LEGAL AND REGULATORY FRAMEWORK FOR DOING BUSINESS IN AFRICA: A HUMAN RIGHTS PERSPECTIVE[1]

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PART 1: INTRODUCTION

THE ABSTRACT

Recognizing the virtual impotence of domestic legal regimes in Africa to right human rights wrongs, this paper attempts an ambitious appraisal of some extant transnational instruments and structures put in place by regional and global bodies – African Union, United Nation, etc. - to tackle human rights violations and prescribes avenues for utilizing same to curtail corporate human rights infractions in Africa.

While the perception is rife that corporations may not yet have a clear-cut set of legal obligations to ensure that the spirit and scope of their operations are in harmony with human rights, emerging trends are increasingly proving otherwise.

This perceived status quo has led to increasing calls for the tightening of the legal and regulatory regime at the level of having a binding global treaty or legislative action for corporate accountability and culpability[4].

This paper postulates that a careful consideration and innovative deployment of the extant instruments as well as a reasoned resort to current judicial and quasi-judicial systems in place may offer meaningful redress to victims of human rights transgressions by those doing businesses in Africa.

We argue that emerging trends dictate an urgent, growing and inescapable need for in-house development and deployment of human rights compliance structures and practices by

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[4] See: "Corporations have rights. Now we need a global treaty on their responsibilities" by Salil Shetty (21 January 2015) – available at https://www.theguardian.com/global-development-professionals-network/2015/jan/21/corporations-abuse-rights-international-law; Also see: "European companies allowed to reap rewards from deadly conflict mineral trade" by Amnesty International (Sept. 24, 2014) – available at https://www.amnesty.org/en/latest/news/2014/09/europeancompanies-allowed-reap-rewards-deadly-conflict-mineral-trade/

corporations as the day of reckoning is here. We also stress that this need is even more critically important for the so-called transnational corporations whose parents are headquartered in countries where the cultures have low tolerance for human rights violations and where domestic legal regimes have created – or are creating - avenues for redressing human rights violations.

PART 2: ANALYSIS

> "States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/ or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.
> The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency."[5]

The foregoing commentary is testamentary to the fact that there is consensus amongst the organs of the United Nations saddled with the formulation and implementation of human rights policies that there are intersections between corporate crimes and state responsibility with a resultant duty on the part of states to closely monitor - and to sanction, if necessary - corporate human rights conduct. Sadly though, there is no UN Convention in place yet that creates binding effect of the guiding principles enunciated in the Framework. Nevertheless, these principles are enjoying

[5] Commentary on Implementing the United Nations "Protect, Respect and Remedy" Framework by Office of the High Commissioner for Human Rights; available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

some acclaim, recommendation and endorsement. This is typified by the pronouncement of the Council of Europe on the Framework[6].

It is submitted that the United Nations "Protect, Respect and Remedy" Framework and the Commentaries are helpful resources in the formulation of arguments in furtherance of any litigation against corporate human rights misdeeds in Africa.

2.1 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A USEFUL TOOL

PROLOGUE

> "**Reaffirming** the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;"
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> **"Conscious** of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions;"[7]

The foregoing are excerpts from the preamble to "African Charter on Human and Peoples' Rights" ("African Charter").

While the connotations of the quoted excerpts from the African Charter may have been – and continue to be - betrayed by the complicit behavior of many African governments in their dealings with errant corporations, the quotes nevertheless represent the historical experiences and the dire desires of Africans.

The reality that "the peoples [of Africa] …are still struggling for their dignity and genuine independence" at this point of human history is somewhat explanatory of the relentless

[6] http://www.coe.int/ca/web/commissioner/-/business-enterprises-begin-to-recognise-their-human-rights-responsibilities
[7] Available at http://www.achpr.org/instruments/achpr/

resentment, restiveness and resistance many corporations, especially transnational corporations, increasingly face in Africa. The absence of clear human-rights-respecting rules of engagement and a prevalence of opaque practices, especially by transnational corporations headquartered abroad, are bound to fuel suspicion by Africans - who have historically borne the brunt of inhuman and degrading treatment by foreigners – that these corporations may be instruments for neocolonialism. It is submitted that corporations ought to adequately accommodate and sensitively respond to this historically well-founded suspicion on the part of their African hosts even when the corporations come to host communities with clean hands and good intentions.

