stated earlier, it has been difficult to protect the right to property, even though section 8(2) provides that "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the

¹²¹ Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

¹²² Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

¹²³ Chapter 2 of the *Constitution of the Republic of South Africa, 1996* (South African *Constitution*).

¹²⁴ S 10 of the South African *Constitution*.

¹²⁵ S 11 of the South African *Constitution*.

¹²⁶ S 27 of the South African *Constitution*.

¹²⁷ S 24 of the South African *Constitution*.

¹²⁸ S 25 of the South African *Constitution*.

right". This provision, which equips TNCs with a legal personality, compels them to comply with human rights.

Although the South African judiciary is prepared to address violations of all rights and especially socio economic rights¹²⁹ (often violated by mining companies), the judicial system in general remains "class-based" as it serves those who have the money to afford lawyers and other necessities to access justice.¹³⁰ In this context, even with the availability of legal aid, it is not always easy to get access to it, which means that the poor people in the mining communities lack the financial muscle and education needed to take on wealthy mining companies in court.¹³¹

The possibility to take cases to the African Commission remains an option. However, as with the processes discussed in the Nigerian case study, the level of education on legal issues, the challenges linked to the exhaustion of local remedies and the lack of understanding the functioning of the regional and sub-regional human rights systems are serious limitations to the indigenous communities found around extractive industry sites. It is also important to note that communities from mining sites in South Africa would not have the benefit of the sub-regional tribunal or court. This is because the SADC tribunal was suspended after Zimbabwe raised concerns that the tribunal had not been appropriately set up, and as such could not be legally perceived as an institution of the SADC.¹³² It is important to note that the concerns raised by Zimbabwe were a reaction to the tribunal's judgments pertaining to the Zimbabwe Fast-Track Land Reform Programme, which the Zimbabwean government found inappropriate.¹³³

The other legislative measure to empower all previously disadvantaged people in the various sectors including mining is the 1994 *Black Economic Empowerment (BEE)*

¹²⁹ Kamga and Haleba 2012 *SUR Int'l J Hum Rts* 91.

¹³⁰ Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

¹³¹ Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

¹³² The Tribunal was suspended at the 2010 SADC Summit of Head of State and Government in Namibia.

¹³³ Makonese 2013 *De Rebus* 13.

Act and the subsequent *Broad-Based Black Economic Empowerment (BBBEE) Act* of 2003. Its objective is to advance people disadvantaged by apartheid¹³⁴ or to "increase black ownership of businesses and to accelerate black representation in management".¹³⁵ However, many observers have been disappointed by the BBBEE, which created a new black bourgeoisie. Moeletsi Mbeki is of the view that the BBBEE:

... strikes the fatal blow against the emergence of black entrepreneurship by creating a small class of unproductive but wealthy black crony capitalists made up of ANC politicians, some retired and others not, who have become strong allies of the economic oligarchy.¹³⁶

This observation is fortified by the common occurrence in the mining sector where under BBBEE schemes either "the owners of the mine are [usually] linked to past and present government officials, [or] senior government officials and their families are often entrenched within the boards of mining houses or indeed own them".¹³⁷ This suggests that in the mining sector only a few benefit from BBBEE, and unfortunately the beneficiaries are not from the mining communities that have their rights frequently violated.¹³⁸ Consequently, BBBEE has failed to empower people in mining communities and to shield them from the abusive activities of the mining companies.

What emerges is that the legal architectures in Nigeria and South Africa have some similarity and some specificity. In terms of similarities, in both countries the abundance of legislation is yet to shield people from the power of the extractive industries. In both countries peoples' rights in the oil production and mining sectors are disregarded by the extractive industries. For example, as alluded to earlier, labour rights and even the life of mineworkers are not adequately protected against

¹³⁴ For more on this see Gen N 112 in GG 29617 of 9 February 2007 entitled the *Codes of Good Practice on Black Economic Empowerment*.

¹³⁵ Fauconnier and Mathur-Helm 2008 *S Afr J Bus Manage* 2.

¹³⁶ Mbeki *Architects of Poverty* 61; also Kovacevic 2007 *Harv Int'l Rev*.

¹³⁷ Capel 2012 <http://www.bizcommunity.com/Article/196/558/72447.html>; Mbeki *Architects of Poverty*.

¹³⁸ Capel 2012 <http://www.bizcommunity.com/Article/196/558/72447.html>.

the clout of the TNCs. Although citizens in both countries may take cases to the African Commission after the exhaustion of local remedies, their level of education and understanding of the functioning of the regional body is weak.

However, in terms of specificity, South Africa's legal architecture is more progressive.

Unlike Nigeria, South Africa has a *Constitution* with a justiciable Bill of Rights, which provides an opportunity to hold extractive industries accountable for the violation of human rights. In addition, not only do TNCs have a legal personae, the judiciary is prepared to address violations of all human rights, including socio economic rights, even though prospective claimants of rights violations lack access to court. Although Nigeria has the DPSP, which provides good opportunities to shield people against the extractive industries, the lack of commitment to the cause by the judiciary and the lack of education of the people they were created to help are problematic. In an attempt to close the gap, Nigeria should insert socio-economic rights in the binding part of its *Constitution*, ensure their justiciability, and make sure that TNCs have full legal personae in their legal system. Unlike Nigerians, South African prospective applicants for the violation of their rights by extractive industries no longer have a sub-regional tribunal/court (the SADC tribunal) to protect their rights. Overall, in both countries the extractive industries are violators of human rights. Hence the need to reflect on what needs to be done to protect people against TNCs.

