

GLOBALIZATION: ECONOMIC DEVELOPMENT AND HUMAN RIGHTS CROSSROAD FOR AFRICAN COUNTRIES*

Abstract

This paper addresses the problem of corporate human rights violations in Africa. The factors that promote corporate impunity for human rights violations as identified by current scholarship are the mismatch between the current corporate structure and the rules of corporate law, the insensitivity of African governments and the almost complete lack of access to judicial remedy for human rights victims in Africa. However, current efforts that seek to address the problem of corporate human violations in Africa fail to recognise the link between demand for foreign investment by African countries and disregard for human rights. As a result, there is scholarship and regulatory focus on human rights as the basis for corporate responsibility. This paper argues that the focus on human rights as a basis for corporate accountability for human rights is misplaced. A doctrinal analysis of the current corporate legal architecture shows how its application to 21st century multinational corporations creates the opportunity for corporations to disregard human rights. The paper concludes that incorporating those mostly affected by corporate decisions and activities into the decision-making process will be an appropriate alternative to ensure human rights and environmental friendly decision-making, rather than relying on the weak and corrupt legal enforcement institutions.

Key words: Globalisation; Africa; Economic Development; Human Rights

1. Introduction

The recognition of the business corporation as a useful structure for promoting economic development dates back to the 16th century. Muchlinski identified four periods in the evolution of modern multinational corporations (MNCs)¹ beginning with the European colonial trading companies established in the 16th and 17th centuries.² These early MNCs exhibit the same kind of productive integration across borders found in modern MNCs but there is a remarkable difference in the degree of their operations. Modern MNCs adopt truly global production chains by expanding their manufacturing and distribution networks around the world,³ unlike their 16th century ancestors that operated mostly as trading companies and agents of colonial powers.⁴ Globalization created the impetus for modern MNCs to expand their operation in order to have a global reach. Although profit maximization has been identified as the underlying motive for global operations and international investment,⁵ it is important to note that there are different forms of foreign investment. This is because understanding such differences will provide the basis to identify the reasons for the dearth of foreign direct investment (FDI) in Africa and its role in promoting violations of human rights and the environment in the continent.

Commentators have categorised foreign investment into four as: natural resource seeking investment, market seeking investment, efficiency seeking investment and strategic asset seeking investment.⁶ However, African countries are able to attract only the natural resource seeking FDI.⁷ The problem that

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¹ The terms “Multinational corporations” and “transnational corporations” will be used interchangeably throughout in this project and will be represented with the acronym MNCs to represent the major multinational business corporations. Other terminologies such as “multinational enterprises” (MNEs) are also used to identify multinational (global) corporate business operations but the differences in terminologies is not material to discussions on global corporate business activities, therefore, MNCs defined as ‘corporations ... which have their home in one country but which operate and live under the laws and customs of another country as well’, is the preferred acronym in this project. For a definition of the various terminologies and their origin, see P M Muchlinski, *Multinational Enterprises and the Law* (2nd Ed, Oxford: Oxford University Press, 2007) pp. 5-8.

² Muchlinski (n 1) pp. 8-25.

³ B Stephens, ‘The Amoralism of Profit: The Transnational Corporation and Human Rights’ (2002) 20 *Berkeley J. Int’l L.* 45, p. 55.

⁴ J W Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* (The University Press of Virginia, 1970), p. 4.

⁵ P M Muchlinski, (n. 1), p. 37.

⁶ *Ibid.*, P. 32.

⁷ UNCTAD World Investment Report (United Nations 1996) 56-71.

African countries are having with regard to attracting other forms of FDI has been attributed to the prevalence of corruption, inadequate infrastructure, low skill levels and macroeconomic uncertainty, especially in sub-Saharan Africa.⁸ Thus, since African countries are not able to attract other forms of FDI, the decreased demand for raw materials in the 1990s led to an acute dearth of FDI in the continent.⁹ The evidence of lack of foreign investment in Africa is not hard to find. According to United Nations Conference on Trade and Development (UNCTAD), as at 2014, the largest part of the U.S \$681bn FDI into developing markets went to Asia, with Africa receiving only U.S \$54bn.¹⁰

The dearth of foreign investment in Africa, in addition to the increasing debt profile and balance of payment difficulties and declining economy that bedevilled most African countries since the 1970s exacerbated the demand for foreign investment. The prevailing economic difficulties during this period opened many African economies for the Breton Wood Institutions (the World Bank and the IMF) to step in with their packages of policy prescriptions under the rubric of structural adjustment.¹¹ As a result of the pressure from the Breton Wood Institutions, most of the African countries generally seek to increase the export of natural resources and agricultural commodities to enhance their capacity to earn foreign exchange required to repay their loans.¹² Under such conditions, the basic issues of environmental and human rights regulations are generally ignored,¹³ and the result has been the wanton destruction of the environment and abuse of human rights by the natural resource seeking MNCs operating in Africa.