The combination of the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) is the legal and regulatory framework for enforcement of the rights enshrined in the African Charter.

A critical element that enhances the effectiveness of the African Court's process is the breadth of the court's decision-making powers and the broad mechanism for enforcement of its judgements. A scholarly discussion of the aforesaid is contained in a paper titled 'Current Challenges Facing the African Court on Human and Peoples' Rights' (2010) wherein the authors, Prof. Dr. Andreas Zimmermann and Jelena Bäumler, stated the following:

> "The court's judgment must be rendered within ninety days of completion of the oral hearing by at least seven judges and approved by the majority (Art. 28 of the Protocol). Judges have the right to deliver a dissenting opinion. In addition to ascertaining whether there has been a breach of human rights, the ACHPR can make orders to remedy the violation or order payment of compensation or reparation (Art. 27 of the Protocol). In so doing, it is not restricted to imposing a monetary fine like the European Court of Human Rights, but can also, in line with practice in the inter-American system, order other action to be taken. Decisions of the ACHPR cannot be contested or appealed. The execution of judgments of the ACHPR is supported in particular by the fact that the monitoring of execution is incumbent upon the Executive Committee on behalf"[8]

The African Court officially began operation in 2006 and has subsequently heard numerous applications and delivered several judgments on broad human rights matters in Africa. Justice Sophia A.B. Akuffo's Report of the African Court on Human and Peoples' Rights on the

[8] Available at http://www.kas.de/wf/doc/kas_20018-544-2-30.pdf?100630122117 ; published by Kas International Reports

Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa, November 2012[9], provides a summarized analysis of the Court's status and disposition with a reassuring conclusion that the "Court constitutes one of Africa's most valuable resources for timely adjudication of disputes related to human and peoples' rights, and for affording effective remedies for the violation of these rights"[10].

Up to date information on the list of African countries that are signatories to the Protocol to the African Charter and/or have submitted Declaration that allows NGOs and individuals to bring cases before the African Court is available on the court's website[11].

A recent judgment (May 26, 2017) of the African Court in the case of African Commission on Human and Peoples' Rights v. Republic of Kenya[12] provides remarkable clarity and assurance to human rights defenders with the court's unambiguous affirmation of the power of the African Commission to initiate cases against states. The court stated:

> "In circumstances where the Commission files a case before the Court pursuant to Article 5 (1) (a) of the Protocol, Article 3 (1) of the same provides no additional requirements to be fulfilled before this Court exercises its jurisdiction. Article 58 of the Charter mandates the Commission to draw the attention of the Assembly of Heads of State and Government where communications lodged before it reveal cases of series of serious or massive violations of human and peoples' rights. With the establishment of the Court, and in application of the principle of complementarity enshrined under Article 2 of the Protocol, the Commission now has the power to refer any matter to the Court, including matters which reveal a series of serious or massive violations of human rights. The Respondent's preliminary objection that the Commission did not comply with Article 58 of the Charter is thus not relevant as far as the material jurisdiction of the Court is concerned."[13]

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[9] http://www.african-court.org/en/images/Other%20Reports/Report_of_the_African_Court_on_Human_and_Peoples_Rights_in_the_Protection_of_Human_Rights_in_Africa_final.pdf

[10] Supra

[11] http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court . It states, inter alia, : "As at July 2017, only eight (8) of the thirty (30) States Parties to the Protocol had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals. The eight (8) States are; Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi , Tanzania and Rep. of Tunisia. The 30 States which have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda"

[12] African Commission on Human and Peoples' Rights v. Republic of Kenya App no. 006/2012. (Available at : http://www.african-court.org/en/index.php/56-pending-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details)

[13] African Commission on Human and Peoples' Rights v. Republic of Kenya App no. 006/2012, at page 15

The African Commission lists its functions as follows:

> "In addition to performing any other tasks which may be entrusted to it by the Assembly of Heads of State and Government, the Commission is officially charged with three major functions:
>
> the protection of human and peoples' rights
>
> the promotion of human and peoples' rights
>
> the interpretation of the African Charter on Human and Peoples' Rights"[14]

It is noteworthy that the African Commission has made strong pronouncements and recommendations that affirm the obligation of the state to ensure that its organs operate within the bounds of international human rights law. In 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe (May 2, 2012)[15], the Commission ruled against Zimbabwe thus:

> **139.** International human rights law therefore requires the Respondent State to both respect and ensure the right to life. The Respondent State has an obligation to prevent the wrongful deaths of its citizens. The Respondent State has to ensure that its organs respect the life of persons within its jurisdiction. The African Commission is of the view that the Respondent State failed in its obligation of respecting and ensuring the right to life of Beavan Tatenda Kazangachire, Munyaradzi Never Chitsenga and Batanai Hadzisi. Their death was as a result of the use of excessive and wrongful force by the law enforcement agents of the Respondent State. Accordingly, the African Commission finds for the Complainant that the Respondent State has violated Article 4 of the African Charter.
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> **140.** In considering the alleged violation of Article 1, the African Commission notes its decision in Jawara v The Gambia[32] where it held that " Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1."
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> **141.** In the case of Commission *Nationale des Droits de l'homme et des Libertes v Chad*, the African Commission stated that "the Charter specifies in article 1 that the state parties shall not only recognize the rights, duties and the freedoms adopted by the Charter, but they should also undertake…measures to give effect to them. In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation."

[14] Available at http://www.achpr.org/about/
[15] Available at http://caselaw.ihrda.org/doc/295.04/

> **142.** The African Commission also notes its decision in the case of *Amnesty International v Sudan*, where it stated that "ratification obliges a state to diligently undertake the harmonization of its legislation to the provisions of the ratified instrument." It further stated that " article 1 of the Charter confirms that the government has bound itself legally to respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them."

It is submitted that even though it is still in a state of judicial infancy, the African Court presents the most potent tool to tackle domestic incidents of corporate human rights crimes yet in contexts of state complicity or state inaction in Africa.

Legal jurisprudence - both within the context of African Court and elsewhere - has advanced to the point where the feasibility of the proposed path to redress against corporate human rights crimes in Africa should no longer be a polemic point.[16]

It is acknowledged that the state will always have to be implicated first in the impugned conduct either through complicity or through its inability to protect the victim before the intervention of the African Court is sought.

It is hereby contended that both the African Court and the African Commission can thus be deployed as veritable avenues to seek redress against human rights crimes in corporate spheres in Africa.

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[16] A simple demonstration can illustrate the proposed path thus:

C = Corporation
P = People
S = State
ACOM = African Commission
AC = African Court

Where C commits human rights violations against P without the direct involvement of S in circumstances where S has abdicated its protection responsibility. Examples will include situations where no meaningful avenues exist for legal redress due to non-existent or weak domestic laws and/or ineffective or inadequate implementation of same.
In instances where S has deposited a Declaration pursuant to the relevant Protocol, Human Rights Organizations or individuals can directly approach AC to assume jurisdiction and to conduct adjudication of issues. Alternatively, Human Rights Organizations can indirectly approach through the route of ACOM. AC may render judgement aimed at compelling S to reign in the excesses of the erring corporation through domestic sanctions ranging from imposition of stiff fines to license confiscation and cessation of operations.

2.2 STATE COMPLICITY OR INABILITY TO PROTECT IN THE CONTEXT OF CORPORATE CRIMES

A look at a few cases that have been adjudicated by the African Court reveals that none of them has specifically targeted corporate human rights crime issues. The central focus the cases has been on the actions of the states and/or its organs. It is our informed view that this status quo is likely to change soon as more searchlights are beamed on legal possibilities at the disposal of victims of corporate human rights crimes in African jurisdictions that provide inadequate remedy.

It is submitted that, to this end, the settled practice in jurisdictions which have grappled with requests from refugees asserting a failure of their state to protect them against human rights abuses at the hands of private individuals or groups deserves analysis and comprehension as it bolsters the underlying rationale for our positions and propositions herein.

2.3 CANADIAN JURISPRUDENCE ON THE CONCEPT OF STATE PROTECTION IN THE REFUGEE CONTEXT: A GERMANE GUIDE

Canadian courts have developed a healthy body of jurisprudence regarding the duty of a state to protect its citizens and where a state's failure to protect ought to trigger surrogate protection for refugees. It is submitted that there is striking similarity between the Canadian refugee jurisprudential scenario (which emphasizes the surrogacy of the protection regime under the Convention[17]) on the one hand and the applicable jurisprudential principles in the African Charter context (which require proof of essential ineffectiveness of domestic protection system) on the other hand. It is therefore submitted that the wholly evolved Canadian jurisprudence can and should guide the discuss in focus. The enforcement mechanisms created under both the African Charter and the Convention for Protection of Refugees are primarily designed to remedy the complete collapse of confidence in the harmonious protective relationships between states and their citizens.