4 What can be done in Nigeria and South Africa to compel TNCs to respect human rights?

Having established so far that the Nigerian and South African legal systems are yet to yield results in terms of shielding citizens against the violations of human rights by the extractive companies, this section attempts to seek solutions to the problem. Our suggestions are fourfold: firstly, the insertion of human rights clauses into international trade and investment agreements; secondly, awareness of and sensitization on the importance of corporate social responsibilities (CSR) as a "profit maximising" mechanism; thirdly, turning CSR into binding human rights obligations;

and fourthly, promoting adequate leverage for international human rights monitoring mechanisms that will assist in protecting citizens against TNCs.

4.1 The insertion of human rights clauses into international trade and investment agreements

An international trade and investment agreement can be defined as an agreement entered into by a government or its representative with a foreign country, an international organisation, or a corporation related to trade in goods or services or investment to which the agreement applies. In this perspective, the agreement is "a contract specifying the rights and responsibilities of a host government and a corporation in the structure and operation of an investment project".¹³⁹ In signing agreements, Nigeria and South Africa must include human rights norms in interpreting the objectives of investment treaties.¹⁴⁰ This could promote respect for human rights in line with the *Vienna Convention on the Law of Treaties*, according to which a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". From this perspective, investment treaties can expressly embody rights-base objectives.¹⁴¹ In addition, besides incorporating human rights norm objectives, it is also important to insert human rights clauses that compel TNCs to respect the rights to health, work, a safe environment, life and other matters in the treaty itself. This approach would address issues of the violation of human rights before they occur.

However, more often than not TNCs are very powerful entities¹⁴² that basically prepare the agreements and hand them to the states in which they operate for approbation. In this vein, some local laws have the nuances of foreign ones as the laws are not adapted to local realities, nor are they tailored to address the national

¹³⁹ FARLEX 2012 <http://financial-dictionary.thefreedictionary.com/Investment+Agreement>.

¹⁴⁰ Aguirre *Human Rights to Development* 158.

¹⁴¹ Aguirre *Human Rights to Development* 159.

¹⁴² Joseph "Liability of Multinational Corporations" 614.

contexts in which they apply. For instance in South Africa, as alluded to earlier, notwithstanding the end of apartheid, mining labour structures are outdated since they still have the nuances of the apartheid era. The insertion of human rights in investment agreements is also hindered by the strong competition to attract foreign direct investment (FDI). As a result of this competition, several countries in Africa do not impose strict conditions on TNCs wanting to invest in their countries. This suggests that even when some of these conditions are included in the agreements, poor countries are not keen to ensure their implementation. Joseph correctly argues that "a developing nation may be reluctant to punish corporate malfeasance, fearing that such punishment may repeal corporate investment".¹⁴³ For Aguirre, the strong competition for FDI often compels states to surrender their sovereignty to investors through investment agreements,¹⁴⁴ which results "in the ownership and control of local economies by developed states' corporations".¹⁴⁵ Furthermore, the international investment protection mechanism portrays FDI as the main instrument of economic development¹⁴⁶ and ensures very good protection of investors. For instance, under the Investor-State Dispute Settlement Mechanism (ISDM),¹⁴⁷ in a case of a conflict opposing investors to states, investors are empowered to evade the courts in the host states and vice versa. As a result, states have no choice, but to:

Live up to the disciplines contained in the treaties or run the risk that legal issues are litigated far away from the place where the conflict originated, adjudicated by rules they were able to shape only to a limited extent, and decided by people sometimes not fully aware of the local situation. In a nutshell, they risk marginalising their own legal order which, in general, should be able to best accommodate the country's specificities.¹⁴⁸

The other barrier to the insertion of human rights standards in international trade and investment agreements is that very often the state itself has a particular interest in ensuring that the TNC operates in the country, or is even a shareholder in the

¹⁴³ Joseph "Liability of Multinational Corporations" 614.

¹⁴⁴ Aguirre *Human Rights to Development* 121.

¹⁴⁵ Aguirre *Human Rights to Development* 122.

¹⁴⁶ Shihata *Legal Treatment of Foreign Investment*.

¹⁴⁷ For more on this system, see OECD 2006 <http://www.oecd.org/china/36052284.pdf>; Capling and Nossal 2006 *Governance* 151-172; Singh and Sharma 2013 *Merkourios* 88-101.

¹⁴⁸ Gutbrod and Hindelang 2006 *JWIT* 83.

TNC. For instance, in the *SERAC v Nigeria* case, the consortium that violated human rights in the Niger Delta was comprised of the Nigerian Government, the Nigerian National Petroleum Company (NNPC) and the Shell Petroleum Development Company. So there are serious impediments to the use of investment agreements as a means of addressing human rights violations before they occur, but it is not only international law which provides avenues for good governance. Under international law, the *UN Charter on Economic Rights and Duties of the States* empowers a state:

- a) to regulate foreign investment "in accordance with its laws and regulations and in conformity with its national objectives and priorities. States are compelled to grant preferential treatment to foreign investment;
- b) to regulate "the activities of transnational corporations ... and take measures to ensure that such activities comply with laws, rules and regulations and conform with its economic and social policies". Transnational corporations may not intervene in the internal affairs of the host-state;
- c) to "nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent ... in any case where the question of compensation gives rise to a controversy, it shall be settled under domestic law of the nationalising state".¹⁴⁹

According to this provision, states can overlook some investment agreements when the circumstance dictates. In a similar vein, the *International Centre for the Settlement of Investment Dispute (ICSID)*¹⁵⁰ recognises the need to consider the application of international law in settling a dispute. It provides that:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In absence of such agreement the Tribunal shall apply the

¹⁴⁹ A 2.2 of the *UN Charter on Economic Rights and Duties of the States* (1974). For more on this, see Aguirre *Human Rights to Development* 126.

