

Holding corporations liable for human rights abuses committed in Africa: the need for strengthening domestic remedies

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ABSTRACT: It has been two decades since the African Commission on Human and Peoples' Rights (Commission) rendered its landmark decision in *SERAC and CESR v Nigeria*. In this landmark judgment, and later in *IHRDA and Others v DRC*, the Commission explicitly affirmed states' obligation to investigate, prosecute and redress corporate human right abuses as part of the obligation 'to adopt legislative or other measures' under article 1 of the African Charter on Human and Peoples Rights (African Charter). Similarly, states' obligation to ensure a remedy for corporate human rights abuses is also one of the issues clarified under the 'Third Pillar' of the UN Guiding Principles on Business and Human Rights. However, as this obligation is not adequately translated into practice at the national level, corporate human rights abuses committed in Africa continue to be met with impunity and lack of access to effective remedy. Over the last several years, African victims who are denied justice in their domestic jurisdictions have increasingly been turning to home states of corporations to seek remedies. Victims' access to home state remedies has, however, been significantly restricted in recent years due to various legal barriers, particularly jurisdictional challenges. The article therefore aims to highlight the increasing restriction on African victims' access to home state remedies and show the need for strengthening domestic remedies in Africa.

TITRE ET RÉSUMÉ EN FRANCAIS:

Tenir les entreprises responsables des violations des droits de l'homme commises en Afrique: la nécessité de renforcer les voies de recours internes

RÉSUMÉ: Deux décennies se sont écoulées depuis que la Commission africaine des droits de l'homme et des peuples (Commission africaine) a rendu sa communication historique dans *SERAC et CESR c. Nigeria*. Dans cette communication, et plus tard dans celle intervenue en l'affaire *IHRDA et autres c. RDC*, la Commission a explicitement affirmé l'obligation des États d'enquêter, de poursuivre et de réparer les violations des droits de l'homme commises par les entreprises, en lien avec l'obligation 'd'adopter des mesures législatives ou autres' en vertu de l'article 1 de la Charte africaine des droits de l'homme et des peuples. De même, l'obligation des États de garantir la réparation des atteintes aux droits de l'homme commises par les entreprises est l'une des questions clarifiées dans le cadre du 'troisième pilier' des Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme. Cependant, comme cette obligation n'est pas suffisamment traduite dans la pratique au niveau national, les violations des droits de l'homme commises par les entreprises en Afrique continuent de bénéficier de l'impunité et d'un manque d'accès à un recours effectif. Au cours des dernières années, les victimes africaines qui se voient refuser l'accès à la justice dans leurs juridictions nationales se tournent de plus

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en plus vers les États d'origine des entreprises pour obtenir réparation. L'accès des victimes aux recours dans l'État d'origine est cependant considérablement limité ces dernières années en raison de divers obstacles juridiques, en particulier les défis juridictionnels. Cette contribution vise donc à mettre en évidence la restriction croissante de l'accès des victimes africaines aux recours de l'État d'origine et à montrer la nécessité de renforcer les recours internes en Afrique.

KEY WORDS: Africa, corporations, home states, remedy, UN Guiding Principles on Business and Human Rights

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1 INTRODUCTION

The involvement of corporations in human rights abuses in Africa has not started with the advent of economic globalisation in the 1990s. Its genesis can be traced back to the colonial era. One of the legacies of colonialism include the exploitation of African natural and human resources by European companies.¹ However, the advent of economic globalisation in the 1990s has created a more permissive environment for corporate human rights abuses in Africa, by creating what John Ruggie called 'governance gap'.² On the one hand, following economic globalisation – the process of trade and investment liberalisation, privatisation, and deregulation³ – corporations have become more global in their operations and more powerful economically.⁴ On the other hand, the ability and willingness of states to manage the adverse impacts of corporations is continually waning.⁵ This imbalance between the huge global impact of corporations and the limited capacity of states has created a 'governance gap' in preventing, investigating, prosecuting and redressing human rights abuses by corporations.⁶

Over the last thirty years, Africa has become one of the most preferred investment destinations, mainly for extractive and other

1 S Ratner 'Corporations and human rights: a theory of legal responsibility' (2001) 111 *Yale Law Journal* 443 at 545.
 2 J Ruggie *Just business: multinational corporations and human rights* (2013) 70
 3 H Ward 'Securing transnational corporate accountability through national courts: implications and policy options' (2001) 24 *Hastings International and Comparative Law Review* 451 at 452; Guiding principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Human Rights Council (21 March 2011) A/HRC/17/31(2011).
 4 A McBeth *International economic actors and human rights* (2009) 245.
 5 A Clapham *Human rights obligations of non-state actors* (2006) 8.
 6 LC Backer 'Regulating multinational corporations: trends, challenges, and opportunities for multinational corporations' (2016) 22 *Brown Journal of World Affairs* 153 at 156.

labour-intensive manufacturing companies.⁷ Indeed, the flow of foreign direct investments and the operation of corporations have hugely contributed for economic development, poverty reduction, and job creation in Africa. However, by taking advantage of lower labour and environment standards and weak systems of governance, and at times by colluding with repressive governments, corporations are directly and indirectly involved in wide-ranging human rights abuses in Africa. In an ongoing case in Canada, for example, Nevsun Resources Ltd is accused of violating freedom from torture and cruel, inhuman, or degrading treatment; and freedom from forced or slave labour in Eritrea.⁸ Shell's oil extraction in Ogoniland, Nigeria, also resulted in the violation of the right to health, the right to clean environment, and the right to dispose of wealth and natural resources.⁹ In a recent lawsuit brought in the US, Nestle and Cargill, the world's biggest chocolate companies, are also accused of being indirectly involved in child slavery in cocoa farms in Ivory Coast.¹⁰

The concern is not just that corporations are widely and increasingly involved in human rights abuses in Africa, but also that abuses are often met with impunity and lack of access to remedy. On the one hand, as explained in the recent study on extractive industries, which is prepared by the Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI), states within whose territory abuses have been committed are often unable and/or unwilling to hold corporations accountable and provide remedies for victims.¹¹ On the other hand, judicial remedies in home states of corporations are becoming increasingly inaccessible due to various legal barriers. The article therefore argues that, unless domestic remedies are accorded due attention and strengthened, reliance on home state remedies will leave victims without remedy. In doing so, following this introductory section, Part 2 of the article discusses the duty of state parties to the African Charter to protect human rights from business activities. Part 3 highlights how domestic corporate accountability and remedy are currently rare in Africa. By discussing recent claims brought by African victims in different home states of

7 Ruggie (n 2) 15. John Ruggie rightly noted that 'extractive industries, such as oil, gas and mining, have always had to go where the resources were found, but by the 1990s they were pushing into ever more-remote areas, often inhabited by indigenous peoples who resisted their incursion, or operating in host countries engulfed by civil wars and other serious forms of social strife that marred that decade, particularly in Africa and parts of Latin America'.