[17] United Nations Convention relating to the Status of Refugees, adopted in 1951; available at: http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html

In The Law of Refugee Status, 2 nd ed. (Cambridge: Cambridge UP, 2014), Hathaway and Foster state:

> Refugee law is thus principally concerned with providing a remedy to a fundamental breakdown in the relationship between an individual and her state.

Through judicial pronouncements, Canada adopts and practices the notion that while state protection may be presumed in the absence of a complete breakdown of law and order, another presumption is that the complicity of the state in, or its inability to protect the citizen against, the impugned act is proof of the well-foundedness of the complainant's claim against the state. In **Ward v. Canada (Attorney General),** [1993] 2 S.C.R. 689, a judgement of the Canadian Supreme Court, the court stated (at para. 52):

> In summary, I find that state complicity is not a necessary component of persecution, either under the "unwilling" or under the "unable" branch of the definition. A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced. I recognize that these conclusions broaden the range of potentially successful refugee claims beyond those involving feared persecution at the hands of the claimant's nominal government. As long as this persecution is directed at the claimant on the basis of one of the enumerated grounds, I do not think the identity of the feared perpetrator of the persecution removes these cases from the scope of Canada's international obligations in this area. (at 112, Imm.L.R.(2d))

Thus, persecution (or violation) need not be at the instance of the state before the victim is granted protection under Canadian refugee law. Victims of persecution perpetrated by private individuals or groups (including corporations) are deemed deserving of refugee protection amid failure of state protection. Canada domesticated the Convention under S. 96 of Immigration and Refugee Protection Act.

Thus, a victim of corporate human rights crime can pursue redress against the state and obtain incidental remedy from the state at the forum of the African Commission and/or African Court either when the state had been complicit or when the state had merely folded its arms whilst the impugned corporate human rights abuse occurred.

2.4 RELEVANT CASE LAW FROM THE AFRICAN COURT:

In a few cases, the African Court has made decisions affirming the vicarious responsibility which a state bears for actions of third parties. The case of 74/92 Commission nationale des droits de l'Homme et des libertés / Chad (October 1995)[18], is illustrative:

> **20.** The Charter specifies in Article 1 that the States Parties shall not only recognise the rights duties and freedoms adopted by the Charter, but they should also "undertake.....measures to give effect to them". In other words, if a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.
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> **21.** The African Charter, unlike other human rights instruments [2] , does not allow for State parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.
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> **22.** In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.

2.5 THE LOOMING HIGH PRICE

Consideration should be given to a recent development in Canada with respect to the case of Omar Khadr - a Canadian citizen, who partook as a child soldier in a war against USA in Afghanistan. Khadr got apprehended on battlefield and was detained by US authorities. Canadian officers actively participated in the process of interrogating Khadr. The interrogations were deemed to have been done in a manner contrary to its international human rights obligations and

[18] Available at http://caselaw.ihrda.org/doc/74.92/view/en/#p20

contrary to his right to liberty and security of the person. In one of several cases launched and won by Khadr against the Government of Canada, the Supreme Court of Canada ruled thus:

> "The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects." Canada v Khadr (2010) SCC 3,[19]

In the wake of several judicial victories by Khadr and in light of his continued determination to seek redress, the Canadian government recently capitulated and agreed to pay a $10.5 million compensation to Khadr and render an apology to him. During a press conference following the 2017 G20 summit in Germany recently, Canadian Prime Minister Justin Trudeau reportedly stated:

> "The charter of rights and freedoms protects all Canadians, every one of us, even where it is uncomfortable… When the government violates any Canadian's charter rights, we all end up paying for it"[20]

It is submitted that the Khadr case illustrates of the colossal cost implications that human rights violations could trigger.

We believe that corporations all over the world, especially in Africa, have exposure to similar sanctions should they get caught up in the tangle of human rights infractions primarily perpetrated by state agents and/or by themselves. In other words, whether the breach of human rights is conducted solely by the corporations or in cohorts with unscrupulous government departments, accountability may still be extracted from corporations.