¹⁵⁰ Established by the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965).

law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.¹⁵¹

This is further evidence that host states of TNCs have the possibility of relying on international law to shield their people from the might of TNCs. In this vein, the first example that could inspire Nigeria is the case of *Piero Foresti, Laura de Carli v Republic of South Africa*.¹⁵² In this case, in 2007, South Africa was brought in front of the ICSID for violating bilateral investment treaties. To put the matter in context, under some international trade and investment agreements, TNCs are given the latitude to claim their rights when they are encroached upon in the implementation of bilateral agreements. In this context, *Piero Foresti, Lauro de Carli and Others*, Italian and Luxembourg companies, challenged the South African BBBEE law for being unfair to foreign investors.¹⁵³ The challenge did not consider the local reality of the policy aiming to empower historically disadvantaged black people. In 2010 the parties settled the claim which occurred through the discontinuation of the procedure as requested by the claimants. The latter were ordered to pay 400 000 Euros to the respondent in respect of the fees and cost. The responsibility for a portion of the respondent's cost was on the claimants because of their failure to indicate their "willingness to settle earlier", amongst other reasons.¹⁵⁴

Subsequent to this case, South Africa went ahead and scrapped its bilateral and investment treaty (BIT) agreements with many European countries (Germany, Belgium and Luxembourg, Switzerland, Spain and the Netherlands). More importantly South Africa adopted the *Promotion and Protection of Investment Bill*,¹⁵⁵ which will replace BIT agreements. This Bill will protect the government from investors from various angles. Ram explains it in these terms:

¹⁵¹ A 42 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965).

¹⁵² *Piero Foresti, Lauro de Carli v Republic of South Africa* (ICSID) case number ARB(AF)/07/1.

¹⁵³ For more on this, see Joseph "Liability of Multinational Corporations" 620.

¹⁵⁴ *Piero Foresti, Lauro de Carli v Republic of South Africa* (ICSID) case number ARB(AF)/07/1 para 119.

¹⁵⁵ Gen N 1087 in GG 36995 of 1 November 2013 (*Promotion and Protection of Investment Bill*).

[T]here is no opportunity for international arbitration, and, unlike most BITs, it [the Bill] does allow for circumstances in which assets could be expropriated for national interest. Also gone is the "fair and equitable treatment" clause enconced in most BITs, which because of its ambiguity has been widely used by MNCs seeking redress.¹⁵⁶

Moreover, in dealing with non-European countries, South Africa seems to be inclined to ensure that its BIT agreements take account of its national policies to empower its people. This is illustrated by the South Africa-Israel BIT agreement, which permits derogation in time of economic recession and inserts provisions accepting affirmative action for the benefit of previously marginalised individuals.¹⁵⁷ This is a clear testimony that a country hosting a TNC is not necessarily a hostage of that company.

The other example that may inspire South Africa and Nigeria is the case of *Aguas del Tunari* (a company belonging to the Dutch based International Water Bechtel) *v* *Bolivia*. After a BIT agreement between Holland and Bolivia for the value of US\$ 25 million, Aguas del Tunari was offered a tender for the privatisation of the water supply in the region of Cochabamba in Bolivia. However, things went wrong and this resulted in a violation of the right to water, as the latter became unaffordable. This resulted in insurrection, and the workers of the Aguas del Tunari could not carry on with the operations for security reasons. Subsequently the Bolivian government annulled the contract and was sued for violating BIT.¹⁵⁸ Nevertheless, in 2006 the applicant dropped the case, which was perceived as a landmark case because as correctly observed by the Democracy Centre, the NGO directly involved in the case stated:

This is the first time a major corporation has ever dropped a major international trade case such as this one as a direct result of global pressure, and it sets an important precedent for the politics of future trade cases like it.¹⁵⁹

¹⁵⁶ Ram *Business Day*.

¹⁵⁷ Aguirre *Human Rights to Development*.

¹⁵⁸ For more on this, see Joseph "Liability of Multinational Corporations" 620.

¹⁵⁹ See Democracy Center 2008 <http://www.democracyctr.org/bolivia/investigations/water/>; also Joseph "Liability of Multinational Corporations" 620.

The fourth example is from Argentina,¹⁶⁰ where in order to cope with the impacts of the 2001 economic crisis the government took emergency measures which affected foreign investors' interests. These measures included currency devaluation,¹⁶¹ and investors wanted to raise tariffs on the provision of water services. The state stood firm on the ground that it was party to international human rights instruments protecting its people's right to water, which included physical and economic access to water.¹⁶² While awaiting the outcome of this case, Argentina demonstrated that BIT agreements can be overlooked on human rights grounds. Though these examples are not directly related to extractive industries, they show approaches that can be used by Nigeria and South Africa when they confront human rights violations by these industries.

4.2 Awareness of and sensitisation on the importance of CSR as a "profit maximising" mechanism

While there is no universally accepted definition of the concept of corporate social responsibility (CSR), it can be defined as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".¹⁶³ CSR is also defined as a "concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".¹⁶⁴ Generally, these definitions make extensive demands on companies without clear justifications or simply for ethical reasons. This approach portrays CSR as a needless expense with little-or-no financial or other benefit to companies.

¹⁶⁰ *Aguas Provinciales de Santa Fe S.A, Suez, Sociedad de Aguas de Barcelona SA, and Inter Aguas Servicios Integrales del Agua SA v The Argentine Republic* (ICSID) case number ARB/03/17 of 17 March 2006. For more on this case, see Aguirre *Human Rights to Development* 170-172.