8 *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856.

9 *Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v Nigeria*, communication 155/96, Africa Commission on Human and Peoples' Rights (2002) (*SERAC v Nigeria*).

10 *Nestle USA, Inc. v Doe and Others*, 593 US (2021).

11 Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI) 'Background study on the operations of the extractive industries sector in Africa and its impacts on the realisation of human and peoples' rights under the African Charter on Human and Peoples' Rights' July 2021 https://www.achpr.org/public/Document/file/English/Extractive%20Studies%20&%20Human%20Rights%20Background%20Study%20Report_ENG.pdf (accessed 12 June 2022).

corporations, Part 4 seeks to highlight the increasing restriction on victims' access to home state remedies. Part 5 recommends how the UNGPs can be used as a guidance regarding what steps need to be taken by states to strengthen domestic remedies.

2 STATES' DUTY TO PROTECT HUMAN RIGHTS FROM BUSINESS ACTIVITIES

The African human rights system offers a unique legal basis to respond to human rights impacts of business activities. First, the African Charter, unlike other universal and regional human rights instruments that exclusively allocate human right obligations among states, provides the duties of individuals under article 27 to 29. In elaborating what this means regarding the responsibilities of business entities, the Commission indicated that 'if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies'.¹² Second, the Malabo Protocol, although not yet entered into force, allows the African Court of Justice and Human Rights to assert criminal jurisdiction over corporations relating to a wide range of crimes.¹³

However, the Commission has neither articulated the responsibilities of corporations nor made explicit reference to UNGPs in its case laws and General Comments, despite these peculiarities and recent developments at the international level.¹⁴ Instead, the Commission responded by comprehensively developing states' duty to protect human rights from business activities. Like the practice of other universal and regional treaty bodies, every right recognised under the African Charter gives rise to various interdependent correlative state

12 African Commission on Human & Peoples' Rights 'Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)', <https://www.achpr.org/public/Document/file/English/Advisory%20note%20Africa%20Group%20UN%20Treaty.ENG.pdf> (accessed 15 June 2011).

13 See art 46 C of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.

14 This is without affecting attempts made by the Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI) to articulate the human rights obligations of corporations, particularly in its explanatory note to State Reporting Guideline relating to Extractive industries, Human Rights and the Environment. In the section dealing with 'obligations of companies', the WGEI highlighted that 'while states are the primary obligation bearers under the African Charter, it is also legally recognised that corporations, particularly multinational ones, have obligations towards right holders. This obligation arises from the recognition that lack of such obligations may result in the creation of a human rights vacuum in which such entities operate without observing human rights.' See African Commission on Human and Peoples' Rights 'State Reporting Guidelines and Principles on articles 21 And 24 of the African Charter Relating To Extractive Industries, Human Rights and The Environment' https://www.achpr.org/public/Document/file/English/State%20reporting%20guidelines%20and%20principles%20on%20articles%2021%20and%2024_ENG.pdf (accessed 6 June 2022).

obligations: the duty to respect, protect and fulfill.¹⁵ States' duty to protect human rights, which is also articulated under the first pillar of the UNGPs, requires states not only to prevent abuses committed by private actors, including corporations, but also to ensure legal accountability of business enterprises and access to effective remedy whenever abuses occur.¹⁶

The duty to protect human rights is often derived from article 1 of the African Charter on Human and Peoples' Rights (African Charter).¹⁷ Under article 1 of the Charter, state parties undertake to 'adopt legislative or other measures to give effect' to rights recognised in the charter. The positive obligations of state parties', including the duty to protect, are considered to be embedded in state parties' explicit obligation to 'adopt legislative or other measures to give effect to [rights]' under article 1 of the Charter. By relying on the duty to protect human rights, the Commission, in several instances, held states responsible for failing to prevent and provide remedy for human rights abuse committed by private actors, including corporations.¹⁸

The obligation of state parties regarding corporate activities was directly and comprehensively addressed in the Commission's landmark decision in *SERAC and CESR v Nigeria*.¹⁹ This communication was brought against the Nigerian government regarding human right violations committed by Nigerian National Petroleum Company (NNPC), owned by the government of Nigeria), and Shell Petroleum Development Corporation (Shell) in the process of production of petroleum in Ogoniland, Nigeria.²⁰ The complainants alleged that Nigeria is responsible for the abuses committed by these oil

15 South African Institute for Advanced Constitutional, Public, Human Rights and International Law 'The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System' 17 January 2010 <https://media.business-humanrights.org/media/documents/f6d9723bf8058ce0ee910577a969a61d3fc88b90.pdf> (accessed 25 June 2022).

16 A Nolan 'Addressing economic and social rights violations by non-state actors through the role of the state: a comparison of regional approaches to the 'obligation to protect' (2009) 9 *Human Rights Law Review* 225 at 236.

17 In addition to art 1 of the African Charter, the duty to protect can also be derived from other substantive rights recognised in the Charter. For instance, Aoife Nolan argues that the obligation to protect can also be extrapolated from the requirements that states parties 'guarantee' the right to property (art 14), 'protect' the right to 'enjoy' the best attainable state of physical and mental health (art 16), and that the family 'shall be protected' (art 18(1)). See Nolan (n 19).

18 *Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v Nigeria*, communication 155/96, Africa Commission on Human and Peoples' Rights (2002); *IHRDA, ACIDH & RAID v DR Congo*, Communication 393/10, Africa Commission on Human and Peoples' Rights (2016). While *SERAC & CESR v Nigeria* and *IHRDA & Others v DRC* directly address states' obligation with regard to corporate activities, there are also other cases where the Commission addressed states' obligation to protect human rights from activities of other non-state actors. See *Nationale des Droits de l'Homme et des Libertés v Chad*, Communication 74/92, Africa Commission on Human and Peoples' Rights (1995). *Amnesty International & others v Sudan*, Communication 48/90-50/91-52/91-89/93, Africa Commission on Human and Peoples' Rights (1999).