However, it is important to note that human rights concern about the activities of MNCs is not limited to their operations in Africa. In fact, some of the most serious violations of human rights take place in other developing regions, such as South America, and in South Asia where some global brand names, such as Nike and H & M are associated with the sweatshop conditions in garment factories involving the use of child labour and other forms of human rights abuses.¹⁴ The focus of this paper on Africa is because the continent presents some of the most basic conditions that encourage corporate violations of human rights. For example, FDI in Africa is concentrated in the extractive sector where human rights violations are most prevalent¹⁵ and, in recent years, some of the worst cases of environmental degradation and human rights breaches have taken place in African countries, such as Nigeria.¹⁶

The main issue that prompted this research is that many attempts aimed at addressing the challenges of corporate human rights violations tend to ignore the dilemma created by the desire for FDI needed to promote economic development by African countries, and the duty of African governments under international law to protect the human rights of their citizens. We argue that recognising the link between the demand for FDI and human rights issues in Africa will provide further understanding of the factors that promote human rights abuses in the continent as well as provide a reasonable basis to analyse the challenges and recommending an appropriate framework to address the challenges. This is especially important because of the need to address emerging social challenges, such as the militancy

⁸ N Uzor, 'PWC Projects Nigeria's Economy to Rank Top 10 in 2050' *The Vanguard*, March 18, 2016 <<http://www.vanguardngr.com/2016/03/pwc-projects-nigerias-economy-rank-top-10-2050>> accessed 19 March 2016.

⁹ PM Muchlinski (n. 1) p. 22.

¹⁰ UNCTAD *World Investment Report* 2015, (United Nations 2015) 29-32 <http://www.unctad.org/PublicationsLibrary/wir/2015_en.pdf> accessed 17 January 2017.

¹¹ D C Korten, *When Corporations Rule the World* (2nd Edn, Bloomfield: Kumarian Press Inc. and Berrett Koehler 2001) p. 163.

¹² *Ibid.*, pp. 164-5.

¹³ *Ibid.*, 164

¹⁴ Clean Clothes Campaign, <<http://www.cleanclothes.org>> accessed 24 December 2016.

¹⁵ See the Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises', E/CN.4/2006/97 (22 February 2006) para. 30; see also the United Nations Environmental Program (UNEP) 2011 Report on the Niger Delta <<http://www.unep.org/nigeria>> accessed 27 December 2016.

¹⁶ According to Audrey Gaughran, Amnesty International Global Issues Director, 'Europe have had an average of 10 spills a year between 1971-2011', and comparing the European situation with regard to oil spills with what is happening in Nigeria, he states that: 'in any other country, this would be a national emergency. In Nigeria it appears to be a standard operation procedure for the oil industry. The human cost is horrific – people living with pollution every day of their lives'. <<http://www.amnesty.org/.../hundreds-of-oil-spills-continue-to-blight-niger-delta>> accessed 28 November 2016.

in the Niger Delta Region of Nigeria, which has been attributed to environmental destruction of the region, and consequential poverty induced by the loss of farmlands and other means of survival for the indigenes of the region.

In view of the above, this essay aims to contribute to the search for an effective legal/regulatory regime that would promote corporate accountability for human rights in Africa as a basis for addressing the emerging social problems. To discuss these issues, this paper will be divided into five parts including this introduction. Part two will interrogate how the link between three related issues of FDI, globalisation and change in corporate structure contribute to corporate human rights violation in Africa. Part three will identify the sources of human rights violations in Nigeria as a basis for analysing the factors that encourage the violations. Part four will analyse emerging international regulatory initiatives that seek to make corporations accountable for human rights. Part five will conclude the paper.

2. The Impact of Globalisation and Change in Corporate Structure

The global operation of MNCs is facilitated by globalisation, and their ability to organise their operations as a corporate group. There are two important aspects to the development of modern MNCs in relation to the corporate group concept and their multinational operation. The corporate group concept is a late 19th century development traceable to the activities of the New Jersey legislature, which by statute in 1888 authorised the acquiring of shares by a corporation in other corporations.¹⁷ This is the precursor of today's "corporate groups" with multi-layered structures. However, globalization provides the impetus for the multinational operation of "corporate groups" and the emergence of truly global MNCs 'for which territory is not the cardinal organising principle'.¹⁸ Thus, today MNCs are able to operate from headquarters in the major economic capitals¹⁹ through subsidiaries, also called special purpose vehicles (SPVs)²⁰ located in many African countries.