Considering that the African continent is one with an extensive history of egregious violations of human rights, corporations cannot simply continue to turn blind eye or pay lip service to human rights matters. It is no secret that Foreign Direct Investment (FDI) frenzy, especially in the

[19] Canada v Khadr (2010) SCC 3; available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7842/index.do

[20] See 'Khadr apology, settlement based on violation of charter rights, Trudeau says' by The Canadian Press. Available at https://www.thestar.com/news/canada/2017/07/08/khadr-apology-settlement-about-violation-of-charter-rights-trudeau-says.html

minerals sector, coupled with the plague of corruption in Africa create huge potentials for human rights misfeasance.

In a paper titled 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never'[21] (2014), Nsongurua J. Udombana charged:

> "Multinational corporations in the Niger Delta, for example, openly engage in criminal mining of oil in collaboration with the government. As a result, oil exploitation has created serious ecological problems, destroying local environments and, as such, the very means of livelihood of the people in the region. Existing national laws are inadequate to address state and corporate infringements of basic subsistence rights, and court orders, where they conflict with government and multinational interests, are routinely disobeyed. This contemptuous attitude of the State and private companies to court orders has led to a situation where citizens have lost faith in the judiciary and, consequently, resort to self-help on a regular basis leading to further human rights abuse."[22]

On the issue of corporate noncompliance with domestic court orders, Udombana provided a critical and compelling reference in the said paper:

> In the case of *Chief Joel Anaro v. Shell Petroleum Development Company Nigeria,* suit Nos. W/72/82, W/16/83, W/17/83, W/20/85, RCD/36/89 (unreported), for example, a Nigerian court found a multinational oil company liable under Nigerian law-for negligence and breach of statutory duties-for oil spillages that affected fish-ponds, fish channels, mangrove swamps, farm lands, riverines, as well as lakes and streams belonging to local communities. The Court held that the plaintiffs were entitled to damages and compensation for loss of income from fishing rights, domestic animals, destruction of fishing grounds and materials, and awarded them N30.5 million. Backed by the military government, Shell Petroleum Company, nevertheless, refused to pay, leaving the aggrieved without any further legal redress. *See Law Report,* LIVING (Living Env't Def. Programme, Shelter Rts Initiative, Nig.), Apr.-Jun. 1998, at 20-21.[23]

Furthermore, a report by the Business & Human Rights Resource Centre on the Marikana massacre in South Africa illustrates instances where governments and corporations act in cohort to push business interests to the point of applying deadly force against citizens. The report states:

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[21] Available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1015&context=yhrdlj , published by *Yale Human Rights and Development Journal, Vol. 3 [2000], Iss. 1, Art. 2*

[22] ibid

[23] ibid

> "Marikana massacre: On 16 August 2012, police opened fire on striking miners at Lonmin's Marikana mine, killing 34 and injuring dozens of others. A judicial commission of inquiry is probing the conduct of Lonmin, the South African police and the unions. Two witnesses have died shortly before being due to testify, one by apparent suicide and one in an execution-style killing. Bench Marks Foundation and other human rights groups have pledged to "never again" allow another injustice like the Marikana massacre to occur, by protecting the rights of workers and communities vis-à-vis mining firms."[24]

Clearly therefore, in order to adequately address issues of corporate human rights abuses in Africa, both businesses and governments will have to effectively change their practices with a view to achieving shared prosperity and sustainable growth for both businesses and the host communities.

2.6 INTERNATIONAL JUDICIAL INTERVENTIONS IN CASES ALLEGING CORPORATE HUMAN RIGHTS MALPRACTICES

For years, there have been attempts by victims alleging corporate collusion in their human rights ordeals at the hands of the governments to seek redress internationally. Pro-human rights litigators are constantly exploring paths to judicial interventions outside of the country of infraction to bring corporate perpetrators of human rights breaches to justice. We are now beginning to see signs of possibilities for judicial interventions outside the countries where the infractions occurred.