¹⁶¹ Argentina Law 25, 561 (*Ley de Emergencia Publica y de Reforma del Regimen Cambiario*) of 6 January 2002.

¹⁶² See a 11 of the *International Covenant on Economic Social and Cultural Rights* (1966) (ICESCR); *CESCR General Comment No 15: The Right to Water* UN Doc E/C 12/2002/11 para 3.

¹⁶³ Lin-Hi *Corporate Social Responsibility* 4; also Holme and Watts *Corporate Social Responsibility*.

¹⁶⁴ Bilchitz 2008 *SALJ* 772.

However, spending on CSR is an investment for the sustainability of the enterprise. For instance, investing in schools, health centres, roads and bridges and other infrastructures for the benefits of workers and the community goes a long way in developing the capacity, the sustainability and the brand of the company.¹⁶⁵ Such investments are not a waste of resources because they improve the company's credibility and competitive edge in terms of attracting and keeping investors, clients and employees as well as the likelihood of charging a premium price for its product(s).¹⁶⁶ Research shows that companies that strive to achieve the triple bottom line by focusing on people, planet and profits are sustainable and more successful than those that do not.¹⁶⁷ In this respect, various studies find that companies that invest in CSR outperform those that do not.¹⁶⁸ In their research, Meijer and Schuyt established that "consumers were more likely to boycott companies with a bad CSP [Corporate Social Performance] reputation and pay a little more for products of companies with a good CSP reputation".¹⁶⁹ In a similar vein, Lin-Hi argues the follows:

It is founded in the enlightened self-interest of corporations to act in such a way that their actions are beneficial with their long-term conditions of actions. This perspective explains that the assumption of responsibility is located as a matter of principle in the self-interest of corporations, and that it does not categorically oppose the self-interest.¹⁷⁰

However, it could be argued that the extractive industries in Nigeria and South Africa are already committed to CSR. In the Niger Delta, Shell and other petroleum companies have put a lot of money into projects to develop the communities. For

¹⁶⁵ Bennett 2002 *JIA* 400.

¹⁶⁶ Baron 2001 *JEMS* 7-45; also McWilliams and Siegel 2000 *SMJ* 603-609; Bagnoli and Watts 2003 *JEMS* 419-445.

¹⁶⁷ Meijer and Schuyt 2005 *Business & Society* 442-461; also Weber and Marley 2012 *Business & Society* 626-649; Orlitzky, Siegel and Waldman 2011 *Business & Society* 6-27; Mohr *et al* 2001 *Journal of Consumer Affairs* 45-72; Sen and Bhattacharya 2001 *Journal of Marketing Research* 225-243.

¹⁶⁸ Meijer and Schuyt 2005 *Business & Society* 442-461.

¹⁶⁹ Meijer and Schuyt 2005 *Business & Society* 442-461; also Weber and Marley 2012 *Business & Society* 626-649; Orlitzky, Siegel and Waldman 2011 *Business & Society* 6-27; Mohr *et al* 2001 *Journal of Consumer Affairs* 45-72; Sen and Bhattacharya 2001 *Journal of Marketing Research* 225-243.

¹⁷⁰ Lin-Hi *Corporate Social Responsibility* 8.

instance, primary schools, hospitals, the provision of clean water - and even scholarships are made available for the benefit of the communities.¹⁷¹ However, these investments seem to be fruitless because they are not undertaken in a systematic and comprehensive manner in consultation with the communities. Emeseh argues that CSR fails to make an impact in the Niger Delta because the "practice is unsustainable as projects are selected *ad hoc*, communities have no real input, and the long-term viability of projects is not built into plans".¹⁷² Therefore, there is a need to remedy the situation by involving communities in the design of CSR projects and inserting them into long-term plans by allowing the local population to lead the process.

In South Africa, extractive companies such as Implats and others are investing in CSR. For instance in 2009 Implats spent millions of rand in community projects such as training, education, housing, health, environment and infrastructure. However, just as in Nigeria, much more needs to be done in terms of improving community participation in these projects. It has been reported that "The consultative process which precedes communities' relocations is often insufficient and therefore deficient" as the affected population is not well informed on the processes.¹⁷³ In addition, section 21 companies¹⁷⁴ and other structures financially dependent on mining companies for their existence are at the centre of conflicts within the affected communities. In fact, these structures seem to serve the interest of the companies. Hence a commentator observes:

The paternalistic relationships of these entities [section 21] with mining companies compromise their standing within the communities; hence the persistent calls for them to be disbanded.¹⁷⁵

¹⁷¹ Emeseh 2009 *JSDA* 116-117.

¹⁷² Emeseh 2009 *JSDA* 116-117.

¹⁷³ Olaleye "Corporate Governance Practices" 38.

¹⁷⁴ It is the section of the *Companies Act* 61 of 1973 which creates a non-profit association which usually defends the interest of workers and protects the environment.

¹⁷⁵ Olaleye "Corporate Governance Practices" 38.