19 *SERAC v Nigeria* (n 18).

20 *SERAC v Nigeria* (n 18) para 1.

corporations not only because it is directly involved by 'placing the legal and military powers of the state at the disposal of the oil companies', but also due to its failure to protect the Ogoni population from the harm caused by the activities of these oil corporations.²¹

One of the main issues that the Commission had to address was whether the African Charter requires Nigeria to take positive steps to protect human rights from corporate activities. In addressing this issue, the Commission first underlined that every right recognised in the Charter entails four layers of obligations: the duty to respect, protect, promote, and fulfill these rights.²² Although all of these layers of obligations are relevant for the case in question, the duty to protect is particularly important. The Commission articulated what the duty to protect entails as follows:²³

The state is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.

In clarifying the content of the duty to protect, the Commission drew inspiration from *Vela'squez-Rodriguez* case of Inter-American Court of Human Rights and *X and Y v The Netherlands* of the European Court of Human Rights.²⁴ In *Velasquez Rodriguez v Honduras*, the Inter-American Court of Human Rights articulated how human right abuses by private actors could give rise to international state responsibility.²⁵ The Court stated:²⁶

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

By relying on these decisions, the *SERAC* jurisprudence pointed out that states are required to take positive steps to prevent abuses by corporations and ensure the provision of effective remedies.²⁷ Finally, the Commission found Nigeria in violation of the right to health (article 16), the right to dispose of wealth and natural resources (article 21), the right to a clean environment (article 24) and family rights (article 18(1)), including for its failure to take steps to prevent and remedy abuses committed by Shell.²⁸ The Commission appealed to the government of Nigeria, among others, to conduct an investigation and

21 *SERAC v Nigeria* (n 18) para 4-9.

22 *SERAC v Nigeria* (n 18) para 44.

23 *SERAC v Nigeria* (n 18) para 46.

24 *SERAC v Nigeria* (n 18) para 57.

25 *Velasquez Rodriguez v Honduras* (29 July 1988) Series C No 4.

26 *Velasquez Rodriguez v Honduras* (n 25) para 172.

27 *SERAC v Nigeria* (n 18) para 58.

28 *SERAC v Nigeria* (n 18) paras 59-69.

prosecute all those involved in the violation and ensure that remedy is provided to the victims of the human right violations.²⁹

The state obligation to prevent and remedy corporate human rights abuses under the African Charter is similarly affirmed in *IHRDA and Others v DRC*.³⁰ Indeed, this communication was mainly related to human rights violations committed by the Congolese army while trying to prevent armed rebels from taking control of the town of Kilwa.³¹ However, the complainants also alleged that DRC failed to investigate and prosecute Anvil Mining Company, a copper and silver mine operating 50 km away from Kilwa, for providing logistical support for the Congolese Army.³² Accordingly, the Commission had to address whether DRC discharged its duty to protect Charter rights under article 1 of the African Charter. The Commission, by particularly relying on its earlier jurisprudence in *SERAC*,³³ found DRC in violation of article 1 of the Charter for failing to investigate, punish and redress the abuses committed by Anvil mining company. In this regard, the Commission stated that

[the duty to protect] implies that the state takes all necessary measures to ensure protection against human rights violations by third parties, including corporations, the adoption of measures to prevent, investigate, punish, and provide reparations to victims.³⁴

The state obligation to ensure remedy for corporate human right abuses is also affirmed in General Comments adopted by the Commission. Under General Comment 3 on the right to life, for instance, the Commission stated as follows:³⁵

The state also has an obligation to protect individuals from violations or threats at the hands of other private individuals or entities, including corporations. ...

The state is responsible for killings by private individuals which are not adequately prevented, investigated or prosecuted by the authorities.³⁶

General Comment 4 on the right to redress of torture victims also states that '[a]rticle 1 of the African Charter requires state parties to uphold the positive obligation to diligently prevent, investigate, prosecute and punish non-state actors who commit acts of torture and other ill treatment and to redress the harm suffered'.³⁷ In this General Comment, the Commission also reminded state parties to address legal and other practical challenges that stand in the way of punishing and

29 *SERAC v Nigeria* (n 18) the holding of the Commission.

30 *IHRDA v DR Congo* (n 18) para 3.

31 *IHRDA v DR Congo* (n 18) paras 3-14.

32 *IHRDA v DR Congo* (n 18) para 6.

33 *IHRDA v DR Congo* (n 18) para 101.

34 As above.

35 Africa Commission on Human and Peoples Rights, General Comment 3 (2015) on the Right to Life, para 38 https://www.achpr.org/public/Document/file/English/general_comment_no_3_english.pdf (accessed 26 June 2022).

36 General Comment 3 (n 35) para 39.

37 Africa Commission on Human and Peoples' Rights, General Comment 4 (2017) on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, para 73 https://www.achpr.org/public/Document/file/English/achpr_general_comment_no_4_english.pdf (accessed 26 June 2022).

remediating abuses committed by non-state actors.³⁸ Similarly, the Niamey Declaration, after reiterating that the primary responsibility to prevent and redress human rights abuses rests with states, requested states parties to put in place all necessary legislative and regulatory frameworks to prevent abuses by extractive industries, and ensure corporate accountability and remedy whenever human rights abuses occur.³⁹

The obligation of states with regard to corporate activities is also addressed at sub-regional level by the ECOWAS Court of Justice in *SERAP v Nigeria*.⁴⁰ The plaintiff, Socio-Economic Rights and Accountability Project (SERAP), alleged the violations of various substantive rights by Nigeria and Oil companies because of the impact of oil-related pollution and environmental damage in the Niger Delta region.⁴¹ In its analysis, the Court underscored that Nigeria is required to take 'concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered'⁴² as part of its obligation under article 1 of the Charter in conjunction with other substantive rights. However, due to its 'omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity',⁴³ Nigeria was found to have violated its obligation. While the Court articulated states' obligation with sufficient detail, it ruled that its jurisdiction does not extend to corporate defendants.

In summary, state parties to the African Charter assume an obligation to take all necessary steps to prevent, investigate, punish and redress corporate related human right abuses as part of their duty to protect human rights under article 1 of the African Charter. Put differently, failure to take all necessary steps, including having effective laws and regulations, to prevent and address business-related human rights abuses and ensure access to effective remedy for those whose rights have been abused constitutes a breach of states' obligations under article 1 of the African Charter.

3 LACK OF DOMESTIC CORPORATE ACCOUNTABILITY AND REMEDY

Having effective laws and regulations is an essential first step to prevent business-related human rights abuses and ensure effective remedy

38 General Comment 4 (n 37) para 75.

39 Africa Commission on Human and Peoples Rights, Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - ACHPR/Res. 367 (LX) 2017.

40 *SERAP v Nigeria*, ECW/CCJ/APP/07/10, ECOWAS Court of Justice (10 December 2010).

41 *SERAP v Nigeria* (n 40) para 13.

42 *SERAP v Nigeria* (n 40) para 105.

43 *SERAP v Nigeria* (n 40) para 111.

whenever abuses occur. However, legislative efforts at the national level are currently inadequate. No African state has adopted or attempted to adopt specifically designed laws, either in the form of mandatory due diligence law or disclosure law, to respond to abuses committed by corporations. In recent years, mandatory due diligence laws which require companies to identify, prevent and mitigate human rights abuses, and non-observance of which entails legal liability, are considered to be an effective means of ensuring accountability and remedy in the realm of business and human rights.⁴⁴ Kenya and Uganda are the only African states that have so far adopted National Action Plans (NAPs) on business and human rights, which, although does not guarantee accountability and remedy, set out strategies to prevent and protect against human rights abuses by business enterprises.⁴⁵ Indeed, other African countries, such as Ghana, Nigeria, South Africa and Tanzania, have already begun the process of developing National Action Plans on Business and Human Rights.⁴⁶

This does not, however, mean that there is no means to hold corporations accountable and provide remedy for victims. Human rights impacts caused or contributed by business activities give rise to causes of action in conventional tort law, labour law and common law duty of negligence in many jurisdictions.⁴⁷ The South African Constitution, for instance, not only allows the horizontal application of the bill of rights against non-state actors, including corporations, but also allows victims to bring human rights claims directly against private entities.⁴⁸ However, as the report of the first African Regional Forum on Business and Human Rights highlighted, private claims against corporations in Africa are rarely successful owing to various challenges, including lack of recognition of collective litigation; lack of financial support and legal assistance to victims and lack of well-functioning and

44 The concept of human rights due diligence is introduced in the UN Guiding Principles as means by which companies can discharge their responsibility to respect human rights. With a view to implement this responsibility of businesses to respect human rights, several states, particularly in Europe, are adopting binding domestic due diligence laws. France, for instance, has adopted a law on duty of vigilance that is a legally binding due diligence obligation on companies. See LOI N° 2017-399 Du 27 Mars 2017 Relative Au Devoir de Vigilance Des Sociétés Mères et Des Entreprises Donneuses d'ordre, 2017-399 § (2017). Germany also adopted its Supply Chain Duty of Care Act in June 2021; Norway passed its Transparency Act in summer 2021. The Dutch adopted a Child Labour Due Diligence Law in 2020.

45 Relating to states who have already adopted NAPs and those who are in the process, see 'National Action Plans' <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights> (accessed 14 June 2022).

46 As above.

47 J Ghai 'Kenya: Constitution, common law and statute in vindication of rights' in E Aristova & U Grusic (eds) *Civil remedies and human rights in flux: key legal developments in selected jurisdictions* (2022) 225; A Price 'South Africa: civil liability for Constitutional wrongs' in E Aristova & U Grusic (eds) *Civil remedies and human rights in flux: key legal developments in selected jurisdictions* (2022) 289.

48 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).

independent legal machinery.⁴⁹ The report also indicated that companies are rarely subject to criminal law enforcement although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions. In effect, thousands of victims of corporate human rights abuses are often left without an effective remedy, and corporations are operating with impunity.

The prevailing remedy and accountability gap is mainly attributed to unwillingness or inability of states to enforce human rights against corporations. The unwillingness states may stem from the fear that corporations would withdraw or relocate their investments to another country where human rights enforcement is lenient.⁵⁰ As relocation or withdrawal of corporations means loss of capital, jobs, and technical expertise, developing states, whose main source of capital is foreign direct investment, could turn a blind eye to corporate human rights abuses.⁵¹ The risk of being dragged to international arbitration could also be another reason behind host states' unwillingness to ensure remedy for corporate human rights abuses. Domestic litigation could lead to international arbitration against the host states based on bilateral investment treaties. Shell, for instance, recently brought an arbitration claim against Nigeria at ICSID after its appeal against a court order to pay compensation to a community for polluting land was rejected by Nigeria's Supreme Court.⁵²

It should also be noted that corporate human rights abuses in Africa are often committed in complicity with respective governments.⁵³ One cannot plausibly expect that the state would investigate and prosecute a crime in which the state itself is implicated with.⁵⁴ Surya Deva noted that '... complicity makes the concerned state an interested party in enforcement of human rights, a fact which seriously hampers the possibility of making the involved MNC liable under the national regulatory mechanism'.⁵⁵ The experiences of the Ogoni people in Nigeria tells us that seeking redress and accountability in such situations is not only futile but even dangerous.

49 Report on the First African Regional Forum on Business and Human Rights, UN Human Rights Council (2 April 2015) A/HRC/29/28/Add.2 (2015).

50 Ratner (n 1) 543.

51 M Wescheka 'Human rights and multinational enterprises: how can multinational enterprises be held responsible for human rights violations committed abroad' (2006) 66 *Heidelberg Journal of International Law* 625 at 628.

52 *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria*, ICSID Case No. ARB/21/7 (10 February 2021).

53 S Joseph *Corporations and transnational human rights litigation* (2004) 3.

54 LJ McConnell 'Establishing liability for multinational corporations: lessons from Akpan' (2014) 56 *International Journal of Law and Management* 88 at 90.

55 S Deva 'Human rights violations by multinational corporations and international law: where from here' (2003) 19 *Connecticut Journal of International Law* 1 at 8.

Besides, corporate human rights abuses, including in Africa, are sometimes committed in the context of armed conflict and other forms of instability.⁵⁶ As noted by the SRSG, '[t]he most egregious business-related human rights abuses take place in conflict affected areas and other situations of widespread violence'.⁵⁷ Ensuring '[a] peaceful and secure Africa' is one of the seven aspirations that the AU Agenda 2063 seeks to deliver. With a view to achieve this aspiration, the AU, through 'Silencing the Guns in Africa by 2020' campaign, has been working to end all wars, conflict and gender-based violence, and to prevent genocide. However, save for the overall improvements in the peace and security situation in Africa compared to the 1990s, several countries continue to experience armed conflict and other various forms of violence. As the commentary to principle 7 of the UNGPs indicated, states in such conflict-affected situations cannot adequately protect human rights due to lack of effective control.⁵⁸ Successive reports of the SRSG similarly highlighted states' inability to protect and remedy abuses committed in conflict-affected areas. In the 2008 report, for instance, it was noted that '[t]he human rights regime cannot function as intended in the unique circumstances of sporadic or sustained violence, governance breakdown, and absence of the rule of law'.⁵⁹

No matter what lies behind, the duty to protect human rights from business activities is not adequately implemented at the domestic level. On the one hand, states lack effective legal and institutional framework necessary to ensure victims' access to civil remedies and to hold corporations accountable for abuses resulting from their activities. On the other hand, there is a lack of capacity and political will to enforce the existing laws against corporations.

- 56 R Mares 'Corporate and state responsibilities in conflict-affected areas' (2014) 83 *Nordic Journal of International Law* 293 at 345; Radu Mares reminds us that emblematic cases of corporate unaccountability in Africa have appeared in unstable and violence-ridden zones: Talisman in a Sudan gripped by civil war; Shell in Nigeria during a military dictatorship which committed gross human rights violations.
- 57 Report of SRSG on Business and human rights in conflict-affected regions: challenges and options towards state responses, UN Human Rights Council (27 May 2011) A/HRC/17/32(2011).
- 58 UNGPs (n 3) Commentary to principle 7; See also V Bernard & M Nikolova 'Interview with John G Ruggie' (2012) 94 *International Review of the Red Cross* 891 at 892. In this interview, John Ruggie highlighted that 'Conflict zones are particularly problematic because nobody can claim that the human rights regime, as it is designed, can possibly function in a situation of extreme duress for the host state. Though it technically has the primary obligation to protect human rights, in times of armed conflict the host state is typically either not functioning, does not control a particular part of a country, or is itself engaged in human rights violations'.
- 59 Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Human Rights Council (7 April 2008) A/HRC/8/5/ (2008) para 47.

4 INCREASING RESTRICTIONS ON ACCESS TO HOME STATE REMEDIES

Unable to seek and obtain remedy in their domestic jurisdictions, African victims of corporate human rights abuses are increasingly turning to home states of corporations.⁶⁰ *Association canadienne contre l'impunité v Anvil Mining* and *Araya v Nevsun Resources Ltd* in Canada, *Kiobel v Royal Dutch Petroleum* in the US, *Lungowe v Vedanta* and *Okpabi v Royal Dutch Shell plc* in the UK are among the recent claims brought by African victims in the respective home states of corporations. Indeed, home states of corporations, often developed nations with independent, efficient, and better equipped judicial mechanisms, can bridge the prevailing remedy and accountability gap by serving as a potential venue for victims to seek and obtain remedy for corporate human rights abuses committed abroad, including in Africa.

However, in recent years, the ability of victims to access and seek remedies in home states of corporations are increasingly restricted, mainly due to legal barriers. Claims brought by African victims in home states of corporations rarely reach the merit stage of the trial. As recent cases demonstrate, claims involving overseas corporate human rights abuses, including those brought by African victims, are routinely dismissed for lack of jurisdiction. Even when the jurisdiction of the court is successfully established, home states courts could also decline jurisdiction on the ground of *forum non conveniens*. How claims brought by African victims in home states of corporations are increasingly dismissed is a testament how home states remedies have become inaccessible.

Kiobel v Royal Dutch Petroleum Co best explains how the ability of victims of corporate human rights abuses to bring claims is significantly restricted in the US. In this case, a group of Nigerian nationals filed a suit in federal court under the Alien Tort Statute (ATS), alleging that the respondent corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. ATS grants jurisdiction to federal district courts over claims brought by foreign plaintiffs alleging the violation of the law of nations, regardless of where the violation occurred.⁶¹ The central question that the Supreme Court had to answer was 'whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States'.⁶² In answering this, the Supreme Court held that ATS applies only to claims that 'touch and concern the territory' of the United States 'with sufficient force'.⁶³ As all the relevant conduct in this

60 The term 'home state' is intended to refer to the state within whose territory the parent company is domiciled. A company is considered to be domiciled in a state where it is incorporated or has its principal place of business or central administration.

61 Alien Tort Statute 28.

62 *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

63 *Kiobel v Royal Dutch Petroleum Co* (n 62) p.1669.

case took place outside of the United State, the Supreme Court dismissed victims' claim. More recently, the Supreme Court, by relying on its decision on *Kiobel v Royal Dutch Petroleum Co.*, similarly dismissed a lawsuit brought against Nestlé USA, Inc, and Cargill, Inc, the biggest chocolate companies, by Six Malian en who were trafficked and forced to work on cocoa farms in Ivory Coast.⁶⁴

Kiobel v Royal Dutch Petroleum Co., in effect, restricted federal courts' jurisdiction over claims alleging the violations of the law of nations committed outside of the United States. Before *Kiobel*, federal courts were able to assert jurisdiction regardless of where the act giving rise to the claim occurred, as long as victims' claims relate to the violation of the law of nations. However, in *Kiobel*, the Supreme Court limited the jurisdiction of courts under ATS only to those claims which have sufficient ties with the US. In consequence, victims can no longer bring claims involving overseas corporate human right abuses under ATS unless it 'touch and concern the territory of the United States ... with sufficient force.' Although the court failed to delineate factors that could meet the 'touch and concern' test, it nevertheless made one thing clear; the 'mere presence' of a business in the United States would not be enough to meet the 'touch and concern' test.⁶⁵ Accordingly, by restricting the jurisdiction of courts under ATS, the Supreme Court's decision in *Kiobel* presented insurmountable barriers to victims seeking to access remedies in the US through ATS.

Association canadienne contre l'impunité v Anvil Mining is a claim brought in Canada against Anvil Mining relating to its alleged role in facilitating and supporting the military repression of an uprising in the town of Kilwa, DRC, which is located 50 kilometres from Anvil's mining operations.⁶⁶ However, the claim brought against Anvil mining in Canada had no connection with Canada, except that Anvil had an office in Quebec. Accordingly, Anvil had argued that the Court of Quebec lacks jurisdiction to hear the claim. It also alternatively submitted that, if the court concluded that it has jurisdiction over the claim, it should nevertheless decline jurisdiction on the ground of *forum non conveniens*. Hence, the court had to determine whether Anvil's activities from its Quebec office were enough to establish jurisdiction over a claim relating to abuse committed in Congo.

Initially, the Superior Court of Quebec had decided that it has jurisdiction to hear the case. In its analysis, the Court stated that it could exercise jurisdiction as far as the activities that Anvil undertook in Quebec are related to the underlying dispute. This implies that Anvil's activities in Canada do not need to directly cause the underlying dispute for the Court to assert jurisdiction. The Court noted that, as the mining operation in the DRC is the main, if not the only activity of

64 *Nestle USA, Inc v Doe and Others* (n 10).

65 *Kiobel v Royal Dutch Petroleum Co* (n 62) 1669.

66 *Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd* 2011 QCCS, 500-06-000530-101.

Anvil, activities it undertook from its Quebec office is necessarily connected with its mining operation in DRC.⁶⁷ Accordingly, the court concluded that it could assert jurisdiction over a claim brought against Anvil regarding abuse committed in DRC.

However, the decision was later overturned by the Quebec Court of Appeal.⁶⁸ The Court of Appeal stated that although Anvil had an establishment in Quebec, its activities were limited to investor relations, it had nothing to do with the underlying dispute.⁶⁹ According to the analysis of the Quebec Court of Appeal, that Anvil's activities in Canada were related to the dispute is not enough to establish the 'real and substantial connection' test. For the Court Appeal, the 'real and substantial connection' test cannot be satisfied unless Anvil's activities in Canada directly caused the underlying dispute. Hence, according to the Court of Appeal, there was no real and substantial connection since Anvil's Quebec office was not involved in the decision that led to the abuse.⁷⁰ In sum, the narrow interpretation employed by the Court of Appeal restricted victims' access to Canadian courts and to seek remedies.

Indeed, the recent landmark decision of the Supreme Court of Canada on *Nevsun Resources Ltd v Araya* would to some extent open Canadian courts to claims involving overseas human rights abuses of Canadian corporations. This claim was brought against Nevsun Resources Ltd, a mining company headquartered in Vancouver, by Eritrean nationals who alleged that they were indefinitely conscripted under Eritrea's National Service Program into working at the Bisha Mine in Eritrea, 60% of it is owned by Nevsun, where they faced cruel, inhuman, and degrading treatment.⁷¹ As there is no law comparable to ATS in Canada, the claim was brought based on customary international law 'as incorporated into the law of Canada,' and domestic torts of battery and unlawful confinement.⁷²

Nevsun had motioned to strike out the claim on several grounds.⁷³ However, the Supreme Court allowed the claim to proceed by dismissing Nevsun's motion. Particularly important is that the Supreme Court recognised the possibility that corporations could be held liable for violations of human rights norms recognised in customary international law.⁷⁴ This does not, however, mean that the Supreme Court cleared all legal hurdles. First, the Supreme Court did not definitively say that corporations can be held liable for violations of human rights norms recognised in customary international law. Instead, it allowed the case to proceed so that the trial judge could

67 *CAAI v Anvil Mining Ltd* (n 69) para 29.

68 *Anvil Mining Ltd. v Association canadienne contre l'impunité*, [2012] QCCA 117.

69 *Anvil Mining Ltd. v Association canadienne contre l'impunité* (n 68) para 83.

70 *Anvil Mining Ltd. v Association canadienne contre l'impunité* (n 68) para 93.

71 *Araya v Nevsun* (n 8) paras 1-2.

72 *Araya v Nevsun* (n 8) para 42.

73 *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 (CanLII).

74 *Nevsun v Araya* (n 73) para 104-113.

decide on the issue. Second, victims would still face other hurdles, including challenges based on the principle of limited liability.

The situation in the UK is not any different. Indeed, UK Supreme Court recently decided that UK courts could assert jurisdiction over *Lungowe v Vedanta*⁷⁵ and *Okpabi v Shell*.⁷⁶ However, these two cases explain how in exceptional cases that UK courts are open for claims involving overseas human rights abuses. *Lungowe v Vedanta*, for example, is an action brought by Zambian victims against UK-domiciled mining corporation Vedanta Resources Plc (Vedanta) and its Zambian subsidiary Konkola Copper Mines (KCM) regarding environmental pollution committed in Zambia.⁷⁷ According to article 4 of the Brussels Regulation, which still governs the jurisdiction of UK courts regarding cross border cases filed before Brexit, UK courts are competent to adjudicate claims brought against parent companies domiciled within the territory of the UK, regardless of where the abuses had been committed. Accordingly, victims' claims against parent companies face no jurisdictional challenge in both *Lungowe v Vedanta* and *Okpabi v Shell*.

The problem, however, is when victims bring claims against foreign subsidiary companies instead of or in addition to the parent companies, as is the case with *Lungowe v Vedanta* and *Okpabi v Shell*. UK courts cannot exercise jurisdiction over claims brought against foreign subsidiary corporations unless it is a 'necessary or proper party' to the claim brought against a UK-domiciled parent company.⁷⁸ This aims to ensure that related claims are jointly adjudicated so as to avoid conflicting judgments. However, whenever victims attempt to establish jurisdiction through a 'necessary or proper party', defendants often argue that the claim against the parent company in the UK is used as an illegitimate hook to permit action against subsidiary companies to be heard in the UK. In *Lungowe v Vedanta*, for example, defendants argued that the claim brought against the parent company (Vedanta) is illegitimately used as 'a device in order to ensure that the real claim, against KCM, is litigated in the United Kingdom rather than in Zambia'.⁷⁹

Accordingly, claimants need to establish that they have an arguable claim against the parent company and that the subsidiary company is a 'necessary or proper party' to the claim brought against the parent company, which is often difficult to establish at the early stage of the proceeding. Indeed, in *Lungowe v Vedanta* and *Okpabi v Royal Dutch Shell*, the Supreme Court has decided that jurisdiction could be asserted over claims brought against foreign subsidiary companies since claimants managed to establish that they have arguable related claims against the UK domiciled parent company. Save these exceptional cases, UK courts are not open for victims claims brought

75 *Okpabi & others v Royal Dutch Shell Plc and Another* [2021] UKSC 3

76 *Vedanta Resources Plc & Another v Lungowe and Others* [2019] UKSC 20.

77 *Vedanta v Lungowe* (n 76) para 1.

78 *Vedanta v Lungowe* (n 76) para 20.

79 *Vedanta v Lungowe* (n 76) para 51.

against subsidiary companies operating and committing human rights abuses in Africa.

As the preceding discussion explains, jurisdictional barriers are the main legal hurdles that make home states' courts inaccessible or leave Africa victims of corporate human rights abuses without remedy even after long litigations. However, victims also face other legal barriers, including challenges on the ground of the principle limited liability, particularly regarding their claim brought against the parent companies based in home states. These legal barriers coupled with other practical barriers, including high financial cost to travel to attend proceedings, translate documents, and transport witnesses and evidence to another country, render home state remedies highly inaccessible and inconvenient for victims of corporate human rights abuses committed in Africa.

This does not, however, mean that there are no legislative and judicial developments in some jurisdictions that have the purpose and/or effect of facilitating victims' access to home states remedies. The Hague Court of Appeals decision in *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc* is, for instance, an important judicial development in improving the ability of victims', particularly those who are affected by the operation of subsidiary companies in Africa, to seek and obtain remedy from parent companies in home states.⁸⁰ Victims cannot automatically hold parent companies liable for abuses committed by their subsidiary companies because of the principle of limited liability, a corporate law principle recognised in almost all states. One of the ways of circumventing the barrier of the principle of limited liability is bringing claims against parent companies based on breach of the duty of care.

In this case, claimants argued that Royal Dutch Shell (RDS), headquartered in The Hague, Netherlands, failed to take due care to prevent and mitigate oil spill by its subsidiary company, SPDC, in Nigeria.⁸¹ So, the main issue addressed in the judgment is whether RDS owed a duty of care to victims of its subsidiary company, SPDC. By applying Nigerian common law, the law of a state in which a damage occurred, the court decided that RDS owed a duty of care to the victims affected by the Oil spill by its subsidiary company, SPDC.⁸² In effect, by recognising and enforcing parent companies' duty of care, the judgment enabled victims to circumvent the principle of limited liability and claim redress from parent companies.

Particularly notable legislative development is the adoption of the French law on duty of vigilance in 2017.⁸³ Companies falling within the scope of the law are required to conduct due vigilance relating to risks arising not only from their own activities but also the activities of other companies which it directly or indirectly exercises control as well as

80 *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc*, ECLI:NL:GHDHA:2021:132:133.

81 *Milieudefensie v Royal Dutch Shell plc* (n 80) 2.1.

82 *Milieudefensie v Royal Dutch Shell plc* (n 80) 7.24.

83 *Au Devoir de Vigilance* (n 44).

subcontractors and suppliers.⁸⁴ Besides, companies will incur civil liability for human right abuses committed by their activities, subsidiaries and business partners if it is caused or contributed by a breach of the duty of vigilance. This means the law enables victims to hold French based companies, falling within the scope of the law on duty of vigilance, liable for business related human rights abuses committed anywhere in the world, including in Africa, as far as the damage has a causal link with the breach of the duty of vigilance. However, the law is criticised for failing to allow third parties to bring civil actions against the parent companies on behalf of victims. Only the victims themselves have the standing to sue the French based parent companies. This presents a barrier to victims', particularly overseas victims', to access French courts.⁸⁵

5 THE NEED FOR STRENGTHENING DOMESTIC REMEDIES

No doubt that seeking remedies in states within whose territory the abuse has been committed is more convenient and less expensive. Besides, as noted in the EU's intervention in *Kiobel*, '[a]s opposed to 'remote justice', such 'in-country justice' may be more likely to inspire accountability in the afflicted nation, and, where needed, to generate remedial reforms'.⁸⁶ However, despite the inconvenience and the cost involved, victims of corporate human rights committed in Africa will continue to turn to the home states of corporations unless effective remedies are made available in their domestic jurisdictions.⁸⁷ Asked what drives their attempt to hold Shell accountable in the UK, King Emere Godwin Bebe Okpabi, plaintiff in *Okpabi v Royal Dutch Shell* representing the Ogale Community, once told the AFP that 'Shell is Nigeria and Nigeria is Shell ... You can never, never defeat Shell in a Nigerian court. The truth is that the Nigerian legal system is corrupt.'⁸⁸

84 *Au Devoir de Vigilance* (n 44) article 1.

85 S Brabant & E Savourey 'France's corporate duty of vigilance law: a closer look at the penalties faced by companies' (2017) 50 *Revue Internationale De La Compliance Et De L'éthique des Affaires*.

86 'Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party in *Esther Kiobel v Royal Dutch Petroleum co., et al*', 13 June 2012 <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf> (accessed 14 June 2022).

87 JP Mujiyambere 'The status of access to effective remedies by victims of human rights violations committed by multinational corporations in the African Union Member State' (2017) 5 *Groningen Journal of International Law* 255 at 259.

88 'A Nigerian King is taking Shell to court in London over oil pollution' 22 November 2016, <https://www.businessinsider.com/afp-polluted-water-in-hand-nigerian-king-takes-shell-to-court-in-london-2016-11?r=US&IR=T> (accessed 6 July 2022).

It should also be noted that the primary responsibility to prevent and remedy corporate human rights rests on states within whose territory the abuse has been committed.⁸⁹ While home states have an essential role to play, whether they assume obligation with regard to overseas operations of their corporate nationals remains contentious under international human rights law.⁹⁰ The UNGPs, for instance, adopted a position that '[s]tates are not generally required under international human rights law to regulate the extra-territorial activities of business domiciled in their territory or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis'.⁹¹ According to the UNGPs, unless home states take necessary steps to prevent and remedy overseas corporate human rights abuses out of domestic policy considerations, they are not required as a matter of obligation under international human rights law.

Thus, instead of relying on home states remedies, which are proved to be inaccessible in many cases, and whose availability is dependent on states' domestic policy considerations, it is time to look inwards and focus on strengthening domestic remedies. As discussed in section 2, states duty to protect human rights from business activities, including the duty to provide remedy, has been clearly articulated in the Commission's jurisprudence and General Comments. However, no guidance has been provided as to the content of the obligation and how states should discharge their obligation within domestic legal order.

Strengthening domestic remedies depends on a range of practical steps that aim to address the existing deficiencies in implementing the obligation to provide remedy for corporate human rights abuse. In this regard, the UNGPs provides important guidance as to how states can strengthen domestic remedial and accountability mechanisms. The UNGPs, for instance, highlighted that remedy and accountability cannot be effectively provided unless procedural, legal, and other related barriers are removed or reduced. Accordingly, under principle 26, states are called on to 'reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.⁹² It also states that procedural and practical barriers that prevent cases from being brought to the court include, among others, court fees, restrictive standing rules, absence of reasonable accommodation, lack of need-based legal aid, and inadequate options for aggregating claims or

89 It should be noted that international human rights law, as a system underpinned by the Westphalian paradigm, mainly relies on the role of states to protect, respect and ensure rights within their respective territories. In this regard, The Kigali Declaration, the 1st African Union (AU) Ministerial Conference on Human Rights in Africa, also expressly stated that the primary responsibility for the promotion and protection of human rights rests with member states.

90 T Thabane 'Weak extraterritorial remedies: the achilles heel of ruggie's protect, respect and remedy' framework and guiding principles' (2014) 14 *African Human Rights Law Journal* 43 at 50.

91 UNGPs (n 3) Commentary to principle 2.

92 UNGPs (n 3) Principle 26.

enabling representative proceedings (such as class actions and other collective action procedures).⁹³ Addressing these issues are paramount to improve victims' access to remedy considering the uneven levels of legal protection and inequalities in the ability of victims to access justice against corporations.⁹⁴

Besides, states also need to take steps to improve the functioning of judicial and law enforcement mechanisms. One of the main challenges in ensuring corporate remedy and accountability is lack of independent and well-functioning judicial and prosecution mechanisms.⁹⁵ In this regard, the UNGPs reminds states of the need to equip prosecutors and the judiciary with adequate resources, expertise, and other relevant support to meet the obligations to investigate and prosecute individual and business involvement in human rights-related crimes.⁹⁶ It also highlights the need to ensure that corporate accountability and remedy is not prevented by corruption and political pressures from other state agents.⁹⁷ Similarly, the State Reporting Guidelines and Principles relating Extractive Industries also indicates that the obligation to provide remedy 'entails that judicial and non-judicial grievance mechanisms are put in place and that such mechanisms are adequately equipped and resourced for handling cases involving extractive industries'.⁹⁸ One of the recommendations of the Working Group on business and human rights to the African states, following the first African Regional Forum on Business and Human Rights, was also 'to meet their duty to ensure access to effective remedy, through judicial and non-judicial mechanisms, including by addressing barriers to access to justice and strengthening the independence and capacity of the judiciary'.⁹⁹

It is also worth stressing that ensuring a remedy for victims of business-related human right abuses is the primary impetus behind the ongoing effort to adopt a binding treaty on business and human rights. During the first two sessions of Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG),¹⁰⁰ which were dedicated to hold broad discussions on the content and scope of the prospective treaty, the issue of access to remedy was a central theme of

93 UNGPs (n 3) Commentary to principle 26.

94 Report on the First African Regional Forum (n 50) para 32.

95 Study on Extractive Industries (n 14) 44.

96 UNGPs (n 3) Commentary to principle 26.

97 UNGPs (n 3) Commentary to principle 26.

98 Reporting Guidelines (n 14) para 24.

99 Report on the First African Regional Forum (n 50) section X (J).

100 Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Human Rights Council (14 July 2014) /HRC/RES/26/9(2014).

discussion.¹⁰¹ Various provisions that aimed to ensure remedy for business related human rights abuses are included in successive versions, including the latest version, of the draft legally binding treaty.¹⁰² Indeed, whether the ongoing treaty process could yield a viable binding instrument is very much doubted due to the absence of consensus among stakeholders. However, the attention accorded to the issue of access to remedy in the ongoing treaty process could give impetus and guidance for domestic efforts in strengthening remedies for corporate human rights abuses.

6 CONCLUSION

No doubt that home states of corporations have an important role to play in ensuring remedy and accountability for human rights abuses committed in Africa. However, due to various legal and practical barriers, home state remedies have become increasingly inaccessible in recent years. Accordingly, unless state parties to the African Charter translate their obligation in practice and strengthen domestic remedies, victims of corporations will be left without remedy and corporations will continue to operate with impunity. Addressing the existing deficiencies and ensuring remedy and accountability mainly depends on various concerted practical steps at the national level. However, at the regional level, the Commission and other entities should take the lead and accord due attention to corporate remedy and accountability in their works, including in the ongoing work related to the African Union policy framework on business and human rights. This could be done by issuing guidance, including by drawing inspiration from the UNGPs and OHCHR guidance,¹⁰³ as to what practical steps states need to take to implement their obligation and ensure corporate remedy and accountability.

101 About the first and the second session of the OEIGWG, see C Lopez & S Ben 'Negotiating a Treaty on Business and Human Rights: a Review of the First Intergovernmental Session' (2016) 1 *Business and Human Rights Journal* 111–116; C Lopez 'Struggling to take off?: the second session of intergovernmental negotiations on a treaty on business and human rights' (2017) 2 *Business and Human Rights Journal* 365–70.

102 'Third Revised Draft of Legally Binding Instrument to Regulate the Activities of Transnational Corporations and Other Business Enterprise', 17 August 2021 <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (accessed 25 July 2022).

103 Report of the United Nations High Commissioner for Human Rights: Improving accountability and access to remedy for victims of business-related human rights abuse, UN Human Rights Council (10 May 2016) A/HRC/32/19 (2016).