Further, MNCs are able to operate separate entities as members of a corporate group by exploiting the established corporate law concepts of separate legal personality and limited liability. The separate legal personality principle provides the basis for MNCs to operate separate business entities as members of a corporate group based on the concept of the corporation's distinct personality which is detached from the identity of its shareholders.²¹ They are also able to rely on the limited liability concept to shield them from the debt and wrongful acts or omissions of their subsidiaries. The new multi-layered structure of MNCs and the increasing ease with which they are able to operate across the globe signifies a change in the traditional role and concept of the corporation.²² One would expect that the new developments in the structure of corporations and the dramatic change in their operations would have brought about a change in corporate law. This is not the case, however, as legal concepts fashioned to serve 19th century corporations are still expected to regulate 21st century mega-MNCs.

The problem with traditional corporate law is that in addition to the fact that it has a national focus, it did not envisage the corporate group structure of modern MNCs which has no doubt proved to be remarkable and efficient economic machine that they use to organise their global operations. Thus, notwithstanding the fact that a MNC may exercise dominant control over the group members, by virtue of the separate legal principle each member is still as a matter of law a separate and autonomous entity.²³ This has made it possible for MNCs to exploit the legal personality principle and deliberately structure

¹⁷ P I Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (Oxford: Oxford University Press 1993) p. 56.

¹⁸ John Gerard Ruggie, 'American Exceptionalism, Exemptionalism and Global Governance' (2004) John F. Kennedy Sch. Of Govt., Working Paper No. RWP04-006, 14, at ssrn.com/abstract=157642.

¹⁹ In this paper, the major economic capitals are used to represent the economic capitals of the major economic jurisdictions of United States, UK, Germany and Japan.

²⁰ Apart from the acronym SPV, a subsidiary of a MNC is also referred to as special purpose entity (SPE) or special purpose company (SPC). However, the terms SPV or subsidiary will be used throughout in this essay. For a detailed analysis of the origin and relevance the use of the different terminologies, the reader is referred to, I Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press) p. 17.

²¹ *Ibid.*,

²² S Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Oxon: Routledge 2014) p. 4.

²³ Per Lord McNaughton in *Salomon v Salomon Co Ltd* (1897) AC 22, 51.

their corporate operations in such a way that the separate legal personality designed to shields corporate assets has become a standard refuge for corporate irresponsibility for MNCs operating in Africa.²⁴

The increasing internationalization of corporate power and its role in the growing incidence of corporate human rights violations in Africa, and the inability of African governments' to hold their corporations to account for the violations has created new and devastating social problems. A case in point is the conflict in the Niger Delta region of Nigeria, which threatens local, national and global security. The Niger Delta situation will be discussed later on, but it suffices to mention here that such developments makes it imperative to effectively address the problems of human rights and environmental violations in the region. However, to effectively address the problem of the violations, it is important to first identify their nature in order to fully understand the factors that encourage and sustain them. This is because understanding the underlying factors will provide a reasonable basis to recommend the improvement necessary to make MNCs more responsive to the social impacts of their activities.

3. Corporate Human Rights Violations in Nigerian: Predisposing Factors and the Implications

The exploratory activities of Shell Petroleum Development Company (a subsidiary of Royal Dutch Shell) and other oil MNCs such as the Italian corporation, ENI, is a major source of pollution and environmental damage in the Niger Delta. The incidence of environmental damage caused by oil pollution is the subject of a 2011 United Nations Environmental Program (UNEP) report that confirmed the extent of the damage caused by pollution, which it estimated to take about thirty years to clean up.²⁵ Apart from pollution and environmental damage arising from direct exploratory activities, the Niger Delta is also replete with abandoned oil pipelines still spilling crude oil into the environment. Gas flaring is another major source of pollution in the region. It is a common feature in the region, lighting up the local communities and oil fields day and night with the attendant damage to the ecosystem.²⁶ The result has been the deleterious contamination of the waters, land and the atmosphere in the Niger Delta, with the attendant damage to the health of the local communities, their farmland and other means of livelihood, with direct implication for their lives. Recourse to legal remedy for violations in the Niger Delta is not supposed to pose any serious problem because liability for the violations identified above could be litigated under established heads of law. The contamination of the waters, land and atmosphere from exploratory activities by the oil corporations constitute an actionable tort, especially under the rule in *Ryland v Fletcher*²⁷ and nuisance.²⁸ In addition, the rights of the affected communities to 'a general satisfactory environment ...' is protected under the African Charter on Human and Peoples' Rights (ACHPR).²⁹ The right to life, right to health and right to water are some of the rights guaranteed under the International Bill of Rights (IBR).³⁰ It is obvious from the foregoing that the rights violated by MNCs in the Niger Delta and the African region generally, are protected under municipal laws and International Covenants. However, despite the plethora of regimes that directly address environmental degradation and human rights violations, what we see is a widespread situation of impunity.

Apart from the problem associated with regulating modern MNCs with a 19th century corporate legal architecture, two other factors identified by current scholarship for why MNCs are able to violate rights and escape liability as will be discussed below are: government's insensitivity to the plight of human rights victims and lack of access to judicial remedies for human rights victims in Africa.³¹ Government's insensitivity to the plight of human rights victims in the Niger Delta has been attributed to the interest

²⁴ S Deva (n. 22) p. 213.

²⁵ See UNEP Report 2011 (n. 15).

²⁶ O Oluduro, *Oil Exploration and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge: Intersentia 2014) p. 309.

²⁷ (1868) LR 3 HL 330.

²⁸ This is concerned with private nuisance. See *St Helens Smelting Co v Tipping* (1865) 11 HLC 642.

²⁹ This right is guaranteed under article 24 of the African Charter on Human and Peoples' Right 1981, Adopted 27 June 1981, and entered into force on 21 October, 1986 OAU. Doc. CAB/LEG/67/3 Rev. 5.

³⁰ 'International Bill of Rights' is the expression used for the Universal Declaration of Human Rights (UDHR), GA Res. 2200A (XXI), UN Doc. A/6316 (1966); International Covenant on Civil and Political Rights (ICCPR) G.A. Res 2200A (XXI) UN Doc. A/6316 (1966); and International Covenant on Economic Social and Cultural Rights (ICESCR), GA Res 2200A (XXI), UN Doc. A/6316 (1966).

³¹ S Deva, (n. 22) 24-45.

of the Nigerian government in the oil sector. This is because crude oil and natural gas account for over 95% of the government's export earnings and 80% of budgetary revenue.³² Therefore, in order to keep the oil flowing and to ensure stability in government spending, the government will readily overlook and sometimes aid human rights and environmental abuses perpetrated by oil MNCs.³³

It is important to point out that since the mid-1960s when oil became the mainstay of the Nigerian economy, it is in the 2016 budget that oil is for the first time proposed to account for only 12.2% of Nigeria's budgetary revenue.³⁴ However, the importance of oil to the Nigerian economy is not diminished by the significant reduction of its contribution to budgetary revenue, because oil and natural gas remains the dominant foreign exchange earners for the government and retention of the office of the Minister of Petroleum by the Nigerian President³⁵ underscores the importance of the oil sector to the Nigerian economy.

The third factor that has encouraged corporate impunity for human rights violation in Africa is the almost complete absence of access to judicial remedies because of the inefficiency of legal enforcement institutions, especially the courts. This is reflected in undue delays that characterise the prosecution of cases, especially the cases involving oil spills by the oil MNCs. An example is the case involving *Shell Petroleum Development Company Nigeria Ltd*,³⁶ which was prosecuted for 32 years.³⁷ The inefficiency of the judicial system is further compounded by some specific oil industry protective legislation, such as the *Associated Gas Re-injection Act*,³⁸ in addition to the concerns by the courts, not to jeopardise the flow of government revenue. For example, in the case *Allan Irou v Shell British Petroleum (Nig.) Ltd*,³⁹ where the plaintiff applied for an injunction, the court denied the injunction because 'oil is the main source of Nigeria's revenue and that a grant of an injunction would render nugatory the oil exploration license granted the defendant'.⁴⁰ Thus, a combination of three factors: the change in corporate structure, the insensitivity of the Nigerian government, and lack of access to remedy all encourage the wanton human rights breaches and destruction of the Niger Delta environment by the oil corporations operating in the region.

4. Regulating Human Rights Violations and International Investment in Africa: The Challenges and Social Implications

In view of the factors identified above, it is not entirely incorrect to say that global MNCs operate largely in a legal vacuum in Africa.⁴¹ This is because they operate from their home-states, usually in developed markets, through subsidiaries scattered across the continent. This safely puts them outside the jurisdictional authority of their subsidiaries' host-states'. The home-states, which ordinarily have authority to rein them in, are unwilling to exert control beyond their borders or are unable to do so because of the powerful influence of business actors over their politicians and governments. Thus, the lack of capacity on the part of host-states and the unwillingness on the part of home-states to regulate

³² See, <<http://www.indexmundi.com/nigeria/economy>> accessed 21 January 2015.

³³ Elisa Guilianani and Chiara Macchi, 'Multinational Corporations Economic and Human Rights Impacts on Developing Countries: A Review and Research Agenda' (2014) 38 *Cambridge Journal of Economics* 479-517, p. 480.

³⁴ Appropriation Act 2016, <<http://www.budgetoffice.gov.ng>>. Accessed 27 December 2016.

³⁵ The Guardian, 'Nigerian President Muhammadu Buhari to Become Oil Minister in Own Cabinet' <<http://www.theguardian.com/2015/sep/30/nigeria-president-muhammadu-buhari-to-become-oil-minister-in-own-cabinet>> accessed March 03, 2016.

³⁶ *Shell Petroleum Development Company Nigeria Ltd v Chief Joel Anaro & Ors*, (2015) LPELR -24750 (SC).

³⁷ Ade Adesomoju, 'Oil Spill: 32 Years After, Supreme Court Orders Shell to Pay N30m Compensation' The Punch, 6 June 2015. This case which commenced in the High Court of the then Bendel State in 1983 was concluded on 6 June 2015.

³⁸ Cap A25, LFN 2004, For example, the terminal date for gas flaring (a major source of pollution in Nigeria) set in 1980 under the Act was January 1, 1984. Since the first time that this date was shifted, it has remained open-ended, as it has been shifted over five times until a December 2012 date was provided for in the draft version of Petroleum Industry Bill (PIB). The December 2012 terminal date has long passed but the PIB is yet to become a law, thus, inadvertently moving the date forward. However, because Section 3 (2) Associated Gas Re-Injection Act permits the minister of petroleum to authorise the continued flaring of associated gas in Nigeria, the courts are precluded from exercising jurisdiction over matters of gas flaring.

³⁹ Unreported Suit No. W/89/71 of November 26, 1973.

⁴⁰ Ibid.

⁴¹ S Pillay, 'And Justice for All? Globalisation, Multinational Corporations, and the Need for Legally Enforceable Rights Protection' (2003-2004) 81 *U Det Mercy L Rev* 489, p. 499.

MNCs has created the incentive for them to disregard the human rights of the citizens of their host-states in Africa, with impunity.⁴² This situation has provided the enabling environment for non-Governmental Organizations (NGOs), such as Amnesty International, Human Rights Watch, Friends of the Earth, Greenpeace and others to champion issues relating to the regulation of human rights and environmental violations in Africa. Often at the urging of these NGOs, the UN and other inter-governmental institutions have responded to the growing impunity for human rights violations in the African region using two main strategies. The first is the increasing focus on the human rights obligations of business in existing human rights instruments,⁴³ and the second is the development of regulatory initiatives that are aimed at setting human rights standards of global MNCs.⁴⁴

The first approach has brought about the subsequent evolution of the UN's powers to adopt policies or to take measures directed at corporate responsibility for human rights, which is now derived from the implied powers of the UN and a broader interpretation of the rights enshrined in the IBR in the context of corporate human rights concerns which were not there at the time existing rights were first formulated.⁴⁵ In this regard, many of the UN Committees have sought to identify the obligations of business from the several texts that contain provisions that speak to duties of persons (natural and non-natural including business corporations) in society.⁴⁶ For example, the Committee on Economic, Social and Cultural Rights (CESCR) stated in its General Comment No. 14 that '[w]hile only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, ..., as well as the private business sector – have responsibilities regarding the realization of the right to health ...'. In addition, the Universal Declaration of Human Rights (UDHR) also recognises private obligations in its preamble in the following terms: 'every individual and every organ of society' should promote respect for basic human rights'.

The second approach which is aimed at setting human rights standards for global MNCs is led by human rights activists and developing markets themselves.⁴⁷ As a result of the renewed pressure from human rights activists, there has been a considerable response from the UN and other inter-governmental institutions. The emergence of several voluntary codes of conduct (VCC) under the rubric of 'corporate social responsibility',⁴⁸ to address the social role of globally operating corporations attests to this. The major "soft-law" instruments developed at the international and inter-governmental levels that are relevant to the discussions in this paper are the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (MNEs),⁴⁹ and UN Guiding Principles (UNGP).⁵⁰ This is because both of them emanate from international and inter-governmental sources, and they deal with the specific issues of human rights and the environment with regard to global operating MNCs.

It is important to note, however, that the UN and inter-governmental initiatives identified above do not regulate FDI in Africa. FDI in Africa is regulated by the numerous bilateral investment treaties (BITs) and Free Trade Agreements (FTAs). In view of the above, we will undertake a critique of the

⁴² C Broecker "'Better the Devil You Know': Home State Approaches to Transnational Corporate Accountability' (2008-2009) 41 *NYU J Int'l L & Pol* 159, p. 167.

⁴³ A Reinisch, 'The Changing International Legal Framework Dealing with Non-State Actors' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) pp. 70-1.

⁴⁴ D L Shelton, *Advanced Introduction to International Human Rights Law* (Cheltenham: Edward Elgar Publishing Limited, 2014) p. 209.

⁴⁵ M R Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) p. 7.

⁴⁶ Reinisch (n. 43).

⁴⁷ D L Shelton, (n. 44) p. 209.

⁴⁸ C Broecker, (n. 42) p. 169.

⁴⁹ OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011 <<http://www.oecd.org/dataoecd/43/29/48004323.pdf>> (hereinafter OECD Guidelines 2011) accessed 4 January 2016.

⁵⁰ Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/17/31 (21 March 2011) (SRSG 'Guiding Principles').

initiatives identified above and the regimes for protecting foreign investment in Africa. This is with a view to determining how the regulatory double standard encourage corporate impunity for human rights violations in Africa, and how the violations contribute to insecurity Africa, especially the one in the Niger Delta.

4.1 A Critique of International Human Rights Norms

The main problem with the application of International human rights instruments to business is that the instruments are generally devoted to recognising the individual's rights and the corresponding obligations of states. The International Covenant on Civil and Political Rights (ICCPR) clearly states the obligation on each states party to the Covenant to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.⁵¹ However, even though as we adverted to earlier, corporations are bound by those rules of international law that are applicable to all persons, 'such rules are mostly restricted to fundamental norms such as those enjoining genocide, torture, slavery and forced labour, crimes against humanity, and extra-judicial murder'.⁵² In fact, 'outside the European Union Framework, it is only in exceptional circumstances that corporations are expressly and directly regulated under international human rights law'.⁵³ Related to this is the fact that there are only few mechanisms under international law⁵⁴ to enforce human rights norms against private actors outside the criminal sphere.⁵⁵

The implication of states being the primary addressees of international human rights law is that human rights standards can only be applied indirectly to corporations. In this regard, the responsibility for the implementation and enforcement of international human rights norms against private actors such as MNCs lies primarily at the national level.⁵⁶ In the case of MNCs operating in Africa, their obligation for human rights is either through the state in which they are incorporated (their home state)⁵⁷ or through the state in which they are operating (the host state).⁵⁸ However, because of the obstacle to home states' regulation of foreign affiliates of locally incorporated companies, responsibility for domestic implementation and enforcement of international norms, therefore, lies with the host states through their national laws and legal enforcement institutions.⁵⁹ To fulfil states' obligation to protect human rights, therefore, requires that the state provide not only adequate access to remedy for human rights victims, but also to take appropriate steps to prevent such violations through legislative or administrative means.⁶⁰ This means that to realise the rights enshrined in the Covenants depends on states capability or willingness to fulfil their obligation in the instruments by providing access to judicial remedy for human rights victims, or alternatively, to prevent violations through legislative or administrative means. However, the weaknesses associated with legal enforcement institutions in Africa makes the remedial approach and thus, the human rights approach an unviable option. Therefore, as will be discussed below, a legislative option, which embraces a preventive approach that is based on public participation in corporate decision-making appears to be a more appropriate alternative because it will provide the opportunity for affected groups in Africa to hold MNCs accountable to human rights standards.

4.2 A Critique of Voluntary Codes of Conduct (VCC)

The United Nations Draft Norms on the Responsibilities of Transnational Corporations was the first major attempt to impose direct responsibility on transnational corporations and other business

⁵¹ Article 2 (1).

⁵² P Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance' (2003) 37 Int'l L 68, p. 71.

⁵³ *Ibid.*, 72.

⁵⁴ See for example, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (4th edn., Geneva: International Labour Office 2006), for non-binding interpretative procedures with respect to the Guidelines and Declarations that they have adopted concerning international business operations.

⁵⁵ P Redmond, (n. 52) p. 72.

⁵⁶ *Ibid.*, p. 72.

⁵⁷ The Barcelona Traction Co., (*Belgium v Spain*) 1970 I.C.J. 3.

⁵⁸ Redmond (n. 52) p. 72.

⁵⁹ *Ibid.*

⁶⁰ D L Shelton, (n. 44) p. 214.

enterprises aimed at protecting human rights.⁶¹ The failure to adopt the UN Norms has been identified as the major factor that set the scene for the development of the alternative “soft law” initiatives and corporate codes by intergovernmental agencies and individual corporations.⁶² Commentators have often associated these “soft law” initiatives⁶³ with many drawbacks. However, because of the limited space available, discussions here will be only on the major shortcoming that is of utmost concern to discussions in this paper, which is that the “soft law” initiatives are non-binding on the MNCs that they purport to regulate and as such unenforceable against them. With regard to the OECD Guidelines, they are recommendations addressed by governments of the Organization for Economic Co-operation and Development (OECD) to MNCs⁶⁴ operating in or from adhering countries.⁶⁵ The Guidelines are non-binding principles and standards addressed to MNCs with the aim to encouraging ‘responsible business conduct in a global context consistent with applicable laws and internationally recognised standards’.⁶⁶ In its provision on concepts and principles the Guidelines clearly states that ‘observance of the Guidelines by enterprises is voluntary and not legally enforceable...’.⁶⁷

The UNGPs on the other hand, is a UN initiative that seeks to address corporate impunity for human rights violations. It is a strategy for corporate accountability for human rights that is not based on any international legal obligation or any other international standard, but based on social expectation. This strategy was adopted to win the support of MNCs and the developed markets who had in the past opposed the adoption of the UN Norms because of their binding character with a preference for voluntary regulation.⁶⁸ To achieve this purpose, the UNGPs simply provides that ‘[b]usiness enterprises should respect human rights’.⁶⁹ However, it did not lay down any responsibilities that corporations are required to respect, instead it adopted an approach in which business have to respect ‘all internationally recognized human rights ...’.⁷⁰ Both the Framework⁷¹ and the Guiding Principle developed to operationalize it, do not provide any normative basis for the responsibility of business for human rights but merely expects corporations to respect human rights because ‘it is the basic expectation society has of business’.⁷² Failure to meet the responsibility to respect human rights can only ‘subject companies to the courts of public opinion comprising employees, consumers, communities, civil society ...’.⁷³ It is important to state that the non-binding character of the OECD Guidelines and the UNGPs underscores their inadequacy for addressing corporate violations of human rights.⁷⁴

4.3 Protecting Foreign Investment in Africa

Unlike regulating human rights violations in Africa, protecting foreign investment in Africa does not mainly depend on municipal authorities and their enforcement institutions or on non-binding UN and inter-governmental regimes. This is because foreign investors bypass the enforcement infrastructure in Africa by the use of bilateral treaties entered into between the capital exporting country (home-

⁶¹UN Economic and Social Council (ECOSOC), Sub-Committee on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights: Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regards to Human Rights, UN Doc E/CN.4/Sob.2/2003/L11, 52 (August 13, 2003).

⁶² D Bilchitz and S Deva, ‘The Human Rights Obligations of Business: A Critical Framework for the Future’ in S Deva and D Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2015) pp. 6-8.

⁶³See the evaluation of existing regulatory initiatives; S Deva (n. 22) pp. 64-118.

⁶⁴ Although Multinational Enterprises (MNEs) is the official identification used in the OECD Guidelines for global corporations, we will use Multinational Corporations (MNCs) to maintain consistency throughout in this paper.

⁶⁵ The preface to the Guidelines, OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing (hereinafter OECD Guidelines 2011), 3. <<http://dx.doi.org/10.1787/978926115415-en>>.

⁶⁶ Ibid.

⁶⁷ OECD Guidelines (n 49) 11, para 1.

⁶⁸ D Bilchitz and S Deva (n 62) pp. 6-10.

⁶⁹ UNGP, Principle 11.

⁷⁰ UNGP, Principle 12.

⁷¹Human Rights Council, ‘Protect, Respect and Remedy: a Framework for Business for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, A/HRC/8/5 (7 April 2008) (SRSG, ‘2008 Framework’).

⁷² UNGP, 4, para 6.

⁷³ UNGP, n 50, para 54.

⁷⁴ Deva (n. 22) pp. 80-118.

states of MNCs) and their African hosts. The numerous BITs and FTAs with stand-alone investment chapters usually provide for investor protection, which establishes minimum standards of treatment for investors from other contracting states in the territory of the host state. Non-compliance with the standards in the treaties is enforced by international arbitration tribunals specified in the particular BIT.⁷⁵ The regulatory double-standards created as result of protecting foreign investment with BITs and FTAs on the one hand, and protecting human rights victims with non-binding regimes and the weak and inefficient legal enforcement institutions in Africa provides a refuge for corporate irresponsibility for human rights. The environmental degradation and the social damage to the Niger Delta, which is the direct outcome of corporate irresponsibility is one of the major factors responsible for the endemic conflict in the region.

4.4 The Emerging Challenges: A Case for an Alternative Regime

If as stated earlier, a state is required to ensure corporate good behaviour through judicial, administrative, legislative or other appropriate means, then there is a duty on the Nigerian state under international law to balance the competing interests (business interests and local community interests), in the Niger Delta. This could be justified by the prospect that adequate legal protection for local communities in the Niger Delta might help prevent the injuries that arise as a result of corporate violations of the human rights of local community members or alternatively guarantee a remedy if injury occurs. This could help to constrain the reckless violation of the rights of local communities. The reduction or control of human rights violations in the Niger Delta is likely to promote a peaceful relationship between the corporations and their host communities, with the added opportunity for local economies to enjoy the economic and social benefits expected to come from hosting MNCs.

However, since investments by MNCs are important for African governments and they have a duty to protect the human rights of their citizens under international law, it might be helpful to seek to balance the competing interests identified above by addressing the major issues of the mismatch between the corporate legal architecture and the corporate structure. This will require legislative intervention. One may argue that some regulations in states' domestic laws such as health and safety regulations already address the competing interests. This argument is unhelpful because the weakness and inefficiency associated with the legal environment in Africa, considerably limits the efficiency of legal enforcement in the region. The fact that the failure of legal enforcement institutions in Africa is identified as the major reason for the increasing wave of international litigation by human rights victims from the region in the UK, and in the United States under the Alien Tort Claims Act⁷⁶ underscores the inefficiency of their legal enforcement institutions.

The absence of adequate remedy for human rights victims in the Niger Delta Region has been identified as the major reason for the emergence of a myriad of social problems in the region, including armed militancy. Thus, it has become particularly important to address the problem of human rights violation in Nigeria because the problem of human rights and armed militancy in the Niger Delta is a "no-win" situation for all the parties interested or participating in corporate activities in the region, whether as local community residents, the oil corporation undertaking exploratory activity or the government that depends on the revenue from oil exploration. Instances of corporate human rights violations in the Niger Delta are well documented.⁷⁷ However, the cost of doing business in Nigeria for the oil companies is also exacerbated by an almost constant declaration of *force majeure* after major militant attacks or major pipeline leakages occasioned by acts of vandalism, in addition to the cost of repairs for vandalised pipelines and other damaged facilities.⁷⁸ The estimated revenue loss from vandalism of oil pipelines

⁷⁵For a more detailed discussion on the regulation of investor/host-state relations under the BITs and the procedure for the settlement of investment dispute, the reader is referred to P M Muchlinski (n. 1), particularly chapter 17.

⁷⁶Bradley, 'The Cost of International Human Rights Litigation' (2001) 2 *Chi. J. Int'l L.* 457, p. 458.

⁷⁷Human Rights Commission and UNEP 2011 Report, n 7.

⁷⁸Okolobo, 'SPDC Declares Force Majeure on Forcados Export' (Shell, News and Media Releases, 30 September 2015) <<http://www.shell.com.ng/aboutshell/media-centre/news-and-media-releases/production-updates/spdc-declares-force-majeure-on-forcados-export.html>> accessed 30 August 2016; John Vidal, 'Niger Delta Oil Pipeline Vandalism Estimated to Cost \$14bn a Year' *The Guardian*, 10 November 2015 p. 1.

and theft of crude oil in Nigeria is estimated to be about U.S \$14bn annually.⁷⁹ The estimated cost of the recent attack on some gas and oil pipelines by militants in January of 2016 alone was put at U.S \$395,000 per day and about U.S \$600,000 to repair the damages.⁸⁰

In view of the situation identified above, it may be useful to exploit the pervasive influence of international norms and the general respect for human rights standards across society in a way that brings the corporations and local people to work together rather than depend on prescriptive rules that rely on government institutions for their enforcement. The fact that an oil pipeline belonging to Adax Petroleum Nigeria has not been vandalized for over two years since they engaged a local community surveillance team to protect their pipeline,⁸¹ is an indication that participation by affected communities in oil company activities could eradicate the distrust between the corporations in the region and their host communities. This is more likely to improve the security situation in the Niger Delta than seeking remedies after the event before the courts for alleged breaches of human rights.

In view of the successful partnership between Adax Petroleum and the Niger Delta communities identified above, it makes sense to devise a system that will give opportunity for public participation in the affairs of the oil corporations and other MNCs operating in Nigeria that generate activities that substantially affect the rights of their neighbours. Thus, given the foundational role of government in providing the legal infrastructure for corporations, it makes sense to propose additional layer of regulation.⁸² Therefore, it is important to move away from the adversarial approach of seeking remedy against MNCs in court after violation has occurred to a preventive model, by altering corporate design and structure so that they are able to promote moral behaviour from inside by establishing appropriate motivations and controls inside the corporation.⁸³ This will require a review of corporate law to accommodate potentially affected groups in the corporate governance structure, thereby making them part of the decision-making process. This will provide them the opportunity to participate in decisions over matters that affect their lives.⁸⁴ This is particularly important because of the limited capacity of legal enforcement in African countries, which makes a remedial approach to solving the problem of corporate human rights violation an unviable option.

5. Conclusion

Discussions so far reveal how the mismatch between the structure of modern MNCs and the corporate legal architecture provides the impetus for them to abuse human rights. Therefore, a review of the corporate legal architecture is suggested to broaden the interests covered by the regime to include those affected by corporate activities. However, developing a corporate legal framework to accommodate the interests suggested in this essay require a more detailed treatment than the time and space available for this research. In view of states' obligation to protect human rights, which requires that the state provide adequate access to remedy as well as take appropriate steps to prevent violations through legislative and administrative means, further research is recommended. This is necessary to identify the normative basis for the suggested corporate legal framework as well as the appropriate basis for incorporating other interests in the way that will also ensure adequate protection for those who contribute capital.

⁷⁹ J Vidal, (n 78).

⁸⁰ *The Vanguard*, 'Renewed Rumpus in Niger Delta' 26 January 2016 p. 1.

⁸¹ Vidal, n 110.

⁸² Eric W. Orts, *Business Persons: A Legal Theory of the Firm* (Oxford: Oxford University Press 2015) 22.

⁸³ Thomas Donaldson, *Corporations and Morality* (Prentice-Hall, Inc. 1982) 166-7.

⁸⁴ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press 1992) 82.