In a specific case of relocation involving Anglo Platinum and two section 21 companies, the mining company argued that the two section 21 companies were independent as their activities were regulated by a memorandum and articles of association. Interestingly, Anglo Platinum omitted to mention that representatives of section 21 companies were on its payroll, which is enough to cast doubt on their independence.¹⁷⁶

While investing in CSR for their self-interest, companies should always remember that their real licence to trade or their legitimacy comes from the communities. Therefore these companies should always strive to ensure the meaningful participation of these communities in the affairs affecting their lives, land and general well-being. The *World Bank's Emerging Best Practices on Consultation* urges companies to gather "relevant social and cultural information, design community relations programmes, and [develop] local capacity to effectively communicate complex issues across cultural barriers".¹⁷⁷ More importantly, even though the first objective of TNCs is to make money, they should be able to encapsulate the cultural context in which business and companies are embedded. In this context, to use the words of Gond and Matten, "culture is where values are exchanged and infused between the corporation and society".¹⁷⁸ From this perspective, TNCs activities are commonly goal-orientated, duty-aligned,¹⁷⁹ and informed by the moral imperative of doing the right thing.¹⁸⁰ This suggests that a company may also act ethically without absolutely linking its actions to profit making. This is in line with the theory of a business ethicist who holds that nowadays a "business must consider the worker, consumer, and the general public as well as the shareholders - and the views and demands of all four - in making decisions. The good of all must be considered".¹⁸¹ This means that TNCs should not assume their CSR on the one hand and violate

¹⁷⁶ Bench Marks Foundation 2008 http://www.bench-marks.org.za/policy_gap_2.htm.

¹⁷⁷ Bennett 2002 *JIA* 400.

¹⁷⁸ Gond and Matten 2007 <http://www.nottingham.ac.uk/business/ICCSR/research.php?action=single&id=33> 19; Strand 1983 *Academy of Management Review* 90-97.

¹⁷⁹ Swanson 1995 *Academy of Management Review* 43-64.

¹⁸⁰ Stormer 2003 *Journal of Business Ethics* 279-288; Gioia 2003 *Organization* 435-438.

¹⁸¹ De George *Business Ethics* 572.

human rights on the other, on the ground that they are offering social services to the community. A trade-off between the two is not acceptable.¹⁸²

Overall, investing in CSR seems to be the best way of ensuring the growth of a company. In 1999, Shell's chairman, Mark Moody-Stuart correctly observed: "The demands of economics, of the environment and of contributing to a just society are all important for a global commercial enterprise to flourish".¹⁸³ Nevertheless, CSR remains voluntary. In other words, a company has the choice to ignore their CSR to the detriment of its workers, environment and communities. Bilchitz correctly argues:

The first set of problems is conceptual and relates to the notion that responsibilities for human-rights protection are assumed voluntarily. This approach is fundamentally flawed. The very logic of having a right entails that others have a duty not to violate that right, and the notion of having a duty in turn means that the course of action concerned is obligatory, not voluntary.¹⁸⁴

It follows that companies should be compelled by law to abide by international standards of human rights.

4.3 Turning CSR into binding human rights obligations

As stated earlier, CSR is known to be a mere voluntary commitment by companies¹⁸⁵ and companies generally give back to communities in order to enhance their reputation or to be simply altruist without any consideration of human rights. In this regard, in the South African context, the King II Report underlines the voluntary basis of CSR by stressing that the stakeholders of a company comprise of "the community in which the company carries its operations, its customers, its employees and its suppliers".¹⁸⁶ It also expands the role of business from an exclusively profit-

¹⁸² Bennett 2002 *JIA* 401.

¹⁸³ Bennett 2002 *JIA* 402.

¹⁸⁴ Bilchitz 2008 *SALJ* 761.

¹⁸⁵ Aguirre 2005 *AHRLJ* 239.

¹⁸⁶ King
Committee
https://www.saica.co.za/Portals/0/documents/executive_summary_king11.pdf.

making tool to include social and environmental protection. However, none of these CSR considerations are informed by the commitment to human rights because, among other things, the report is centred on corporate governance. There is no clear provision on corporate obligations or remedies in case there are violations of social and environmental rights. In his analysis of the King II report Bilchitz correctly observes:

Whilst these proposals [in the King II Report] have sought to encourage recognition of the wider social responsibilities of corporations, they fall short of the notion that such responsibilities impose binding obligations with enforceable consequences.¹⁸⁷

This raises the question of how to compel TNCs to realise their CSR. As stated earlier, a starting point could be to look at the Preamble of the 1948 UDHR, which obliges *every organ of society* to play its parts in the promotion and protection of human rights.¹⁸⁸

Though non-binding, this provision calls upon every entity in the society or "organ of society" to ensure that human rights are observed. Such organs can be private, public or TNCs which operate in a state. In Nigeria the *Criminal Code*¹⁸⁹ punishes any form of environmentally-related offences. These offences range from water fouling to the use of noxious substances, and yet hitherto the authorities have failed to arrest the nefarious environmental degradation and human rights violations by the TNCs in the extractive industry. This is because the Nigerian government has pecuniary interests in the TNCs by virtue of their joint venture arrangements.

Originally it was difficult to impute criminal liability to a company due to the difficulty in attributing *mens rea* to corporations. This is because, in law, for criminal liability to be established there must be proof of *actus reus* and *mens rea*. *Mens rea* is referred to as the mental element (ie the guilty mind) that is required to be proved in respect of a particular crime. In company law, it is questionable that it is possible

¹⁸⁷ Bilchitz 2008 *SALJ* 754.

¹⁸⁸ Our emphasis.

¹⁸⁹ Ss 245-248 of the *Criminal Code*, CAP C38, LFN 2004.

to prove the guilty mind of a company that is widely regarded as an artificial entity. Is it fair for a company in violation, commission, or omission, to be allowed to seek sanctuary behind the façade of corporate personality, and thereby escape responsibility for crimes committed, or violations it is culpable of? It is sufficient to note that the common law has extended the principle of criminal liability to corporate organizations. In the case of *National Rivers Authority v Alfred M E Homes*¹⁹⁰ it was observed that a corporation can possess guilty knowledge and form an intention only through its agents and officers, and that such knowledge and the intention of the agent in certain circumstances must be imputed to the company. Even though a company cannot be indicted for murder, affray, and bigamy, it is submitted that a company can be convicted for manslaughter. In other words, the liability of a company for acts of its agents is based on the elementary principles of agency and vicarious liability in tort. The courts have also further evolved additional bases for corporate responsibility by recognising that certain human agencies are organs of the company rather than just mere agents. Hence, it is noteworthy that the octopus arm of the law has ensured that companies, and corporations, are not allowed to hide behind the veil of corporate legal personality while they get away with the breach of the law and sundry crimes/violations. It is important to note that the management of a company is carried out by the directors and its members in general meetings. Thus, with regards to crime, companies can either be implicated and/or indicted. This can easily be determined by identifying those people who have been entrusted with the exercise of the powers of the company.

The other avenue to explore is the *Nigerian Extractive Industry Transparency Initiative (NEITI) Act of 2007*.¹⁹¹ This Act was adopted in line with the 2004 global Extractive Industries Transparency Initiative. The NEITI inserts the compulsory regulation of CSR into its corporate governance. This piece of legislation is expected to foster transparency, accountability and stakeholder commitment that will trickle

¹⁹⁰ *National Rivers Authority v Alfred ME Homes*, 1994 CLR 760.

¹⁹¹ For more analysis of the Nigeria Extractive Industries Transparency Initiative, see Ihugba 2012 *JPL* 72.

down in the form of social and economic development.¹⁹² The architecture of the NEITI provides two entry points to compel TNCs to promote and respect human rights. The first point of entry is the objectives of the NEITI, which ensure due process and transparency in the payments made by all extractive industry companies to the Federal Government and statutory recipients; in order to monitor and ensure accountability; eliminate all forms of corrupt practices; and ensure conformity with the principles.¹⁹³ It is submitted that these objectives should be amended to include a compulsory obligation of the NEITI to monitor the impact of the TNCs' activities on human rights and how they have been addressed. This initiative might persuade TNCs to be mindful of human rights, because of the existence of a watchdog.

The second point of entry can be located in the sanctions attached to the violation of the NEITI. In this regard, companies or their representatives and government agents who provide false information or render forged statements of accounts, or refuse to or delay to render statements of accounts that lead to loss of revenue to the federal government of Nigeria will pay a fine of N30,000,000 (around 200 000 USD).¹⁹⁴ Furthermore, an extractive company which fails to comply with its obligation under the NEITI runs the risk of having its operational licence suspended or revoked.¹⁹⁵ In the same vein, a guilty manager of a company is liable to at least 2 years of imprisonment and a fine of at least N5,000,000 (30 000 USD) unless that person proves that the offence was committed without his or her permission or involvement.¹⁹⁶ It is our contention that the manager of such a company should also be compelled to report on the impact of the company's activities on human rights, and the submission of false reports in this regard should lead to prosecution. In the same vein, the manager of a TNC should be held accountable for violations of human rights unless he or she can prove his or her non-involvement.

¹⁹² NEITI Extracting Transparency.

¹⁹³ Annex H (Explanatory Memorandum) of the *Nigeria Extractive Industries Transparency Initiative (NEITI) Act of 2007* (NEITI Act).

¹⁹⁴ S 16 of NEITI Act.

¹⁹⁵ S 16(4) of NEITI Act.

¹⁹⁶ S 16(5) of NEITI Act.

Notwithstanding the challenges of the implementation of the NEITI, which include its complexity and the inability of stakeholders to understand and use its substance, it is our contention that in setting the standards of transparency and accountability in the extractive industry sector, CSR should be moved from a voluntary sphere and become compulsory and legally binding.

In the South African context, in spite of challenges to its application, section 8(2) of the *Constitution* provides a roadmap that compels TNCs to respect human rights. According to the article "A provision of the Bill of Rights binds a natural or a juristic person if and to the extent that it is applicable, taking into account *the nature of the right and the nature of any duty imposed by the right*".¹⁹⁷ Accordingly, two elements should be considered for a right to be applicable to companies: the nature of the right and the nature of any duty imposed by the right. Even though the provision clearly indicates that juristic persons are to be accountable for human rights, it is vague on how to determine the criteria of accountability. This vagueness on the horizontal application of human rights was seen in *Khumalo v Holomisa*,¹⁹⁸ where the issue brought before the court was to determine whether or not the right to freedom of expression was of horizontal application in a dispute between private parties. The court failed to give clear guidance on the question. Nevertheless, a company's obligation deriving from the Bill of Rights in the *Constitution* is unequivocal because, as guided by the application clause, "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".¹⁹⁹ In order to ensure that the Bill of Rights applies vertically and horizontally, section 8(3) of the *Constitution* empowers the courts as follows:

(a) in order to give effect to a right in the Bill [the courts] must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) [the courts] may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

¹⁹⁷ Our emphasis.

¹⁹⁸ *Khumalo v Holomisa* 2002 5 SA 401 (CC).

¹⁹⁹ S 8(1) of the South African *Constitution*.

All laws, including company law, must be in line with the *Constitution*, which is the supreme law of the land. From this perspective, the actions of private companies must conform with the Bill of Rights to the extent that it is applicable to them. Therefore private companies have a constitutional obligation to respect human rights.

To some extent the South African *Companies Act* should be commended for stating that its purpose is to "promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law".²⁰⁰ Nevertheless, to crystallise this principle into corporate practice it is important to amend company law by ensuring that the corporate human rights obligation is expressly written. As correctly prescribed by Bilchitz, the South African *Companies Act* should compel companies "to recognise in their memoranda of association that they are bound by the Bill of Rights and are responsible for their realization to the extent that they bear responsibility for them".²⁰¹

In addition, companies' directors should have a fiduciary obligation to ensure that company operations obey the rules of achieving fundamental human rights to the degree that they have to.²⁰² Such an approach would oblige companies to operate within the ambit of the *Constitution*. Nigeria and South Africa would not be unique in taking this approach, because it has been adopted by the United Kingdom in its revised *Companies Act* of 2006. Accordingly, Directors have an unambiguous "duty to promote the success of the company as a whole", and this comprises considering "the impact of the company's operations on the community and the environment".²⁰³ This statutory duty could be strengthened by ensuring the liability of Chief Executive Officers for the company's violations of human rights, especially when it is established that they were conscious that their actions or decisions would result in the violation of human rights.²⁰⁴ Moreover, besides the financial reporting obligations

²⁰⁰ S 7(a) of the *Companies Act* 71 of 2008.

²⁰¹ Bilchitz 2008 *SALJ* 781.

²⁰² Bilchitz 2008 *SALJ* 782.

²⁰³ See s 172(1)(d) of the United Kingdom's *Companies Act* of 2006.

²⁰⁴ Bilchitz 2008 *SALJ* 782.

of the companies²⁰⁵ contained in their statutory duties, mandatory reporting on the human-rights impact of the companies' activities and how they have sought to meet their obligations should also be included.²⁰⁶

For our analysis, even though South Africa has to amend its company law as indicated above, it is advanced for having a Bill of Rights with article 8(2) which enhances the prospect of a better protection of human rights against the might of TNCs. Nigeria could learn from South Africa by moving socio-economic rights from the mere Directive Principles of State Policies to the binding part of the *Constitution* to make sure that the country companies law is tailored towards compelling corporations to respect human rights. In order to do so, the NEITI should be amended to enshrine CSR obligations.

4.4 Using international human rights monitoring mechanisms

Under international human rights law, the UN and regional human rights bodies are tasked to protect and scrutinise respect for human rights in the world. To achieve its objectives the UN set up the Human Rights Council, which monitors the implementation of civil and political rights, and the *Committee on Economic Social and Cultural Rights* (ESCR).²⁰⁷ At regional level, every region of the world has a monitoring body in the form of a court or a commission that deals with human rights abuses.²⁰⁸ Upon joining these bodies, states commit themselves to submitting a report every two years on how they implement human rights. Civil society organisations are allowed to submit shadow reports to these bodies. Sometimes a human rights body independently undertakes field trips to monitor human rights conditions in specific countries. Sometimes members of the public are empowered to

²⁰⁵ S 286 of the *Companies Act* 71 of 2008.

²⁰⁶ Bilchitz 2008 *SALJ* 782.

²⁰⁷ For more on the UN system and human rights, see Hannum "United Nations and Human Rights" 61-78; also Clapham "United Nations Charter-based Protection of Human Rights" 79-103.

²⁰⁸ On the African human rights system, see Viljoen *International Human Rights Law*, on the European human rights system, see for examples Drzewicki "European System" 397-422; Lawson "European Convention on Human Rights" 423-462; on the Inter-American system, see Quiroga "Inter-American System" 519-549.

take cases to the Committees, to the Commission and the courts at regional level. Though TNCs are not party to international treaties and cannot be directly taken to the monitoring bodies, the host states in which they operate are the primary duties bearers of human rights, and as such have an obligation to protect their citizens against abuses perpetrated by the TNCs on their shores. This is clearly stated by the ESCR Committee in these terms:

Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others.²⁰⁹

This clarification by the ESCR Committee shows that states can be held responsible for the unscrupulous activities of TNCs. For example, in *Lubicon Lake Band v Canada*,²¹⁰ the Human Rights Committee found that the Canadian government had violated the cultural rights of the Lubicon Lake Band indigenous community by allowing the state of Alberta to remove the indigenous community from their land for the benefit of private corporations. At a regional level similar decisions were taken to compel states to protect their citizens against TNCs. In Africa the *SERAC v Nigeria* case discussed earlier is a well-known example. In the Americas, in the *Awas Tingni v Nicaragua* case,²¹¹ the Inter-American Court of Human Rights found that the government of Nicaragua was in violation of the American Convention on Human Rights²¹² for allowing a South Korean company to establish itself on the land of the indigenous people (the Awas Tingni). A similar decision was reached by the same court when Ecuador failed to protect an indigenous community against extractive activities by an oil company.²¹³ In Europe, in *Lopez Ostra v Spain*,²¹⁴ the European Court of Human Rights was of the view that Spain was responsible for the pollution

²⁰⁹ *CESCR General Comment No 14: The Right to Highest Attainable Standard of Health* UN Doc E/C 12/2000/4 para 51.

²¹⁰ *Lubicon Lake Band v Canada* Communication No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40) (1990) 1.

²¹¹ *Awas Tingni v Nicaragua* (Inter-Am Ct HR) judgment of 31 August 2001.

²¹² A 21 of the *American Convention on Human Rights* (1969), providing for the right to property.

²¹³ *The Kichwa Peoples of the Sarayaku Communities and its Members v Ecuador* Inter-Am Ct HR petition number 167/03, report number 62/04 of 13 October 2004.

²¹⁴ *Lopez Ostra v Spain* 1995 20 EHRR 277.

caused by a privately owned waste treatment plant. Spain was held directly responsible for failing to take the appropriate measures to avoid the pollution.

This broad jurisprudence characterised by the responsibility of states for their failure to protect their people against the power of companies shows that states are obliged to ensure that TNCs respect human rights. However, the implementation of these court decisions remains problematic. Nevertheless, the amount of negative publicity such judgments generate for TNCs that violate human rights has a considerable impact on them, as it destroys the good reputation of the brand of the company, amongst other things. In addition to this, naming and shaming states through such international mechanisms is also important. To use Joseph's words, "the shining of an international spotlight on a state for its failure to regulate MNCs/TNCs may shame that state into a change of behaviour".²¹⁵

Based on this analysis, Nigerian and South African citizens, as well civil society organisations, should not miss the opportunity to take their states before international and regional monitoring bodies which they are parties of. For this to happen, civil society organisations should educate and train citizens on the regional and sub-regional human rights systems to enable them to use these platforms for their protection. Such training would lead to more decisions similar to the *SERAC v Nigeria* case. This approach could well persuade a state to shield its citizens against TNCs on its shore.

5 Conclusion

The aim of this paper was to examine how to address the violations of human rights by extractive industries in Africa through the case studies of Nigeria and South Africa. From the outset, the paper interrogated the legal basis of the human rights responsibility of TNCs. It was found that at the global level, the human rights obligations of TNCs are located in non-binding instruments with very limited impact.

²¹⁵ Joseph "Liability of Multinational Corporations" 616.

Moreover the lack of a legal personality exonerates TNCs from direct human rights obligations. The article showed that the state, vested with legal personality in international law is the only duty bearer of human rights and should therefore ensure that companies under its jurisdiction comply with human rights standards. After establishing the blatant violations of human rights by these industries in the countries under study, the paper found that four mechanisms could be used to shield citizens against the power of TNCs.

Firstly, the insertion of human rights clauses into international trade and investment agreements could assist in compelling TNCs to respect human rights. This approach is problematic, because the undue influence of TNCs often defines the content of these agreements. However, there are various examples that show that this could be done successfully when countries are resolute to do so. In this vein, Nigeria could learn from the case of *Piero Foresti, Lauro de Carli and Others v Republic of South Africa*.²¹⁶ It could also decide to revisit its BIT agreements or quit the agreements as South Africa did.

Secondly, awareness and sensitisation on the importance of CSR as a "profit maximising" mechanism could also lead to TNCs' compliance with human rights. From this perspective, TNCs need to understand that investing in CSR will lead to their growth and success.

Thirdly, CSR could be made compulsory for TNCs. This could be done by incorporating or ensuring that provisions of the Bills of Rights are applicable to natural and juristic persons. In this vein, Nigeria should learn from South Africa by moving socio-economic rights from the mere Directive Principles of State Policies to the binding part of the *Constitution* to ensure that natural and juristic persons are bound to honour these rights. In addition to this, national company laws should compel companies "to recognise in their memoranda of association that they are bound by the Bill of Rights and are responsible for their realization to the extent that

²¹⁶ *Piero Foresti, Lauro de Carli v Republic of South Africa* (ICSID) case number ARB(AF)/07/1.

they bear responsibility for them". Furthermore, companies' directors should have a fiduciary obligation to ensure that company operations obey the rules of achieving fundamental human rights.

Lastly, the use of international and regional human rights monitoring mechanisms would also make a difference in protecting citizens against TNCs. Although it is difficult to ensure the enforcement of the decisions of monitoring bodies, they name and shame "bad" TNCs by putting the spotlight on them as well as the states that failed to take action against them. From this perspective, South Africa should learn from the *SERAC v Nigeria* case.

Though the points made in this article generally engage the human rights impacts of extractive industries in Nigeria and South African, the proposed solutions are generalisable to other societies in which these industries operate.

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
BBBEE	Broad-Based Black Economic Empowerment
BEE	Black Economic Empowerment
BIT	Bilateral and investment treaty
Brook J Int'l L	Brooklyn International Law Journal
C4C	Coalition for change
CESCR	UN Committee on Economic, Social and Cultural Rights
Conn J Int'l L	Connecticut Journal of International Law
CSR	Corporate social responsibilities
DME	Department of Minerals and Energy
DPSP	Directive Principles of State Policies
ECOWAS	Economic Community of West African States
ESCR	Committee on Economic Social and Cultural Rights
FDI	Foreign direct investment
Fordham Int'l LJ	Fordham International Law Journal
GDP	Gross Domestic Product
Geo Wash Int'l L Rev	George Washington International Law Review
Harv Int'l Rev	Harvard International Review
Hum Rts Q	Human Rights Quarterly
ICHRP	International Council on Human Rights Policy
ICSID	International Centre for the Settlement of Investment Dispute
ILO	International Labour Organisation
ISDM	Investor-State Dispute Settlement Mechanism

JAL	Journal of African Law
JEMS	Journal of Economics and Management Strategy
JIA	Journal of International Affairs
JPL	Journal of Politics and Law
JSDA	Journal of Sustainable Development in Africa
JWIT	Journal of World Investment & Trade
LFN	Laws of the Federation of Nigeria
Merkourios	Merkourios Utrecht Journal of International and European Law
NDI	National Democratic Institute for International Affairs
NEITI	Nigeria Extractive Industries Transparency Initiative
NNPC	Nigeria National Petroleum Corporation
Nw J Int'l Hum Rts	North Western Journal of International Human Rights
OECD	Organisation for Economic Co-operation and Development
RECO	Rustenburg Environmental Coalition
S Afr J Bus Manage	South African Journal of Business Management
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALJ	South African Law Journal
SERAP	Socio-Economic Rights and Accountability Project
SMJ	Strategic Management Journal
SUR Int'l J Hum Rts	SUR International Journal on Human Rights
TNCs	Transnational companies
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
Va J Int'l L	Virginia Journal of International Law
Vanderbilt J Transnat'l L	Vanderbilt Journal of Transnational Law