In the context of human rights-based litigation against corporations doing businesses in Africa, the cases involving petroleum giant, Royal Dutch Shell PLC, stand out. Shell has faced - and continues to face - serious allegations and litigation over its alleged complicit role in human right abuses committed against the people of Ogoni by the government in Nigeria. Shell is alleged to have colluded with Nigerian authorities to commit gross human rights violations against the Ogoni people of Nigeria[25]. In countries like UK, USA, Netherlands and Italy, lawsuits that are

[24] For the full report see https://business-humanrights.org/sites/default/files/documents/Time-for-responsibility-revolution-business-human-rights-Africa-Sep-2014_1.pdf

[25] See http://marc-lemenestrel.net/IMG/pdf/complaint_against_shell.pdf

largely related to human rights abuses have been brought and/or are being pursued against Shell and its parent company, Royal Dutch Petroleum[26]

The case of Esther Kiobel v Royal Dutch Petroleum which was launched in the USA went up the court hierarchy; but was dismissed at the US Supreme Court level after the court declined jurisdiction with a finding that there was "no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms"[27]. The Alien Tort Statute (ATS) was the statutory basis upon which the case had been launched[28].

A similar jurisdictional finding was made by the British High court when it was held that "there is simply no connection whatsoever between UK jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a Nigeria company."[29]

It is urged that regardless of the loss of the US and UK cases by the Ogoni plaintiffs, the cases ring alarm bells that can only continue to be ignored by corporations at their own peril.

Furthermore, it is noteworthy that Shell made a $15 million settlement payout to the relatives of some of the persecuted Ogoni people even though Shell continues to deny the murderous allegations in the cases.[30]

The Shell Development Company of Nigeria Ltd. together with its parent company, Royal Dutch Shell Plc., have yet again recently been confronted with a lawsuit seeking redress for the human rights atrocities of the Nigerian authorities in which Shell Nigeria was allegedly complicit. Just last month, (June 2017), Esther Kiobel resurrected her matter against Shell in the Netherlands by launching a civil lawsuit in The Hague. Kiobel's main allegations are that Shell colluded with the Nigerian government to commit human rights atrocities including the killing of her husband[31]. Amnesty International also issued a strong statement in support of Ms. Kiobel's claim[32]

[26] http://royaldutchshellplc.com/2017/01/15/esher-kiobel-v-shell-article-published-in-dutch-ft/ ; also see https://milieudefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit and https://milieudefensie.nl/english/shell/courtcase/timeline
[27] https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf
[28] https://www.wsws.org/en/articles/2013/04/23/supr-a23.html
[29] https://www.theguardian.com/business/2017/jan/26/nigerian-oil-pollution-shell-uk-corporations
[30] http://royaldutchshellplc.com/2017/01/15/esher-kiobel-v-shell-article-published-in-dutch-ft/
[31] http://www.cnn.com/2017/06/30/africa/ogoni-widow-shell-court/index.html
[32] https://www.amnesty.org/en/press-releases/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/

Kiobel's new lawsuit in the Netherlands is sure to draw strength from developments in another case[33] where a Dutch appellate Court had ruled that Royal Dutch Shell can be held liable for actions of its Nigerian subsidiary.

Given the emerging trend of corporate parental responsibility, it is highly recommended that parent corporations need to do more to rein in the human rights excesses of their subsidiaries lest they be entangled by the legal web being weaved by lawyers to victims who are determined to seek justice at all costs.

PART 3: CONCLUSION

Corporations operating in Africa ought to evolve and standardize an inhouse culture of commitment to human rights values. There is a heightened need for such commitment given the undemocratic antecedents of governments in Africa and the susceptibility of Africa's governance systems to corruption.

Formulation of human rights compliant policies and the periodic training of corporate staff at all levels – from management staff to the rank and file – on the necessity to avoid practices and procedures that are at variance with human rights norms should be the basic minimum to be expected of corporations with operations in Africa. This is especially necessary for corporations with operations in volatile regions or places with manifestations of restiveness.

A consistent implementation of pro-human rights policies by corporations will likely insulate them – and their parent corporations - from exposure to charges of corporate crimes and/or complicity should the governments from which they obtain legitimacies and draw protective support or with which they collaborate in furtherance of their corporate agenda be involved in human rights violations against citizens of the host communities.

[33] Available at https://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria ; see also https://milieudefensie.nl/english/shell/courtcase also see https://milieudefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit and https://milieudefensie.nl/english/shell/courtcase/timeline

[33] https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf