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## A legally-binding instrument on business and human rights: Implications for the right to development in Africa

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**Summary:** *This article examines the relationship between business actors and the implementation of the right to development in Africa. It focuses on the implications of a possible (future) international legally-binding instrument on business and human rights. Although there is no guarantee that such an instrument will eventually be adopted and ratified by states in the near future, the article nevertheless critically examines ways in which the clarification of some issues associated with this process could help revitalise the implementation of the right to development in Africa. It concludes that a legally-binding instrument on business and human rights might elucidate certain contested human rights principles such as international cooperation and assistance; extraterritoriality and accountability, which are central to a meaningful implementation of the right to development on the continent.*

**Key words:** *Africa; transnational corporations and human rights; right to development and accountability; African Charter*

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## 1 Introduction

The UN Declaration on the Right to Development (RTD Declaration) proclaims the right to development as ‘an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised’.<sup>1</sup> Both the content and obligations that flow from the RTD Declaration remain contested although its status as part of the international human rights framework has been reaffirmed at the Vienna World Conference on Human Rights<sup>2</sup> as well as the 2030 Agenda for Sustainable Development.<sup>3</sup> The right to development could be referred to as an umbrella right that amalgamates all other rights and seeks to mainstream human rights principles into development. In its current form, the obligations towards the realisation of the right to development are placed primarily on states thus reinforcing the conservative analysis of international law, which still suggests that states are the only subjects of international law.<sup>4</sup> Within the African regional human rights system, the African Charter on Human and Peoples’ Rights (African Charter) promulgates a legally-binding right to development with corresponding duties<sup>5</sup> and remains ‘one of the precious few hard law guarantees of a [right to development] that currently exist in the realm of international human rights’.<sup>6</sup>

Notwithstanding the clarity that exists within a regional human rights system such as that of Africa on the content of the right to development, international human rights law still lacks certainty regarding the obligations of transnational corporations (TNCs).<sup>7</sup> TNCs

1 Art 1 RTD Declaration adopted by the UN General Assembly on 4 December 1986.

2 Vienna Declaration on Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

3 ‘Transforming our world: The 2030 Agenda for Sustainable Development’ (Gen Ass Res A/RES/70/1) Resolution adopted by the General Assembly on 25 September 2015. See in particular paras 10 and 35.

4 See *inter alia* R McCorquodale *International law beyond the state: Essays on sovereignty, non-state actors and human rights* (2011); C Cutler ‘Critical reflections on the Westphalian assumptions of international law and organisation: A crisis of legitimacy’ in A Bianchi (ed) *Non-state actors and international law* (2009) 19; Opinion of the International Court of Justice *Reparation for injuries suffered in the service of the United Nations* case ICJ Report (1949) 174.

5 Art 22 African Charter on Human and Peoples Rights, adopted 27 June 1981.

6 OC Okafor ‘A regional perspective: Article 22 of the African Charter on Human and Peoples’ Rights’ in OHCHR *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 373.

7 J Klabbers *An introduction to international law* (2010) 51; T Atabongawung ‘New thinking on transnational corporations and human rights: Towards a multi-stakeholder approach’ (2016) 34 *Netherlands Quarterly of Human Rights* 147; M Pentikäinen ‘Changing international “subjectivity” and rights and obligations

as non-state actors profit enormously from economic globalisation in the form of trade liberalisation. The dramatic changes brought about by economic globalisation and advances in communication technology have rendered the state-centric focus of international law increasingly obsolete and have led human rights scholars to call for a 'reimagining' of our conception of the nature of human rights and the relationship between different actors within the human rights regime.<sup>8</sup>

This is because the opportunities presented by globalisation for business actors have consequences on global development and may sometimes result in human rights violations, including the denial of the right to development, especially for those in the global South.

Take, for instance, the recent conviction of Royal Dutch Shell's subsidiary in Nigeria by The Hague Court of Appeals, regarding environmental contamination in Nigeria's Niger Delta region with wider implications on the right to development of the Ogoni peoples.<sup>9</sup> When such events occur, human rights practitioners and scholars are confronted with the fundamental question as to what it means to have an efficient global economy, operating in parallel with a more accountable legal system that ensures social justice for local communities.<sup>10</sup> It is increasingly obvious that the current misalignment between international law and business actors, such as TNCs, 'creates intolerable gaps in the structure of the international normative order' in terms of inclusive human rights accountability and ensuring sustainable development.<sup>11</sup>

In June 2014 the United Nations (UN) Human Rights Council adopted a resolution calling for the creation of an Open-Ended Intergovernmental Working Group to elaborate on the possibility of an international legally-binding instrument on TNCs and other

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under international law: Status of corporations' (2012) 8 *Utrecht Law Review* 154.

- 8 B Andreassen 'Development and the human rights responsibilities of non-state actors' in B Andreassen & S Marks (eds) *Development and human rights: Legal, political and economic dimensions* (2010) 150.
- 9 'Shell loses Dutch court case over Nigeria oil spills' *Bloomberg* 29 January 2021. For more, see <https://www.bloomberg.com/news/articles/2021-01-29/dutch-court-orders-shell-nigeria-to-compensate-for-oil-spills> (accessed 31 January 2021). For reference to the original lawsuit, see *Kiobel v Royal Dutch Petroleum Co* 10-1491 (2013).
- 10 M Monshipouri et al 'Multinational corporations and the ethics of global responsibility: Problems and possibilities' in D Kinley (ed) *Human rights and corporations* (2009) 125.
- 11 K Nowrot *New approaches to the international legal personality of multinational corporations: Towards a rebuttable presumption of normative responsibilities* (2005).

business enterprises with respect to human rights.<sup>12</sup> This momentum is built on previous attempts and initiatives, including the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights (UN Norms);<sup>13</sup> the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises;<sup>14</sup> the UN Global Compact;<sup>15</sup> and the UN Guiding Principles on Business and Human Rights (UN Guiding Principles).<sup>16</sup> The current effort seeks an instrument that legally binds states while imposing direct legal obligations on TNCs with regard to human rights.<sup>17</sup> The initiative is driven by two principal reasons. First, the recognition that the existing soft law instruments in the area of business and human rights, which include the UN Guiding Principles, so far have failed to clarify the most important hurdles – whether or not TNCs indeed can be attributed with human rights responsibilities and be held to account based on existing practice under international law. Second, some commentators maintain a view that most soft law instruments currently in place are fragmented and have failed to commit states to ‘enforce well described set of international norms against transnational corporations and to change their domestic legal orders to comply’.<sup>18</sup> This includes states being duty bound under international law to not only respect human rights but also to protect persons from third party violations, including violations committed by TNCs.

The above notwithstanding, any concerted efforts aimed at regulating corporate human rights conduct can also be observed from at least two perspectives. First, these initiatives reinforce the view that duties to realise human rights can no longer be limited to sovereign states. They must involve all global actors whose actions affect human rights. Second, corporations as economic actors can affect the development capabilities of individuals. It is widely agreed that ‘TNCs and other businesses are central actors in development

12 UN Human Rights Council Resolution A/HRC/26/L.22/Rev.1 (25 June 2014).

13 UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

14 OECD Guidelines for Multinational Enterprises (updated 2011).

15 The UN Global Compact (2000). See also <http://www.unglobalcompact.org/AboutTheGC/> (accessed 20 August 2014).

16 UN Human Rights Council Resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

17 The vote on the matter in the UN Human Rights Council was divisive, with 20 votes for, 14 against and 13 abstentions. It might be worth mentioning that all EU members of the Human Rights Council and the US voted against the Resolution. This may hint at the political confrontations that have marred this process.

18 L Backer ‘And a treaty to bind them all – On prospects and obstacles to moving from the GPs to a multilateral treaty framework: A preliminary assessment’ *Law and the End of the Day* 3 July 2014, <http://lbackerblog.blogspot.nl/2014/07/and-treaty-to-bind-them-all-on-prospects.html> (accessed 2 February 2021).

[although] ... development discourse has only recently manifested concern with the ethics of corporate behaviour and specifically the human rights impact of TNCs in the global economy as “agents of development”<sup>19</sup>. Some scholars also maintain that trade and investment fulfil an important role in alleviating abject poverty from communities.<sup>20</sup>

Evidently, TNCs cannot secure long-term sustainable development when their activities fall short of international human rights standards, including the protection of the right to development for local communities in which they operate. Unlike the economic development construct, the right to development specifically addresses development from the human rights perspective, deviating from the classical gross domestic product (GDP) quantification of development and growth. This may explain why the United Nations Development Programme (UNDP) conceives development as ‘human development’ that is focusing on ‘an environment in which people can develop their full potentials and lead productive, creative lives in accord with their needs and interest’.<sup>21</sup> Similarly, Sengupta has defined the right to development as incorporating a ‘process of development which leads to the realisation of each human right and of all of them together and which has to be carried out in a manner known as rights-based, in accordance with the international human rights standards’.<sup>22</sup> Accordingly, any development process and actors involved therein should be respectful of all human rights and fundamental freedoms, and advance the realisation of human rights for all.

In this article I examine the connection between business actors (particularly TNCs) and the implementation of the right to development in Africa by focusing on the implications of a possible (future) international legally-binding instrument on business and human rights.<sup>23</sup> Although there is no guarantee that such an instrument will eventually be adopted and ratified by states in the near future, I nevertheless critically examine ways in which the clarification of some of the concepts associated with this process could help revitalise the implementation of the right to development in Africa. In so doing, I adumbrate on the relationship between

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19 Andreassen (n 8) 151.

20 W Meyer *Human rights and international political economy in the Third World nations: Multinational corporations, foreign aid and repression* (1998).

21 See UNDP ‘Human Development Report’, <http://hdr.undp.org/en/humandev/> (accessed 1 February 2021).

22 A Sengupta ‘On the theory and practice of the right to development’ (2002) 24 *Human Rights Quarterly* 846.

23 HRC Res 26/9 (26 June 2014).

TNCs and human rights with a particular focus on development. The article considers the peculiarities of TNCs' activities on the right to development in Africa and concludes that a legally-binding instrument on business and human rights might elucidate certain contested human rights concepts such as international cooperation and assistance, extraterritoriality and accountability, which are central to the implementation and realisation of the right to development in Africa.

## 2 Transnational corporations and human rights

Corporations are generally not excluded from international law and remain beneficiaries of rights under specific regimes of international law.<sup>24</sup> In terms of rights, Cassel and Ramasastry have noted that '[c]urrent investment and trade treaties grant corporations both substantive and remedial rights'.<sup>25</sup> These include the right to arbitrate in international investment disputes alongside states.<sup>26</sup> Within the human rights regime, there is jurisprudence from the European Court of Human Rights to suggest that corporations share certain rights with natural persons, such as the right to a fair trial and due process.<sup>27</sup> Nevertheless, these rights have not translated into concrete duties and the question of whether an obligation to realise human rights extends to TNCs still is not sufficiently addressed.

Regarding the question of whether an obligation to realise human rights extends to TNCs, the former UN Independent Expert on the Right to Development has responded affirmatively by indicating that human rights obligations 'fall not only on states nationally and internationally, but [also] on international institutions'.<sup>28</sup> Although the meaning of international institutions is contested, it can nevertheless be understood as implying both formal international organisations, for example, the World Bank, as well as other prominent players, such as non-governmental organisations (NGOs) and TNCs of which the

24 Atabongawung (n 7)

25 D Cassel & A Ramasastry 'Options for a treaty on business and human rights' White Paper prepared for the American Bar Association, Centre for Human Rights and the Law Society of England and Wales, May 2015 6, <http://business-humanrights.org/sites/default/files/documents/whitepaperfinal%20ABA%20LS%206%2022%2015.pdf> (accessed 2 February 2021).

26 Atabongawung (n 7).

27 *Sunday Times v United Kingdom* (Series A No 30) European Court of Human Rights (1979-80) 2 EHRR 245, 26 April 1979. See also W van den Muijsenbergh and S Rezai 'Corporations and the European Convention on Human Rights' presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.

28 'Third Report of the Independent Expert on the Right to Development' UN Doc E/CN.4/2001WG.18/2 para 25.

impact is felt increasingly within the international normative order.<sup>29</sup> TNCs have become powerful global institutions, in part due to their economic and sometimes political power. They are capable of jostling the state for influence on both the domestic and international scenes. In Africa, for example, the delivery of certain public goods and services such as security, education and health, which traditionally were perceived as the sole province of the state, are increasingly being carried out by powerful business actors. A practical example here will include companies that operate in conflict zones and maintain their own private security arrangements, sometimes beyond state oversight. In general, corporations have for a long time exerted influence 'over natural resources, state sovereignty, and [the] national identities of developing countries', and this is seen as a precursor for the establishment by the UN General Assembly in 1974, of the New International Economic Order (NIEO).<sup>30</sup> The UN Resolution establishing the NIEO forms a key contribution to the subsequent adoption of the RTD Declaration.<sup>31</sup> This notwithstanding, the exact nature and scope of corporate obligations towards international human rights, and the right to development in particular, remain a subject of debate, despite the fact that the corporate duty to respect human rights might be grounded in several human rights instruments. Even with this growing understanding of attributing human rights obligations to corporation, its normative content, if not 'coverage is scattered and often indirect and incomplete'.<sup>32</sup>

In general, the human rights responsibility of non-state actors, such as the corporate responsibility to respect human rights, begins with the Universal Declaration of Human Rights (Universal Declaration).<sup>33</sup> The Universal Declaration embodies a variety of rights ranging from political, civil to economic, social and cultural rights while being 'recognised as the foundation for establishing worldwide consensus on a universal jurisprudence of human rights'.<sup>34</sup> Its Preamble states:<sup>35</sup>

[As] a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education

29 J Duffield 'What are international institutions?' (2007) 9 *International Studies Review* 1.

30 UN General Assembly Res 3201 (S-VI) 29 UN GAOR Supp No 1 3, UN Doc A/9559 (1974); UN General Assembly Res 3202 (S-VI), 29 UN GAOR Supp No 1 5, UN Doc A/9559 (1974).

31 R Sarkar *International development law: Rule of law, human rights, and global finance* (2009) 206.

32 Cassel & Ramasastry (n 25) 11.

33 S Joseph *Corporations and transnational human rights obligations* (2004).

34 Sarkar (n 31) 202; for more analysis, see M Mutua 'The ideology of human rights' (1996) 36 *Virginia Journal International Law* 589.

35 See para 8 of the Preamble to the Universal Declaration (my emphasis).

to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

The insertion of *organ of society* into the Preamble to the Universal Declaration is given a broader interpretation as extending human rights duties beyond the state to include other organs and actors that are capable of affecting those rights.<sup>36</sup> Similarly, article 29 states that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'.<sup>37</sup> In the same vein, article 30 imposes a negative duty by stating that '[n]othing in this Declaration may be interpreted as implying for any state, *group* or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.<sup>38</sup> Some human rights treaties offer similar formulations, for example, article 5 of the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> The Committee on the Rights of the Child (CRC Committee) has equally interpreted the UN Convention on the Rights of the Child (CRC) as extending the 'duties and responsibilities to respect children's rights in practice beyond the state and state-controlled services and institutions and apply to private actors and business enterprises'.<sup>40</sup> Accordingly, business actors are increasingly being considered actors capable of affecting human rights both positively and negatively.<sup>41</sup>

The UN Guiding Principles – though not a legally-binding instrument – have also elaborated on the 'corporate responsibility to respect human rights'.<sup>42</sup> In particular, Ruggie has noted that 'there are few if any internationally recognised rights [that] business cannot impact – or be perceived to impact – in some manner'<sup>43</sup> and '[b]ecause business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, their

36 L Henkin 'The Universal Declaration at 50 and the challenge of global markets' (1999) 25 *Brooklyn Journal of International Law* 17; S Ratner 'Corporations and human rights: A theory of legal responsibility' in D Kinley (ed) *Human rights and corporations* (2009) 257.

37 Art 29(1) Universal Declaration.

38 Art 30 Universal Declaration.

39 International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966.

40 CRC Committee General Comment 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights para 8.

41 D Leipziger *The corporate responsibility code book* (2010) 135.

42 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, respect and remedy" framework', <https://digitallibrary.un.org/record/705860?ln=en> (accessed 2 February 2021).

43 J Ruggie 'Protect, respect and remedy: A framework for business and human rights' UN Doc A/HRC/8/5, 7 April 2008 para 2.

responsibility to respect applies to all such rights'.<sup>44</sup> It is in this respect that Alston has argued that

[a]n international human rights regime which is not capable of effectively addressing situations in which powerful corporate actors are involved in major human rights violations, or ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues.<sup>45</sup>

The UN Human Rights Council, while endorsing the Guiding Principles on Business and Human Rights, calls 'upon all business enterprises to meet their responsibility to respect human rights in accordance with the Guiding Principles'.<sup>46</sup> At the same time, the current disagreement among states regarding the need for a legally-binding instrument on business and human rights does not so much involve the substance but rather a manifestation of decades-long ideological divides. As De Schutter has noted:<sup>47</sup>

The gap between the states supporting the proposal by Ecuador and South Africa and the other states – including all industrialised countries who are members of the OECD (Organisation for Economic Co-operation and Development) club – is less wide than the voting patterns seem to suggest. The suspicion towards the Ecuador-South Africa proposal is in fact largely a matter of perception, to be explained by the connotation attached to the initiative. Many see this proposal as an attempt to reopen a battle fought during the 1970s, when the regulation of transnational corporations (TNCs) was a major component of the attempts to establish [NIEO], or as a resurrection of the proposal made in 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights for the adoption of a set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (Draft UN Norms).

## 2.1 Business actors and development

The role of business actors as 'vehicles for social development' was accentuated at the World Summit on Social Development at Copenhagen (1995),<sup>48</sup> which 'marked a paradigm shift from

44 Commentary to UN Guiding Principle 12 (n 16).

45 P Alston 'The not-a-cat syndrome: Can the international human rights regime accommodate non-state actors' in P Alston *Non-state actors and human rights* (2005) 19.

46 Human Rights Council 'Human Rights and Transnational Corporations and Other Business Enterprises' A/HRC/Res 26/22 (27 June 2014) (Resolution 26/22) para 6.

47 O de Schutter 'Towards a new treaty on business and human rights' (2015) 1 *Business and Human Rights Journal* 43.

48 At the World Summit for Social Development (WSSD) held in March 1995 in Copenhagen, states represented unanimously agreed on the need to put people

development through aid, to development through trade and investment'.<sup>49</sup> Since then the role of corporations and the private sector as development actors has been increasingly recognised. The contribution of private actors, including business actors, towards the realisation of human rights (and development) is emphasised in several international instruments. For example, the Vienna Declaration and Programme of Action,<sup>50</sup> the High-Level Plenary Meeting of the UN General Assembly on the Millennium Development Goals,<sup>51</sup> and the now adopted 2030 Agenda on Sustainable Development, which incorporates the Sustainable Development Goals (SDGs)<sup>52</sup> reiterate the role of non-state actors in development, while emphasising the need for public-private partnerships in ensuring the full and effective enjoyment of human rights.<sup>53</sup> In particular, the SDGs acknowledge the role of business in development and governance. It

call[s] upon all businesses to apply their creativity and innovation to solving sustainable development challenges ... [and States have pledged to] foster a dynamic and well functioning business sector, while protecting labor rights and environmental and health standards in accordance with relevant international standards and agreements.<sup>54</sup>

A holistic reading of the 2030 Agenda and the SDGs would seem to suggest a bold attempt at placing the future of international development in the hands of business actors alongside states.

The RTD Declaration identifies states as both right bearers and duty holders at the same time. Nonetheless, the Declaration also alludes to the individual's contribution towards the realisation of the right to development. The RTD Declaration calls upon individuals to actively participate in development, both individually and collectively as members of a community.<sup>55</sup> Unlike the interpretation of *organs of society* referred to above in the context of the Universal Declaration, it is difficult to conceptualise the *individual* in this case as encompassing legal entities such as corporations. The RTD Declaration is more explicit on the role of states, which requires that states

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at the centre of development. For more, see <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html> (accessed 26 January 2021).

49 C Dias 'Corporate human rights accountability and the human right to development: The relevance and role of corporate social responsibility' (2011) 4 *NUJS Law Review* 497.

50 Part I, art 13 of Vienna Declaration and Programme of Action (n 2).

51 Para 17 reiterates the role of 'private sector and other relevant stakeholders.

52 Sustainable Development Goals (n 3). See in particular the role of private actors in achieving Goals 8, 9 and 12.

53 As above.

54 Sustainable Development Goals (n 3) para 67.

55 Art 2 RTD Declaration.

[create] national and international conditions favourable to the realisation of the [RTD] ... States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development ... States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development.<sup>56</sup>

The ramification of the above formulation is that the legal and political debates that follow right to development tend to revolve around states with a strong demarcation of ideologies between the developed and less developed countries. Commenting on the need to move beyond the state-centric model and embracing a multi-actor approach for the realisation of right to development, De Feyter has suggested a rethink of the role of TNCs and other actors in the implementation of right to development as one of the possible outcomes of negotiating a Framework Convention on the right to development.<sup>57</sup> Similarly, Vandenbogaerde has noted that 'in order to change the current international order ... it should be possible to hold all relevant international organisations accountable ... [and they] be made legally responsible for implementing the right to development'.<sup>58</sup>

The high-level task force on the implementation of the right to development has examined Millennium Development Goal 8, on the 'global partnership for development',<sup>59</sup> which now features as SDG 17 under the 2030 Sustainable Development Agenda.<sup>60</sup> The criteria it has developed for periodic review of global partnerships from a right to development perspective includes the 'mainstreaming of [RTD] in policies and operational activities of relevant actors at the national, regional and international levels, including multilateral financial, trade and development institutions'<sup>61</sup> which extend to corporations and other business actors. As elucidated by Andreassen, the formulation in the RTD Declaration of states being the 'primary' duty holders in realising the right to development 'indicates that there are "secondary" or "lower order" responsibilities for the implementation of [RTD]'.<sup>62</sup> In particular, some of the core human

<sup>56</sup> Arts 3 & 4 RTD Declaration.

<sup>57</sup> Discussion on a Framework Convention on RTD (Roundtable THIG) 27 May 2015).

<sup>58</sup> A Vandenbogaerde 'The right to development in international human rights law: A call for its dissolution' (2013) 31 *Netherlands Quarterly of Human Rights* 187 (footnote omitted).

<sup>59</sup> The HLTF on the implementation of the RTD had a mandate from 2004-2010, and comprised of five independent experts from distinct geographical regions.

<sup>60</sup> Goal 17 calls for 'strengthen[ing] the means of implementation and revitalise the Global Partnership for Sustainable Development'.

<sup>61</sup> 'Background report submitted by the United Nations High Commissioner for Human Rights' UN Doc A/HRC/SF/2011/2, 25 July 2011 para 8.

<sup>62</sup> Andreassen (n 8) 157-158.

rights principles, such as participation and self-determination, which the right to development seeks to protect, can be violated by TNCs in the course of doing business. As pointed out elsewhere, corporations can violate these human rights either directly or as accomplices to the state.<sup>63</sup> Self-determination and participation are mutually reinforcing in this context and speak to the central idea that locals must be given a right to participate in the design and implementation of any development agenda that affects them. This has been a noteworthy factor in some of the complaints that have appeared in the African regional human rights system in respect of TNCs' violation of human rights, to which I now turn.

## 2.2 Transnational corporations and the right to development in Africa

Recent litigations around the globe have shown that business violations of human rights form a significant proportion of right to development infringement on the African continent. For example, in the Democratic Republic of the Congo (DRC) alone, more than 80 multinational corporations from around the globe have been implicated in the illegal exploitation of natural resources, forced labour, and the distribution of weapons to different armed groups.<sup>64</sup> Corporate greed continues to be detrimental to the realisation of the right to development for these communities. The sheer volume of cases that have sprouted globally in the realm of corporate violation of human rights are linked to the African continent considering that 'African countries contain more than half of the world resources [such as] cobalt, manganese, gold and significant supplies of platinum, uranium and oil'.<sup>65</sup> These resources are mostly situated in territories deemed indigenous. Indigenous communities, in particular, continue to face legal challenges in the struggle against the increasing encroachment from foreign investors, especially those in the extractive resource sector.

Mujyambere has observed that

63 T Atabongawung 'Corporate complicity for human rights violations in Africa post-Kiobel case' in J Cernic & Tara van Ho (eds) *Human rights and business: Direct corporate accountability for human rights* (2015) 447.

64 N Gotzman *Legal personality of the corporation and international criminal law: Globalisation, corporates human rights abuses and the Rome Statute* (2008) 39.

65 The institute of West-Asia and Africa Studies of the Chinese Academy of Social Sciences and John Kennedy School of Government, Harvard University, M Forstater et al 'Corporate responsibility in African development' October 2010 9, [sites.hks.harvard.edu/mrcbg/CSRI/publications/workingpaper\\_60.pdf](http://sites.hks.harvard.edu/mrcbg/CSRI/publications/workingpaper_60.pdf) (accessed 2 February 2021).

the lack of redress regarding human rights abuses committed by TNCs in [Africa] has become a major concern. There are many TNCs that stand accused of involvement in human rights abuses [in Africa] and yet their victims still face many barriers to access effective remedies.<sup>66</sup>

The current economic race to the bottom<sup>67</sup> makes African states less inclined to any stringent forms of corporate regulation partly due to the desire to attract direct foreign investments.<sup>68</sup> Relatedly, some domestic courts are equally hesitant at using their remedial power to enforcing violations of economic and social rights, including the right to development. For example, in the case of South Africa, Ngang has attributed this hesitancy on the part of domestic courts to some inclination towards upholding the separation of powers doctrine in a constitutional democracy.<sup>69</sup> Whatever the justification, the reality is that most victims of corporate human rights violations in Africa can mostly rely on forum shopping in other jurisdictions (sometimes beyond Africa) for seeking justice. Some high-profile cases emanating from Africa have been litigated in the United States under the Alien Tort Claim Act (1789),<sup>70</sup> as well as in the United Kingdom and The Netherlands.<sup>71</sup>

As noted earlier, the African Charter promulgates a legally-binding right to development with corresponding duties as follows:<sup>72</sup>

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind ... States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

66 JP Mujiyambere 'The status of access to effective remedies by victims of human rights violations committed by multinational corporations in the African Union member states' (2017) 5 *Groningen Journal of International Law* 256.

67 'Race to the bottom' reveals that some MNCs tend to invest in countries where there is less regulation, and for states to be at a competitive advantage over one another, provide such incentives, with detrimental effects on human rights (workers' rights) and environment. For more, see W Olney 'A race to the bottom? Employment protection and foreign direct investment' Draft Paper July 2012.

68 D Graham & N Woods 'Making corporate self-regulation Effective in developing countries' (2006) 34 *World Development* 869.

69 C Ngang 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take "other measures"' (2014) 14 *African Human Rights Law Journal* 664-667.

70 The Alien Tort Claim Act enacted in 1789 as part of the first Judiciary Act provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations'. For more background, see E Young 'Universal jurisdiction, the Alien Tort Statute, and transnational public law litigation after *Kiobel*' (2015) 64 *Duke Law Journal* 1023.

71 *Kiobel v Royal Dutch Petroleum Co* [2013] 569 US 108; *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe* [2019] UKSC 20; and *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.

72 Art 22 African Charter.

The African Commission on Human and Peoples' Rights (African Commission) has ruled on cases concerning the right to development with business links, for instance, in the case brought before the African Commission by the Social and Economic Rights Action Centre (SERAC) concerning environmental degradation and health concerns resulting from the contamination of the environment in the Niger Delta region of Nigeria.<sup>73</sup> SERAC and the ESCR Committee alleged that the contaminations resulted from oil production by a consortium jointly owned by the state oil company, the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC), which is a local subsidiary of the Royal Dutch Shell plc.<sup>74</sup> This case involved several alleged violations of the African Charter, including article 21 on free disposition of wealth and natural resources in the exclusive interest of the people, read together with articles 22 and 24 of the African Charter. In granting its decision against the Nigerian government, the African Commission did not directly attribute any human rights responsibility to the corporations involved but stated that 'the state is obliged to protect right-holders against other subjects' including business actors.<sup>75</sup> Some have suggested that the reason for the African Commission not discussing the 'direct' human rights responsibilities of corporations in this case probably is the lack of substantive jurisprudence in the area of direct corporate accountability for the violation of any specific category of human rights.<sup>76</sup> Nevertheless, others have noted the direct responsibility of Royal Dutch Shell plc in these violations,<sup>77</sup> and in a recent judgment of 29 January 2021 a Dutch Court of Appeals in The Hague did find Royal Dutch Shell plc, Nigeria's subsidiary, liable for this environmental contamination as well as the related human rights violations associated therewith.<sup>78</sup>

73 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (SERAC).

74 As above.

75 SERAC (n 73) para 46.

76 O Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 910.

77 O Amao 'The African regional human rights system and multinational corporations: Strengthening the host state responsibility for control of multinational corporations' (2008) 12 *International Journal for Human Rights* 771.

78 In its final judgments, 'the court ... assessed the claims substantively under Nigerian law ... and found Shell Nigeria is therefore liable for the damage resulting from the leakage of those pipelines'. Equally, 'the court finds that Shell should build in a better warning system in the Oruma pipeline, so that future leaks are detected sooner. Then the outflow of oil in the event of a leak, and thus the (environmental) damage, can be limited. This obligation is imposed on both Shell Nigeria and the Shell parent company.' For more, see <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liable-for-oil-spills-in-Nigeria.aspx> (accessed 1 February 2021).

The above case illustrates that corporate responsibility towards the right to development lies at the core of the discourse on business accountability for human rights. Dias has identified two tasks that are vital if the right to development is not to be relegated to the dustbin of history. These include the fact that '[c]orporations must be held fully, and expeditiously accountable for all of the adverse human rights impacts that result from their activities and conduct [and secondly] communities affected by the activities of corporations must have all of their human rights fully respected, protected, promoted, and fulfilled'.<sup>79</sup>

The ongoing negotiations in Geneva concerning a possible international legally-binding instrument on TNCs and human rights seem to incorporate some of these concerns. If such an initiative succeeds notwithstanding the political sensitivities that have marred previous attempts, it could be beneficial for the revitalisation of the right to development in many ways, especially its implementation by clarifying certain contested human rights principles such as extraterritoriality, as well as the range of accountability for the different actors. The current draft of the legally-binding instrument allows for cases to be filed in a wide range of jurisdictions, including any country where an act or omission contributing to the human rights abuse occurred, and against individuals who are not domiciled in a jurisdiction if the claim is connected to an individual who is domiciled there.<sup>80</sup> Equally, the draft document emphasises accountability and access to remedies that are central to the right to development discourse.

### 3 Legally-binding instrument on business and human rights

Since June 2014 there have been concerted international efforts toward the drafting of a legally-binding instrument on business and human rights (legally-binding instrument). This follows the adoption of Human Rights Council Resolution 26/9, which was co-sponsored by Ecuador and South Africa on exploring the possibility of an international legally-binding instrument to regulate TNCs and other business enterprises with respect to human rights.<sup>81</sup> Currently in its second draft, this instrument seeks:

<sup>79</sup> Dias (n 49) 513 (footnote omitted).

<sup>80</sup> <https://www.lexology.com/library/detail.aspx?g=d3c49d62-8e05-4bf6-82be-3819ef4d33f6> (accessed 4 January 2021).

<sup>81</sup> HRC Res 26/9 of 26 June 2014.

- (a) to clarify and facilitate effective implementation of the obligation of states to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard;
- (b) to prevent the occurrence of human rights abuses in the context of business activities;
- (c) to ensure access to justice and effective remedy for victims of human rights abuses in the context of such business activities; and
- (d) to facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses in the context of business activities and provide access to justice and effective remedy to victims of such abuses.<sup>82</sup>

As in the case of most human rights instruments, the proposed legally-binding instrument is bound to face enforcement as well as compliance challenges even when fully ratified by states. This is partly attributable to the fact that the human rights system is 'designed with significantly limited enforcement capacity'<sup>83</sup> and a proliferation of new human rights instruments as such is no guarantee for universal adherence. Nonetheless, a monumental shift brought about by the current draft legally-binding instrument is in its expansive understanding of corporate human rights accountability as well as the range of business actors included in the process. It specifically takes notice of the RTD Declaration as one of its guiding human rights frameworks.<sup>84</sup> The draft instrument, whenever adopted, certainly will be opened for ratification by states. Accordingly, it shall be binding on state parties while at the same time defining a set of legal standards 'apply[ing] to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character'.<sup>85</sup> While reinstating the current international human rights standards, the legally-binding instrument reminds states of their primary duty to

[r]egulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction. For this purpose states shall take all necessary legal and policy measures to ensure that business enterprises ... within their territory or jurisdiction, or otherwise under their control, respect all internationally recognised human rights and prevent and mitigate human rights abuses throughout their operations.<sup>86</sup>

<sup>82</sup> Art 2 legally-binding instrument.

<sup>83</sup> D Donoho 'Human rights enforcement in the twenty-first century' (2007) 35 *Georgia Journal of International and Comparative Law* 5.

<sup>84</sup> See para 4 legally-binding instrument.

<sup>85</sup> Art 3(1) legally-binding instrument.

<sup>86</sup> Art 6(1).

Under the proposed framework, business actors are under a duty to exercise human rights due diligence procedures as well as measures to prevent and mitigate other human rights and environmental impacts of their activities. In terms of granting access to remedy, the draft instrument specifically calls on both home and host states to ensure access to adjudicative remedies and to eliminate all forms of procedural hurdles such as *forum non conveniens*,<sup>87</sup> which remains a significant hurdle for most plaintiffs seeking compensation for a corporate violation for human rights.

The most impactful elements of this proposed legally-binding instrument (from a right to development perspective) involve adjudicative accountability, mutual legal assistance and international cooperation as well as its extraterritorial scope. As Arts and Atabongawung have argued elsewhere, these are essential concepts necessary for the revitalisation of the right to development in international law.<sup>88</sup> In what follows, I will adumbrate on how these principles are particularly consequential in the African context as it pertains to the implementation of the right to development.

### 3.1 International cooperation

The duty to cooperate has a long-standing history in international law and features prominently in several human rights treaty regimes. In particular, the International Covenant on Economic, Social and Cultural Rights (ICESCR) calls on states to ‘take steps, individually and through international assistance and cooperation, especially economic and technical’<sup>89</sup> to realise the Covenant. Since then several legally-binding instruments have re-emphasised international cooperation and assistance. For example, the Convention on the Rights of Persons with Disabilities (CRPD) is among some of the most recent to recognise the principle.<sup>90</sup> The normative content of the duty to cooperate can further be found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

87 See specifically arts 9 and 10 above.

88 K Arts & T Atabongawung ‘The right to development in international law: New momentum thirty years down the line?’ (2016) 63 *Netherlands International Law Review* 221.

89 See arts 11 and 15 of the International Covenant on Economic, Social and Cultural Rights, art 2(1), adopted 16 December 1966, entry into force 3 January 1976, with 164 state parties on 1 July 2016 according to <https://treaties.un.org> (accessed 3 February 2021).

90 See art 32 of the Convention on the Rights of Persons with Disabilities, signed on 13 December 2006, entered into force 3 May 2008, 2515 UNTS 3. Art 32 ‘recognise[s] the importance of international co-operation and its promotion, in support of national efforts for the realisation of the purpose and objectives of the present Convention’ and ‘undertake[s] appropriate and effective measures in this regard’.

or Punishment (CAT),<sup>91</sup> which calls on state parties to provide each other ‘the greatest measure of assistance in connection with criminal proceedings ... and the supply of all evidence at their disposal necessary for the proceedings’.<sup>92</sup> Other similar clauses containing international cooperation and assistance can be found in the International Convention for the Protection of all Persons from Enforced Disappearance.<sup>93</sup> Equally, article 4 of the Convention on the Rights of the Child (CRC),<sup>94</sup> read together with the first two Optional Protocols to the Convention on the Rights of the Child, oblige states to cooperate to prevent and punish the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict. They also require states to assist victims and, if they are in a position to do so, to provide financial and technical assistance for these purposes.<sup>95</sup>

There also is a growing understanding that

states must cooperate to ensure that non-state actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-state actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.<sup>96</sup>

The different treaty bodies through their General Comments have further elucidated and emphasised the instrumentality of international cooperation towards the realisation of human rights. As noted elsewhere,

[s]ince 1989, the Committee on Economic, Social and Cultural Rights has adopted more than 23 [General Comments]. Only four of these lack references to international cooperation/assistance ... while the Committee on the Rights of the Child has issued over 17 General

91 Art 9(1) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment signed on 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.

92 As above.

93 Art 15 International Convention for the Protection of all Persons from Enforced Disappearance, signed on 20 December 2006, entered into force on 23 December 2010 2716 UNTS 3.

94 UN Convention on the Rights of the Child, adopted on 20 November 1989, entered into force September 1990. The Convention has over 196 state parties as at February 2021 according to <https://treaties.un.org> (accessed 3 February 2021).

95 Art 10 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227; art 7 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2173 UNTS 222.

96 See, in particular, Principle 27 of the Maastricht Principles on Extraterritorial Obligation of States in the Area of Economic, Social and Cultural Rights, adopted on 28 September 2011. For more, see [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUId%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23) (accessed 21 February 2021).

Comments. All except two of these refer (succinctly or elaborately) to international cooperation and/or assistance.<sup>97</sup>

The draft legally-binding instrument has gone a step further in reaffirming not only the importance of international cooperation in achieving human rights,<sup>98</sup> but also the duty of state parties to offer mutual legal assistance and international judicial cooperation.<sup>99</sup> De Schutter has identified '[t]he lack of effective cooperation between the different states across which ... corporations operate ... as a major source of impunity in this area'.<sup>100</sup> Accordingly, states are called upon to 'cooperate in good faith to enable the implementation of their obligations recognised under this (legally-binding instrument) and the fulfilment of the purposes of this (legally-binding instrument)'. Furthermore, they

recognise the importance of international cooperation, including financial and technical assistance and capacity building, for the realisation of the purpose of the present (legally-binding instrument) and will undertake appropriate and effective measures in this regard, between and among states and, as appropriate, in partnership with relevant international and regional organisations and civil society.

The measures imposed on States for the realisation range from

promoting effective technical cooperation and capacity-building ... [to] raising awareness about the rights of victims of business-related human rights abuses and the obligations of states ... [equally] facilitating cooperation in research and studies on the challenges, good practices and experiences in preventing human rights abuses in the context of business activities, including those of a transnational character; [not excluding their duty to contribute] within their available resources, to the International Fund for Victims.<sup>101</sup>

Unlike other instruments mentioned earlier, the draft legally-binding instrument goes a step further in elaborating a legal duty of state parties to request and provide mutual legal assistance. The provision dealing with mutual legal assistance is the most detailed of all its articles and offers a break through on one of the most important hurdles that human rights victims in Africa have to confront. Too often allegations of corporate violation of the right to development in Africa are complex and with limited resources on the side of host states, and these allegations usually are not properly investigated or prosecuted. A clear case in point involves allegations brought against the Canadian-owned corporation Anvil Mining operating in

97 Arts & Atabongawung (n 88) 21.

98 Art 13 legally-binding instrument.

99 Art 12 legally-binding instrument.

100 De Schutter (n 47) 63.

101 Art 13 legally-binding instrument.

the DRC. The allegations documented in the UN Report involving this company included the killing of more than 100 civilians, torture, rape, widespread looting, extortions of civilians' properties and arbitrary detentions.<sup>102</sup> Despite proceedings initiated in both the DRC (host state) and Canada (home state), these litigations were dismissed as 'inadmissible'<sup>103</sup> and a lack of forum, respectively.<sup>104</sup> Accordingly, the draft legally-binding instrument expands on judicial cooperation from civil to criminal litigation as including 'the gathering of evidence, [p]roviding information, evidentiary items and expert evaluations'<sup>105</sup> and other forms of documentary evidence. The provision also emphasises cooperation in ensuring the protection and assistance of 'victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to international legal requirements, including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment'.<sup>106</sup> At the level of enforcement, states are called upon to consider

any judgement of a court having jurisdiction in accordance with this legally-binding instrument which is enforceable in the state of origin of the judgement and is not subject to any appeal or review shall be recognised and enforced in any State Party as soon as the formalities required in that State Party have been completed.<sup>107</sup>

African states are already duty-bound to realise the right to development under the African Charter, As observed earlier, the African Charter remains the only international or regional human rights instrument that legally binds states on the right to development. Thus, assuming that many African states, led by South Africa, are in favour of a legally-binding instrument on business and human rights<sup>108</sup> and are committed to its ratification, one can rashly presume

102 United Nations Missions in the Democratic Republic of Congo (MONUSCO) Report on the Conclusions of the Special Investigation Concerning Allegations of Summary Executions and Other Human Rights Violations Perpetrated by Armed Forces of the Democratic Republic of Congo (FARDC) in Kilwa, Katanga Province of 15 October 2004, 23 September 2005, [raid-uk.org/sites/default/files/monuc-final-report.pdf](http://raid-uk.org/sites/default/files/monuc-final-report.pdf) (accessed 3 February 2021).

103 Global Witness 'Military Court of Appeal succumbs to political interference in Kilwa trial in 21 December 2007', [globalwitness.org/en/archive/military-court-appeal-succumbs-political-interferencekilwa-trial/](http://globalwitness.org/en/archive/military-court-appeal-succumbs-political-interferencekilwa-trial/) (accessed 3 February 2021).

104 J Mujiyambere 'The status of access to effective remedies by victims of human rights violations committed by multinational corporations in the African Union member states' (2017) 5 *Groningen Journal of International Law* 262.

105 Art 12(3) legally-binding instrument.

106 As above.

107 Art 12(8) legally-binding instrument.

108 Many African states, including other emerging economies, regard corporate human rights immunity as an example of capitalism excesses resulting from the neo-liberal economic agenda. Thus, some have argued that the current support for a binding instrument is a 'response to the failure of neo-liberal politics that have dominated the practice of politics and law since the emergence of this

that these efforts will help concretise current regional efforts. The jurisprudence emerging from the African human rights system on the right to development has emphasised the need for international cooperation among states in achieving the right to development. In particular, the African Commission in the case of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*<sup>109</sup> noted that

[t]he deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the [RTD], guaranteed under article 22 of the African Charter.<sup>110</sup>

Thus, it is evident that by reinstating the duty for states to cooperate in the realm of corporate accountability for human rights, it adds another layer of concretisation and fills an important gap in the current debate on human rights accountability. It will be instrumental in the revitalisation of the right to development in Africa, especially as the instrument targets both states and non-state actors (businesses).

### 3.2 Extraterritoriality

In the context of business and human rights, extraterritorial obligations are thought to

arise when a state party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.<sup>111</sup>

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debate in its current form in the 1970s'. For more, see S Khoury & D Whyte *Corporate human rights violations: Global prospects for legal action* (2017).

109 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003); *DR Congo v Burundi, Rwanda and Uganda* decided at the 33rd ordinary session, May 2003, 20th Activity Report. In this case the DRC alleged grave and massive violations of human and peoples' rights committed by the armed forces of these three respondent countries in the Congolese provinces where there had been rebel activities since 2 August 1998, and for which the DRC blames Burundi, Uganda and Rwanda. For more context, see OO Oduwole 'International law and the right to development: A pragmatic approach for Africa' inaugural lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015 delivered on 20 May 2014 at the International Institute of Social Studies, The Hague, The Netherlands 15.

110 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (n 109) para 95.

111 General Comment 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, adopted by the Committee on Economic, Social and Cultural Rights at its 61st session (29 May-23 June 2017) para 28.

There have been growing calls within the UN treaty bodies for states to 'take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, or that have their main seat or their main place of business under their jurisdiction'<sup>112</sup> The Committee on Economic, Social and Cultural Rights (ESCR Committee) has persistently noted that states' obligations under ICESCR does not stop at their territorial borders and, as a result,

states parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.<sup>113</sup>

In the past, the ESCR Committee has expounded on this extraterritorial application by addressing specific extraterritorial obligations of state parties concerning business activities [in its] General Comments relating to the right to water,<sup>114</sup> the right to work,<sup>115</sup> the right to social security,<sup>116</sup> and the right to just and favourable conditions of work,<sup>117</sup> as well as in its examination of states' periodic reports.<sup>118</sup>

While the above formulation of extraterritoriality may seem controversial at first sight considering that sovereignty and territoriality principles are fundamental to international law,<sup>119</sup> the ESCR Committee nevertheless has clarified that it is

consistent with the admissible scope of jurisdiction under general international law, [that] states may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.<sup>120</sup>

Accordingly, the 'competence of the state to regulate the conduct of its nationals abroad is well established under international law,

<sup>112</sup> De Schutter (n 47) 45.

<sup>113</sup> See 'Statement on the obligations of states parties regarding the corporate sector and economic, social and cultural rights' (E/C.12/2011/1), adopted by the Committee on Economic, Social and Cultural Rights at its 46th session, in particular paras 5 & 6.

<sup>114</sup> See General Comment 15 paras 31 & 33.

<sup>115</sup> See General Comment 18 para 52.

<sup>116</sup> General Comment 19 para 54.

<sup>117</sup> General Comment 23 para 70.

<sup>118</sup> For more, see General Comment 24, in particular para 26.

<sup>119</sup> H King 'The extraterritorial obligations of states' (2009) 9 *Human Rights Law Review* 521.

<sup>120</sup> General Comment 24 para 32.

which in this regard refers to the principle of active personality'.<sup>121</sup> The American Law Institute's Third Restatement on Foreign Relations Law affirms extraterritorial regulation of corporations 'on the basis that they are owned or controlled by nationals of the regulating state'.<sup>122</sup> This understanding is further clarified under the Maastricht Principles on the Extraterritorial Obligations of States (Maastricht Principles).<sup>123</sup> Although not a binding instrument, the Maastricht Principles, aimed at clarifying states' duties towards a violation of human rights outside of their own territorial borders, remain 'an important point of reference both for civil society and international human rights bodies'.<sup>124</sup>

The legally-binding instrument incorporates the extraterritorial obligations of states under article 9 dealing with 'adjudicative jurisdiction'.<sup>125</sup> In particular, it recognises:

Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under [the legally-binding instrument], shall vest in the courts of the state where:

- (a) the human rights abuse occurred;
- (b) an act or omission contributing to the human rights abuse occurred; or
- (c) the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.<sup>126</sup>

Extraterritoriality (especially adjudicative) is timely for many human rights victims in Africa considering that the lack of local enforcement mechanisms has typically led to 'forum shopping', which itself encounters different obstacles, including *forum non conveniens*. Most cases emanating from Africa have gained public awareness not because of the efforts of local law enforcement in their host states but rather the fact that victims have been able to form coalitions with powerful NGOs to explore extraterritorial adjudication. The recent judgment of the Dutch Court of Appeals in The Hague, cited above, is a clear example of how extraterritorial adjudication can be beneficial for victims in Africa. This case, spanning more than a decade, involved four Nigerian farmers and Friends of the Earth

<sup>121</sup> De Schutter (n 47) 46.

<sup>122</sup> Restatement (Third) of the Foreign Relations of the United States, § 414.

<sup>123</sup> Maastricht Principles (n 96).

<sup>124</sup> <https://www.etoconsortium.org/en/main-navigation/our-work/what-are-etos/> (accessed 20 January 2021).

<sup>125</sup> Art 9 Draft Instrument.

<sup>126</sup> Art 9(1) legally-binding instrument.

Netherlands as plaintiffs.<sup>127</sup> In a related case (*Okpabi & Others v Royal Dutch Shell Plc*) the United Kingdom Supreme Court has allowed proceedings and asserted jurisdiction over the tort claim brought by the plaintiff against the defendants in the UK.<sup>128</sup> This follows the same Court's previous judgment in a similar litigation from a group of Zambian citizens regarding toxic emissions from the Nchanga copper mine in Zambia.<sup>129</sup> Accordingly, these recent developments may bring hope to human rights victims of the potential use of extraterritorial adjudication, although it remains to be seen which other jurisdictions will follow suit.

However, there are still thousands of victims across Africa that are not able to benefit from these coalitions, worse still, not able to dismantle the current hurdles associated with *forum non conveniens*. To this effect, the draft legally-binding instrument specifically notes that '[w]here victims choose to bring a claim in a court as per article 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of *forum non conveniens*'.<sup>130</sup> By so doing, the draft legally-binding instrument notes that

all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another state where ... the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights ... is domiciled.<sup>131</sup>

### 3.3 Accountability

In arguing for a new momentum towards the implementation of the right to development under international law, Arts and Atabongawung have noted that a 'vital element in pushing for more implementation action concerning the RTD is that of assigning more concrete responsibilities to both rights holders and duty bearers'.<sup>132</sup> The responsibility of states towards the implementation or realisation of the right to development is not so contested despite the political and ideological wrangling that persists between northern and

127 <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechthoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liaable-for-oil-spills-in-Nigeria.aspx> (accessed 1 February 2021).

128 *Okpabi & Others v Royal Dutch Shell Plc* [2021] UKSC 3, UK Supreme Court judgment, <https://www.supremecourt.uk/press-summary/uksc-2018-0068.html> (accessed 22 March 2021).

129 *Vedanta Resources PLC & Another v Lungowe & Others* [2019] UKSC 20.

130 Art 9(4) legally-binding instrument.

131 As above.

132 Arts & Atabongawung (n 88) 22.

southern states with respect to the legal binding nature of those duties. In the African regional human rights system, the duties imposed on states are pretty clear but, most importantly, these duties are legally binding.<sup>133</sup> Nevertheless, and as noted earlier, the African Charter, like most human rights instruments, is silent on the responsibility of non-state actors such as corporations despite being the only human rights instrument to forcefully pronounce on both the 'rights and duties' of man.<sup>134</sup>

The African Commission in rendering its decisions (communications) on the right to development has been very careful in maintaining a state-centric interpretation of human rights law – that is, states being the primary duty holders. As discussed earlier, some have noted that a failure by the African Commission in the *SERAC* case to attribute direct human rights responsibility to Royal Dutch Shell plc was mostly guided by the Commission's perception of the lack of substantive jurisprudence in the area of direct corporate accountability for the violation of any specific category of human rights.<sup>135</sup>

The right to development is simply unachievable without an inclusive accountability – that is, the identification of all actors involved in the process of globalisation who can impact this right. Thus, a need to move beyond the state-centric model and embracing a multi-actor approach for the realisation of the right to development or, what De Feyter has suggested, as a rethink of the role of TNCs and other actors in the implementation of the right to development,<sup>136</sup> thus making it 'possible to hold all relevant international organisations accountable ... [and] be made legally responsible for implementing [RTD]'.<sup>137</sup> Inclusive accountability remains crucial for the implementation of the right to development. Lamenting on this point, Dias has identified two tasks that are vital if the right to development is not to be relegated to the dustbin of history. These include the fact that

[c]orporations must be held fully, and expeditiously accountable for all of the adverse human rights impacts that result from their activities and conduct [and secondly] communities affected by the activities

133 Art 22 African Charter.

134 As above.

135 O Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 910.

136 Discussion on a Framework Convention on the Right to Development (Roundtable THIG), 27 May 2015).

137 Vandenbogaerde (n 58).

of corporations must have all of their human rights fully respected, protected, promoted, and fulfilled.<sup>138</sup>

By identifying corporations as potential violators of human rights and the setting up of what is presumed to be a monitoring mechanism similar to the Special Procedures of the Human Rights Council, the legally-binding instrument on business and human rights seeks to clarify at least some of the above concerns. Article 2 of the draft legally-binding instrument identifies as one of its purposes to 'clarify and facilitate effective implementation of the obligation of states to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard'.<sup>139</sup> In addition to that, article 3 stipulates that the draft legally-binding instrument 'shall apply to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character'.<sup>140</sup> In addition, it 'shall cover all internationally recognised human rights and fundamental freedoms emanating from the [Universal Declaration], any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law'.<sup>141</sup> Even more meaningful is the fact that the draft legally-binding instrument in paragraph 4 of its Preamble clearly refers to the RTD Declaration as one of these instruments.<sup>142</sup>

It is acknowledged that

all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights, environmental and health standards in accordance with relevant international standards and agreements.<sup>143</sup>

More specifically, it affirms

that all business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships.<sup>144</sup>

138 Dias (n 49) 513 (footnote omitted).

139 Art 2 legally-binding instrument.

140 Art 3 legally-binding instrument.

141 As above.

142 Para 4 Preamble, legally-binding instrument.

143 Para 12 Preamble, legally-binding instrument.

144 Para 13 Preamble, legally-binding instrument.

If states were to adopt and ratify the legally-binding instrument, it will fill an important gap in the current jurisprudence on the right to development in Africa by extending accountability to business actors. As noted above, the impact of business activity on communities across Africa is enormous – something which the draft legally-binding instrument reaffirms by '[r]ecognising the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples ... and other persons in vulnerable situations'.<sup>145</sup> It will make it normative and provide a legal guide for communities affected by business activities in Africa to have certainty when bringing such litigations before the African Court on Human and Peoples' Rights (African Court), the African Commission and elsewhere. In the past, both the African Court and the African Commission have demonstrated their boldness in ruling on right to development cases despite the lack of clarity on corporate accountability for a human rights violation. With the over 260 decisions that have been rendered by the African Commission until September 2020, at least seven have centred on the violation of article 22 of the African Charter, dealing with the right to development.<sup>146</sup> If there were to be a global consensus on a common set of codified norms on business and human rights, this will create new momentum and go a long way in clarifying doubts that persist in this domain.

## 4 Conclusion

I have examined the relationship between business actors and the implementation of the right to development in Africa by focusing on the implications of a possible international legally-binding instrument on business and human rights.<sup>147</sup> In so doing, I adumbrated on the current *lacunae* that exist in human rights law in the realm of inclusive accountability for business actors. The focus has been on the implementation of right to development in Africa and how a possible legally-binding instrument on business and human rights can both revitalise and bring more meaning to its implementation. While acknowledging that there is no guarantee that a final draft of this instrument will eventually be adopted in the near future, I have nevertheless critically examined ways in which the clarification of some of the issues associated with this process could advance the implementation of the right to development in Africa and perhaps human rights accountability, more generally, on the continent.

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145 Para 15 Preamble, legally-binding instrument.

146 Arts & Atabongawung (n 88) 24.

147 HRC Res 26/9 (26 June 2014).

Several conclusions are drawn in respect of international cooperation and assistance, extraterritoriality and accountability, which are central to the right to development discourse. First, the article reveals that international cooperation and assistance already feature prominently in international human rights law. The jurisprudence emerging from the African human rights system on the right to development has emphasised the need for international cooperation among states in achieving the right to development. Therefore, reinstating the duty for states to cooperate in the realm of corporate accountability for human rights adds another layer of concretisation and fills an important gap in the current debate on human rights accountability and, in particular, the right to development in Africa. Second, I have emphasised that the extraterritoriality principle developed in the draft legally-binding instrument on business and human rights is particularly timely for many human rights victims in Africa considering the lack of local enforcement and the fact that most victims of corporate human rights violations continue to rely on forum shopping. Lastly, I conclude that if the draft legally-binding instrument on business and human rights is adopted and ratified, it will fill an important accountability gap in the current jurisprudence on the right to development in Africa by extending accountability to business actors considering the impact of business activity on communities across Africa. What remains to be seen is whether the current efforts in Geneva will galvanise global consensus for the legally-binding instrument to come to fruition and attract significant state ratifications.