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Extraterritorial Jurisdiction — the Magic Wand in Enforcing Corporate Accountability in Uganda's Oil Sector?

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Abstract

For decades, Global North multinational corporations have perpetrated human rights violations and escaped liability through complex corporate structures. The use of extraterritorial jurisdiction has been presented as a solution to close the accountability gap. This thesis examines how the principle has been applied in the enforcement of corporate accountability to hold Europe-based multinational corporations accountable for human rights violations in the Global South.

The thesis looks at international and African regional perspectives on the subject and eventually takes for its province Uganda's oil sector as a domestic case study. Doctrinal research was undertaken, complemented by semi-structured interviews of professionals and civil society organizations in the field of corporate accountability.

The research revealed that there is inadequate academic literature on extraterritorial jurisdiction in the enforcement of corporate accountability from an African perspective. It is hoped that this thesis will contribute to efforts to close this gap and guide policymakers at the African level and in Uganda in formulating and implementing policies to hold multinational corporations accountable.

The study's findings demonstrate that extraterritorial jurisdiction is not a flawless solution and, therefore, must be implemented together with other strategies, such as mediation and arbitration.

DEDICATION

To my father, who sacrificed everything to help me pursue my dreams.

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The motivation to write this thesis stems from the courage exhibited by Ugandan environmental activists who have fearlessly advocated for sustainability standards in the oil and gas sector even amidst intimidation and arrests.

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List of Abbreviations

AfCFTA - African Continental Free Trade Area

ATS - Alien Tort Statute

BHR - Business and Human Rights

CSDDD - Corporate Sustainability Due Diligence Directive

EACJ - East African Court of Justice

EACOP - East African Crude Oil Pipeline Project

EU- European Union

ICJ – International Court of Justice

ILC – International Law Commission

MNCs – Multinational Corporations

NAP – National Action Plan

NGO – Non-Governmental Organization

OECD - Organisation for Economic Co-operation and Development

PCIJ – Permanent Court of International Justice

UDHR – Universal Declaration of Human Rights

UK – United Kingdom

UN - United Nations

UNGPs - United Nations Guiding Principles on Business and Human Rights

US – United States

WGEI - Working Group on Extractive Industries, Environment and Human Rights in Africa

1 Introduction

1.1 Summary

Africa is known as the most natural resource-rich continent on earth, which has attracted Global North Multinational Corporations to exploit these resources for profit.[1]The modus operandi of these Multinational Corporations (hereinafter "MNCs") is that they usually incorporate subsidiary companies in African countries where the resources are located (hereinafter "host States"). The subsidiary companies will, in turn, be directly or indirectly controlled by the parent companies domiciled or headquartered in Global North countries (hereinafter "home States").[2]

MNCs have for decades been responsible for gross violations of human rights and massive destruction of the environment.[3] Because of the cross-border nature of their operations, complex corporate structures and regulatory gaps, MNCs have escaped liability for their actions in many instances.[4] An often cited example of the adverse effects of MNCs on human rights is the extraction of oil in the Niger Delta by the Royal Dutch Shell Plc (hereinafter "Shell") which caused unprecedented oil spillages, contamination of water bodies, decline of food production, injuries and death of people of Ogoniland in Nigeria.[5]

The well-documented atrocities of MNCs in the Global South prompted the international community to advocate for a business and human rights agenda which culminated into the adoption of the United Nations Guiding Principles on Business and Human Rights (hereinafter "UNGPs").[6] One of the cornerstones of the UNGPs is the need to guarantee the right to an effective remedy for victims of corporate human rights violations.[7] Because of systematic

[1] UNCTAD, "Economic Development in Africa Report 2023" (UNCTAD, 2023), https://unctad.org/publication/economic-development-africa-report-2023#:~:text=Another%20comparative%20advantage%20is%20Africa's,opportunity%20to%20accelerate%20climate%20action.

[2] Rachel Chambers, "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court," *University of Pennsylvania Journal of International Law* 42, no. 3 (2021): 522.

[3] "How Can We Hold Companies Responsible for the Damage They Cause?," Global Witness, accessed June 28, 2024, https:///en/blog/how-can-we-hold-companies-responsible-damage-they-cause/.

[4] "Do Victims of Corporate Human Rights Violations Get Justice?," European Union Agency for Fundamental Rights, October 6, 2020, https://fra.europa.eu/en/news/2020/do-victims-corporate-human-rights-violations-get-justice.

[5] Taiwo Adebayo, "Oil Spill from Shell Pipeline Fouls Farms and a River in a Long-Polluted Part of Nigeria," *Associated Press News*, June 26, 2023, https://apnews.com/article/nigeria-oil-spill-shell-niger-delta-ccfa3bfdd04b840f765189cdc5d90d3d.

[6] "Justice Delayed: 10 Years of UN Guiding Principles on Business & Human Rights," ECCJ, June 16, 2021, https://corporatejustice.org/news/justice-delayed-10-years-of-un-guiding-principles/.

[7] "Access to Remedy," OHCHR, accessed June 28, 2024, https://www.ohchr.org/en/special-procedures/wg-business/access-remedy.

limitations to access to justice in many host States, victims of corporate human rights violations are often left with no means to obtain an effective remedy.[8] The limitations to access to justice in host States have driven some victims to seek audiences in home State courts as an alternative option or last resort to obtain an effective remedy.[9] This has been possible through the principle of extraterritorial jurisdiction, which can be traced under international law. Extraterritorial jurisdiction empowers home States' courts to adjudicate disputes of alleged corporate human rights violations of MNCs in the Global South.[10]

This thesis examines whether extraterritorial jurisdiction is the panacea for most corporate accountability gaps by taking a closer look at doctrinal, substantive, and procedural aspects of extraterritorial jurisdiction from an international and African regional perspective and eventually taking for its province a national perspective by examining whether extraterritorial jurisdiction is the answer to the alleged corporate human rights violations in Uganda's oil sector.

1.2 Introducing the problem

Extraterritorial jurisdiction generally refers to a State's competence to make, apply, and enforce its rules of conduct beyond its territorial boundaries.[11] In this thesis, the term extraterritorial jurisdiction shall be used interchangeably with adjudicative jurisdiction, a subset of extraterritorial jurisdiction that refers to the ability of courts to adjudicate and resolve disputes arising beyond a state's territorial boundaries.[12]

Extraterritorial jurisdiction has contributed to the enforcement of corporate accountability by allowing victims of corporate human rights violations to institute civil suits in home state courts in Global North countries such as England and the Netherlands against MNCs. A case in point

[8] "Overcoming Barriers to Access to Justice for Victims of Corporate Human Rights Abuses" (International Federation for Human Rights, July 2023), https://www.fidh.org/IMG/pdf/access_to_justice_joint_brief_july_2023_.pdf.

[9] "Suing Goliath: An Analysis of Civil Proceedings Brought against EU Companies for Human Rights Abuses and Environmental Harm in Their Global Operations and Value Chains, and Key Recommendations to Improve Access to Judicial Remedy" (European Coalition for Corporate Justice, September 2021), https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf.

[10] Clara Bonin, "Extraterritorial Obligations: Improving Human Rights Accountability of Multinational Corporations," *Human Rights Research Center* (blog), November 8, 2023, https://www.humanrightsresearch.org/post/extraterritorial-obligations-improving-human-rights-accountability-of-multinational-corporations.

[11] Menno Kamminga, "Extraterritoriality," in *The Max Planck Encyclopedia of Public International Law* (Oxford University Press), 3, accessed June 29, 2024, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1040.

[12] Danielle Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?," *Melbourne Journal of International Law* 13 (2012): 4.

are the 1,826 Zambian villagers who filed a successful claim against the United Kingdom (hereinafter "UK") based Vedanta Resources and its Zambian subsidiary, KCM. The claim alleged that waste from copper mines owned and operated by KCM had contaminated local waterways, causing harm to residents and property damage. The UK Supreme Court ruled that a corporation has a duty of care towards third parties if the parent company has assumed control over the subsidiary's actions.[13] This ruling allows victims of corporate human rights violations in the Global South to sue UK-based MNCs in English courts.[14]

On the face of it, extraterritorial jurisdiction appears to be a viable avenue to guarantee the right to obtain an effective remedy for victims of corporate human rights violations. Several commentators have recognised that international human rights law has been increasingly interpreted as requiring States in whose territory or jurisdiction corporations are domiciled or headquartered to take measures to ensure that these corporations do not cause or contribute to human rights abuses abroad.[15] This has been reiterated by the UN Working Group on Business and Human Rights ("Working Group"), which has noted that States have a duty to cooperate and collaborate with their peers to plug gaps in victims' quests to seek effective remedies against business enterprises. It further observed that States act extraterritorially in many areas within the parameters of international law, and there are no sound reasons why they should hesitate to do so in the field of business and human rights.[16]

Despite the potential of extraterritorial jurisdiction to enforce corporate accountability, the notion has not been immune from criticism relating to its doctrinal, substantive and procedural aspects. For instance, Third World Approaches to International Law (TWAIL) scholars have argued that it continues to entrench neocolonialism. Civil suits instituted in home State courts have also been dismissed on technical grounds such as *forum non conveniens*.[17] The absence of hard law international instruments providing for extraterritorial jurisdiction has also led

[13] Vedanta Resources Plc and another v Lungowe and others, No. [UKSC] 20 (UK Supreme Court April 10, 2019).
[14] "UK Supreme Court Clarifies Issues on Parent Company Liability in Lungowe v Vedanta | Global Law Firm," Norton Rose Fulbright, June 29, 2024, https://www.nortonrosefulbright.com/en-be/knowledge/publications/70fc8211/uk-supreme-court-clarifies-issues-on-parent-company-liability-in-lungowe-v-vedanta.
[15] Ian Brownlie and Ian Brownlie, *State Responsibility*, System of the Law of Nations / Ian Brownlie (Oxford: New York: Clarendon Press; Oxford University Press, 1983), p.165.; Nicola Jägers and Nicola Maryon Catharine Paula Jägers, *Corporate Human Rights Obligations: In Search of Accountability*, School of Human Rights Research Series 17 (Antwerpen: Intersentia, 2002).
"Report on Human Rights and Transnational Corporations and Other Business Enterprises" (UN Working Group on Business and Human Rights, July 18, 2017).(**"Report on Access to Effective Remedies"**).
[17] B. S. Chimni, "The International Law of Jurisdiction: A TWAIL Perspective," *Leiden Journal of International Law* 35, no. 1 (March 2022): 29–54, https://doi.org/10.1017/S0922156521000534.

some scholars to question whether States are under an obligation to exercise extraterritorial jurisdiction to hold MNCs accountable.[18]

1.3 Research Questions

The overarching research question that permeates throughout this thesis reads as follows:

Is extraterritorial jurisdiction a viable avenue to hold MNCs in Uganda's oil sector accountable for alleged human rights violations?

A selection of interrelated research sub-questions were formulated to guide my discussion, and these include:

a) Has the notion of extraterritorial jurisdiction crystallized under international law?
b) Is there sufficient recognition of extraterritorial jurisdiction under Africa's business and human rights framework?
c) Is Uganda's legislative and judicial framework robust enough to ensure corporate accountability of MNCs in the oil sector?
d) Is the right to an effective remedy for vulnerable groups such as children, women, and indigenous communities guaranteed under the aforementioned framework?
e) What are the limitations of enforcement of extraterritorial jurisdiction from a Ugandan perspective, and what feasible alternatives exist?

1.4 Research Methods and Materials

A hybrid research method was used in preparation for this thesis. The majority of the discussion is informed by doctrinal research sourced from (1) international law, (2) international human rights law, (3) the African Union legal framework, and (4) the national laws of Uganda. To further the breadth of the doctrinal research, particular attention was placed on soft law instruments relating to Business and Human Rights (hereinafter "BHR"). Secondary sources, including publications by eminent BHR scholars and Non-Governmental Organisations (hereinafter "NGOs"), were also considered in this thesis to establish how BHR principles and extraterritorial jurisdiction have been interpreted.

A selection of cases and legislations from international, regional, and national jurisdictions were reviewed to identify common patterns and divergent points in the application and interpretation of extraterritorial jurisdiction.

[18] Bonin (2023).

Some of the undertaken doctrinal research did not yield the anticipated research outcomes. A case in point was the surprising deficient literature and jurisprudence on the application of extraterritorial jurisdiction in corporate accountability across Africa and in Uganda. Instead of re-evaluating the research topic, the qualitative interview method was used to complement the doctrinal research. A semi-structured interviewing method was adopted to let the interviewees freely express themselves on different themes.

The interviewees[19] selected were from reputable Non-Governmental Organistions (hereinafter "NGO") involved in extraterritorial disputes and corporate accountability, which include European Coalition for Corporate Justice (ECCJ), a coalition representing more than 450 organisations from 17 countries and Notre Affaire à Tous, a French NGO that has been involved in extraterritorial disputes against TotalEnergies in France. I interviewed Mr. Mathew Renshaw, a partner from Leigh Day, a reputable law firm that has represented several victims of UK based MNCs in England. I was also a participant in a conference of leading experts and academics on extraterritorial jurisdiction organised by the University of Antwerp, where I had the opportunity to interview Professor Surya Deva, who has previously served as a member of the UN Working Group on Business and Human Rights and is the current Special Rapporteur on the right to development.[20]

No form of compensation was offered to the interviewees. All interviewees were informed of the purpose of the interview and its voluntary nature, including their right to end the interview at any point, and gave informed consent to be interviewed.

1.5 Limitations

As already noted in section 1.4, there is a deficiency of literature and jurisprudence on the subject of extraterritorial jurisdiction in the attainment of corporate accountability in Africa and Uganda. Another limitation is the absence of internationally binding instruments on the subject, which meant that a number of soft law instruments had to be reviewed to ascertain whether there has been a crystallisation of some of the BHR obligations under international law.

[19] The interviewees were Matthew Renshaw (Partner of Leigh Day law firm located in the United Kingdom), Mathilde Cohen (Notre Affaire à Tous – France), Virginie Rouas (ECCJ), Marion Lupin (ECCJ) and Surya Deva (UN Special Rapporteur on the Right to Development).

[20] "Human Rights Beyond Territory and State, 27, 28, 29 May 2024 | Law and Development | University of Antwerp," accessed July 2, 2024, https://www.uantwerpen.be/en/research-groups/law-and-development/news-and-events/hr-beyond-territory-and-state/.

There was also a challenge of a very low level of responsiveness to the interview requests. The logistical constraints such as time and financial resources meant that other options for obtaining interviews could not be explored. Due to the aforementioned limitations, this thesis does not reflect the direct interview perspectives of victims of corporate human rights violations as initially anticipated. Be that as it may, a thorough analysis of the data collected from doctrinal research and interviews was done to test the hypothesis and deduce the research findings.

1.6 Outline

Chapter 2 discusses the application of extraterritorial jurisdiction in BHR in the international arena and examines whether there are traces of crystallization of the normative principle under international law. Chapter 3 shifts the focus to the African continent and demystifies whether there are sufficient regulations and policies on the continent to hold MNCs accountable as an alternative to the application of extraterritorial jurisdiction outside the continent. Chapter 4 narrows the discussion to a national context by elucidating how extraterritorial jurisdiction has emerged as a possible avenue to hold MNCs accountable for human rights violations in Uganda's oil sector. The final chapter explores alternatives to extraterritorial jurisdiction, synthesizes the research findings identified in the preceding chapters, and suggests solutions for the future strengthening of corporate accountability of MNCs.

1.7 Purpose of the Thesis and its Contribution to the Existing Scholarship

Rivera has emphatically made the point that the concept of extraterritorial jurisdiction is not novel under international law by relying on the famous Permanent Court of International Justice (hereinafter "PCIJ") decision of *S.S. 'Lotus'* (France v. Turkey), which has been cited as evidence that states are not prohibited from applying laws which have an extraterritorial effect under international law.[21] Jennifer Zerk's 2010 report, intended to guide the then Special Representative of the UN Secretary-General on Business and Human Rights (SRSG) on the operationalization of the UNGPs, is instructive in providing an overview of the application of extraterritorial jurisdiction under the BHR framework.[22] She rightly observed that a lot has

[21] Humberto Cantú Rivera, "Chapter 5 - Corporate Accountability in the Field of Human Rights. On Soft Law Standards and the Use of Extraterritorial Measures," in *Duties across Borders: Advancing Human Rights in Transnational Business*, ed. Bård-Anders Andreassen and Võ Khánh Vinh (Cambridge, United Kingdom ; Antwerp ; Portland: Intersentia, 2016), 113.

[22] Jennifer A. Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" (Corporate Social Responsibility Initiative, June 2010), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf .

previously been written about extraterritorial jurisdiction in criminal law and civil litigation, but also generally.[23]

Zerk's research set the stage for Nadia Bernaz, who, two years later, in 2013, expressed her scepticism about whether states' obligations to exercise extraterritorial jurisdiction to hold corporations accountable had crystallized under international law. She observed that the safest position was to assume that the law was still developing in the area and that there was no obligation to prevent and punish corporate human rights violations committed abroad yet, but the practice was increasingly recommended.[24]

Despite the passage of years, the position of the law has remained ambiguous. In 2018, Rivera noted that the inexistence of an international legal framework or even specific guidance regarding extraterritorial adjudication raises doubts about what is permissible under international law.[25] Even Dalia Palombo cast doubts on the subject in 2022 by observing that domestic cases with a cross-border human rights dimension raise the question of whether public international law mandates that states address cross-border human rights abuses.[26] From the literature reviewed, it is evident that scholars are still split on the current status of extraterritorial jurisdiction in the enforcement of corporate accountability under international law, and the standoff is far from being resolved.

The purpose of this thesis is threefold: (1) to examine whether there are any strides in the crystallization of the concept of extraterritorial jurisdiction under international law by reviewing recent state practice, (2) to establish whether the legal framework on corporate accountability in Africa and in Uganda is robust enough, especially in light of the adoption of a free trade area agreement in Africa and the commencement of oil production in Uganda; and (3) to suggest strategies to improve the application of extraterritorial jurisdiction and to assess other feasible alternatives to hold MNCs accountable. It is hoped that the topics under discussion will contribute to the existing scholarship by adding African perspectives to

[23] See for example: Donald Francis Donovan and Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction," SSRN Scholarly Paper (Rochester, NY, January 1, 2006), https://doi.org/10.2139/ssrn.1514358. Halina Ward, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options," *UC Law SF International Law Review* 24, no. 3 (January 1, 2001): 451.

[24] Nadia Bernaz, "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" *Journal of Business Ethics* 117, no. 3 (October 2013): 493–511, https://doi.org/10.1007/s10551-012-1531-z..

[25] Rivera (2016).

[26] Dalia Palombo, "Extraterritorial, Universal, or Transnational Human Rights Law?" *Israel Law Review* 56, no. 1 (March 2023): 92–119, https://doi.org/10.1017/S0021223722000139.

extraterritorial jurisdiction and corporate accountability scholarship, which has mainly been Western-dominated.

2. International Perspectives on Extraterritorial Jurisdiction

2.1 Introduction

Despite several decades of the existence and practice of extraterritorial jurisdiction, States considerably differ in its application. Even those that share a common legal tradition—for instance, the UK and the United States (hereinafter " US")—have often found themselves at different ends of the spectrum.[27] The International Law Commission (hereinafter "ILC") would be best placed to clarify the law on extraterritorial jurisdiction because States have given it the mandate to progressively develop and codify international law.[28] It is worth noting that extraterritorial jurisdiction has been on the ILC's long-term programme of work since 2006; however, the Secretariat has not worked on it so far except for a note.[29]

The absence of clarity on States' obligations to exercise extraterritorial jurisdiction to enforce corporate accountability has led to divergent interpretations of the obligation. For instance, at the time of adoption of UNGPs, Ruggie and his team neither confirmed nor denied the existence of such obligations under international law.[30] As already noted in section 1.7, scholars such as Jennifer Zerk in 2010[31] and Nadia Bernaz in 2013[32] have expressed scepticism on whether there is a binding obligation on States to exercise extraterritorial jurisdiction. Dalia Palombo still asks the question in 2022 whether public international law mandates that states address cross-border human rights abuses[33], signalling that the issue has not been settled under international law.

MNCs are defined under this chapter because they are the basis of a State's exercise of extraterritorial jurisdiction in the enforcement of corporate accountability. In this chapter, I also review domestic legislations and cases on extraterritorial jurisdiction in the enforcement of corporate accountability across several jurisdictions in the Global North. The focus on jurisprudence from Global North jurisdictions in this chapter might lead the reader to conclude that the writer has a bias toward those jurisdictions. However, as noted in section 1.1, many of the MNCs are domiciled in the Global North States; it is therefore unsurprising that the majority

[27] Kamminga (2020) at p.3.
[28] Nikolaos Voulgaris, "The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development," *European Journal of International Law* 33, no. 3 (December 5, 2022): 761–88, https://doi.org/10.1093/ejil/chac051.
[29] Kamminga (2020) at p.10.
[30] Commentary to Principle 2, UN Guiding Principles.
[31] Zerk (2010)
[32] Bernaz (2013)
[33] Palombo (2022)

of the jurisprudence on extraterritorial jurisdiction has emerged from those states. Be that as it may, the application of extraterritorial jurisdiction from the Global South is considered in subsequent chapters.

This chapter aims to demonstrate to the reader the genesis of corporate accountability by highlighting its historical development. The reader will also be able to appreciate the general doctrinal aspects of extraterritorial jurisdiction. The discussion of cases from several jurisdictions is not aimed at achieving a comprehensive assessment of whether the obligation of States to extraterritorially hold MNCs accountable for human rights violations has become customary law, as that is beyond the scope of this thesis. The *raison d'être* is to show that extraterritorial jurisdiction is increasingly being used to hold MNCs accountable in the international arena.

2.2 Definition of MNCs

There is no established consensus on the definition of MNCs. However, MNCs can be described as large, politically influential, and autonomous entities that can move operations from separate countries.[34] When you think about corporations like Meta, you will appreciate that MNCs can exert influence that approaches the level of States or even surpass them.[35] However, defining MNCs should just be a question of nomenclature because some corporations operate locally in a disguised manner through subsidiaries that are linked to the principal corporations through supply chains. Such businesses can still impact human rights even if they do not fit the criteria of a 'large corporation.'[36]

2.3 A Brief History of Corporate Accountability

The 1940s and 1950s saw a rapid upsurge in the human rights movement after the end of the Second World War, which resulted in the adoption of the 1948 Universal Declaration of Human Rights (hereinafter "UDHR"). The UDHR was declared to apply to States, individuals, and all organs of society.[37] Some commentators have argued that *"every organ of society"* is clear

[34] Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights," SSRN Scholarly Paper (Rochester, NY, 2009), pp. 47-48. https://papers.ssrn.com/abstract=2621770.
[35] John Gerard Ruggie and UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, March 21, 2011, https://digitallibrary.un.org/record/705860.
[36] David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law* 97, no. 4 (October 2003): 901–22, https://doi.org/10.2307/3133689.
[37] "Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).," accessed May 26, 2024, http://hrlibrary.umn.edu/instree/b1udhr.htm.

enough language, which "excludes no one, no company, no market, no cyberspace."[38] Article 30 of the UDHR goes further ahead to include a "group" as an entity required to respect human rights. The *travaux préparatoires* of the UDHR suggests that the term "group" was meant to include private companies.[39] However, despite the above proclamations, the recognition of corporate accountability under international law remained unclear. In 1974, the UN Commission of Transnational Corporations was established, whose mandate ended in 1992. The main purpose of the Commission was to draft a general code of conduct for corporations. However, the Draft Code was not adopted because of disagreements between the countries.[40]

Another attempt by the UN to develop a legal instrument on corporate accountability began in 1997 and ended in 2004. This culminated in the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[41] The Draft Norms raised some optimism in the pursuit of corporate accountability because it was argued that they were a 'restatement of the international legal principles applicable to businesses with regard to human rights.'[42] However, they failed to receive the necessary backing, especially from corporations. The corporations insisted on continued self-regulation of their human rights impact through the voluntary Corporate Social Responsibility regime, which prompted the UN Commission on Human Rights to declare that the Draft Norms have no legal standing.[43]

The Draft Norms' failure eventually led to Professor John Ruggie's appointment as the Secretary-General's Special Representative on human rights and transnational corporations and other business enterprises.[44] Ruggie spearheaded a six-year international consultation process to draft principles on business and human rights, which concluded on 16 June 2011 when the United Nations Human Rights Council endorsed the Guiding Principles on Business and

[38] Samuel K Murumba, "The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Themes and Variations," 1999, 17–26.
[39] William A. Schabas, ed., *The Universal Declaration of Human Rights: The Travaux Préparatoires*, 1st ed. (Cambridge University Press, 2013), https://doi.org/10.1017/CBO9781139600491.
[40] Olivier de Schutter, ed., *Transnational Corporations and Human Rights*, Studies in International Law, v. 12 (Oxford; Portland, Or: Hart Pub, 2006).
[41] Adopted on 13 August 2003, UN Doc., E/CN.4/Sub.2/2003/12/Rev.2.
[42] David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *The American Journal of International Law* 97 (October 1, 2003): 901, https://doi.org/10.2307/3133689.
[43] Giovanni Mantilla, "Emerging International Human Rights Norms for Transnational Corporations," *Global Governance* 15, no. 2 (2009): 279–98.
[44] Elisa Giuliani, "Nadia Bernaz, Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap (Routledge, 2017), 313 Pp.," *Business and Human Rights Journal* 2 (May 4, 2017): 1–3, https://doi.org/10.1017/bhj.2017.4.

Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs).[45] The UNGPs establish a State's duty to protect human rights, a corporate responsibility to respect human rights, and the need to provide remedies to respond to business violations of human rights.[46] The UNGPs have been described as the world's most authoritative normative framework guiding responsible business conduct and addressing human rights abuses in business operations and global supply chains.[47]

The relative success of the UNGPs has made them a starting point for any meaningful engagement in business and human rights discourse. This has also resulted in negotiations for a legally binding instrument on business and human rights by the UN Human Rights Council, which set up an intergovernmental working group in 2014 tasked with coming up with a legally binding instrument to regulate corporations as a follow-up to the UNGPs.[48] The working group has developed a revised draft instrument on domestic due diligence obligations and access to remedies for victims of corporate abuses. However, not all states agree, and negotiations are still ongoing.[49]

Bernaz has argued that, from a legal point of view, the UNGPs and UDHR models, despite their contributions to business and human rights advocacy, still provide weak forms of corporate accountability because they are institutionally weak and have no specific enforceability mechanism.[50] The lack of a successful or binding legal mechanism leaves a lacuna that continues to be exploited by MNCs at the expense of helpless victims of gross human rights violations. Extraterritorial jurisdiction, therefore, presents an effective remedy option in the pursuit of corporate accountability.

2.4 Extraterritorial Jurisdiction under International Law

In this section, I examine whether states' obligations to exercise extraterritorial jurisdiction to address cross-border corporate human rights violations are gradually crystallizing under public

[45] UN Human Rights Council, UN Doc. A/HRC/17/31, 21 March 2011.
[46] Ibid.
[47] "UNGP Brochure," n.d., https://www.undp.org/sites/g/files/zskgke326/files/migration/in/UNGP-Brochure.pdf.
[48] UN Human Rights Council, Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,' A/HRC/RES/26/9.
[49] "Report on the Ninth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights," n.d., https://documents.un.org/doc/undoc/gen/g23/264/16/pdf/g2326416.pdf?token=3lpaUREkls0gZEvOR7&fe=true/.
[50] Nadia Bernaz, "Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty," *Human Rights Review* 22, no. 1 (March 1, 2021): 45–64, https://doi.org/10.1007/s12142-020-00606-w.

international law. But before that, we need to understand what jurisdiction means and entails. Broadly speaking, jurisdiction refers to the limits of a state's legal competence to make, apply, and enforce rules of conduct on persons. It also concerns the extent of each state's right to regulate conduct or the consequences of events.[51]

2.4.1 Types of Jurisdiction

Under international law, jurisdiction can be divided into prescriptive and enforcement jurisdiction. Prescriptive jurisdiction refers to a state's ability to make its law applicable to particular persons or circumstances, usually through adopting legislation or, in some cases, through courts developing the law, whereas enforcement jurisdiction refers to the state's ability to take action to enforce those laws.[52]

2.4.2 Exercise of Extraterritorial Jurisdiction

The widely cited passage of the PCIJ in the *Lotus* case is regarded as a broad endorsement of a laissez-faire approach to extraterritorial jurisdiction. The Court held: "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules."[53] The implication of the PCIJ's decision is that whilst it left the window open for the exercise of extraterritorial jurisdiction, the Court confirmed the pre-eminence of territoriality, requiring a "permissive rule" of international law to justify extraterritoriality. Put differently, unless international law explicitly prohibits extraterritorial use of domestic law, a state can design and apply its laws outside its boundaries.[54] The task is, therefore, to establish whether holding corporations accountable can justify the exercise of extraterritorial jurisdiction.

In a world where businesses and individuals are increasingly operating globally, the issue of the extraterritorial application of national laws is progressively assuming greater importance.[55]

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[51] Vaughan Lowe, 'Jurisdiction' in *International Law* (Malcolm D Evans ed, 2nd ed 2006) 335.

[52] "Report of the Task Force on Extraterritorial Jurisdiction" (IBA Legal Practice Division Task Force, June 4, 2008), https://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf. (hereinafter "IBA Task Force Report")

[53] "The Case of the S.S. Lotus, France v. Turkey, Judgment, 7 September 1927, Permanent Court of International Justice (PCIJ)," at pp. 18-19, accessed May 26, 2024, https://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.

[54] David L. Sloss, "Kiobel and Extraterritoriality: A Rule Without a Rationale," SSRN Scholarly Paper (Rochester, NY, May 13, 2013), https://papers.ssrn.com/abstract=2264358.

[55] IBA Task Force Report (2008) at p.5.

Traditionally, a state's exercise of jurisdiction was generally limited to persons, property, and acts within its territory.[56] However, the growth of multinational corporations doing business globally makes extraterritorial jurisdiction necessary.[57]

As seen from the *Lotus* case, the notion of extraterritorial jurisdiction is not novel and has puzzled jurists and scholars for decades. Therefore, its invocation in business and human rights presents old and new questions for discussion. The concept is controversial and widely debated under public international law, which hinges on state sovereignty; thus, jurisdiction is considered primarily territorial.[58] There is an emphasis on the equality of states, connoting that since states are equal, they ought to respect each other's sovereignty and avoid interference with the territories of other states. It is only in exceptional circumstances that a state may exercise its jurisdiction outside its territory.[59] International human rights courts and treaty bodies have increasingly developed a jurisprudential trend known as the extraterritorial application of human rights, which has emerged as an exception to territorial jurisdiction.[60]

2.5 Extraterritorial Jurisdiction under International Human Rights Law

Under international human rights law, there has been growing recognition that States in whose territory or jurisdiction MNCs are domiciled can take measures to ensure that these corporations do not cause or contribute to human rights abuses abroad.[61] The exercise of extraterritorial jurisdiction in home States' courts is justified by the limitation of access to justice in MNCs' host States and the need to guarantee the right to an effective remedy for victims of corporate human rights violations.[62]

2.5.1 Failure to obtain access to justice in the host State

UN Special Rapporteurs on the Environment and Toxics have noted that access to justice is an essential ingredient in the attainment of rule of law, and it facilitates victims of corporate abuses

[56] "Yearbook of the International Law Commission 2006 Vol. II Part Two" (United Nations, 2006), https://legal.un.org/ilc/reports/2006/english/annexes.pdf.
[57]"Migration in an Interconnected World: New Directions for Action. Report of the Global Commission on International Migration" (Global Commission on International Migration (GCIM), October 5, 2024), https://www.refworld.org/reference/research/gcim/2005/en/19053.
[58] "Jurisdiction of States," Oxford Public International Law, at p.3, accessed May 26, 2024, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1436.
[59] Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 83; Besson (n 8).
[60] Palombo (2023), at p.92.
[61] Injustice Incorporated p 24.
[62] (European Coalition for Corporate Justice, September 2021)

to hold MNCs accountable by providing access to an effective remedy.[63] However, this is not always obvious in host States because of several factors, such as fear of reprisals and lack of funding.[64]

Research from Amnesty International has revealed that claimants' decisions to institute civil suits in MNC home State courts as opposed to host State courts may be informed by a higher probability of achieving justice and reparation in the home rather than the host State. This is true in instances where the host State's justice system suffers from corruption, inefficiency, severe delays, lack of independence, or other factors that undermine justice.[65] A home State court may also present significant legal advantages, such as the possibility of instituting a class action suit. This was relied on by an English court in *Lubbe v. Cape plc*[66] to reject the defendant's argument of *forum non conveniens* because the court recognised that class action proceedings were not available in South Africa.

2.5.2 The right to an effective remedy

One of the core tenets of international human rights law that justifies enforcement of extraterritorial jurisdiction is the right to an effective remedy. It is trite under international human rights law that victims and survivors of human rights violations are entitled to an effective remedy.[67] The right to an effective remedy is recognised under international human rights instruments such as the UDHR[68] and ICCPR[69] which provide that the right to an effective remedy must be exercised before a competent judicial tribunal.

The right to an effective remedy has both procedural and substantive limbs[70] and is comprised of three core elements: (i) access to justice, (ii) adequate, effective, and prompt reparations for

[63] "A/HRC/45/CRP.10: The Human Right to an Effective Remedy: The Case of Lead-Contaminated Housing in Kosovo," OHCHR, accessed May 26, 2024, https://www.ohchr.org/en/documents/thematic-reports/ahrc45crp10-human-right-effective-remedy-case-lead-contaminated-housing.
[64] "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse," May 10, 2016, at paras 4-5, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP-Submission-RevisedDraftLBI.pdf.
[65] "Injustice Incorporated: Corporate Abuses and the Human Right to Remedy," Amnesty International, at p.117, accessed May 26, 2024, https://www.amnesty.org/en/documents/pol30/001/2014/en/.("Injustice Incorporated")
[66] [2000] UKHL 41.
[67] See *Chorzów Factory (Germany v Poland)*, 1928 PCIJ (ser A) No. 17, para 73; UN High Commissioner for Human Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse : Report of the United Nations High Commissioner for Human Rights" (United Nations, May 10, 2016), https://digitallibrary.un.org/record/841635, para 6.
[68] Article 8 of the UDHR.
[69] Article 2(3) of the ICCPR.
[70] "A/72/162: Report on Access to Effective Remedy for Business-Related Human Rights Abuses" (UN Working Group on Business and Human Rights, July 19, 2017), https://www.ohchr.org/en/documents/thematic-

harm suffered, and (iii) access to information concerning violations and reparation mechanisms.[71] For this right to be realised, the means of attaining a remedy must be affordable, adequate, and timely.[72]

The UN Working Group on Business and Human Rights (Working Group) has also observed that effective remedies for business-related human rights abuses should result in some form of corporate accountability.[73] The multi-jurisdictional nature of MNCs' operations creates a lacuna in the regulation of their human rights impact, thus denying victims the right to an effective remedy.[74] This prompted the UN High Commissioner for Human Rights to point out that:

"The prevailing lack of clarity across jurisdictions about the roles and responsibilities of different interested States in cross-border cases create a significant risk that no action will be taken, leaving victims with no prospect of remedy. Against that background, various human rights treaty bodies have recommended that **home States take steps to prevent business-related human rights abuses by business enterprises domiciled in their jurisdiction**."[75](Emphasis added)

The Working Group has also stated that States have a duty to cooperate and collaborate with their peers to plug gaps in victims' quests to seek effective remedies against business enterprises. It also noted that since States act extraterritorially in many areas within the parameters of international law, there are no sound reasons why they should hesitate to do so in the field of business and human rights.[76]

reports/a72162-report-access-effective-remedy-business-related-human-rights." ("Report on Access to Effective Remedies").

[71] See UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006, Principle 11 "Victims right to remedies."

[72] Report on Access to Effective Remedies, paras 32 and 34.

[73] Human Rights Council, "Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes" (United Nations, August 3, 2018), https://documents.un.org/doc/undoc/gen/g18/239/70/pdf/g1823970.pdf?token=UFNAVh8SOJ6S11tMml&fe=true.

[74] Injustice Incorporated, p 23.

[75] Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Report of the United Nations High Commissioner for Human Rights."

[76] Report on Access to Effective Remedies, paras 61-64.

2.6 Indispensability of Extraterritorial Jurisdiction

As already discussed, the application of extraterritorial jurisdiction is restricted under customary international law, which sets limits upon the exercise of jurisdiction by states and other international legal persons. The rationale is the need to preserve sovereignty, avoid jurisdictional conflicts between states, and provide legal consistency and predictability.[77] Given these doctrinal challenges of extraterritorial jurisdiction, a multilateral solution with a treaty-based complaints mechanism would be the ideal adjudication strategy to hold corporations accountable for human rights violations.[78] However, this approach is not pragmatic at the moment because harmonization is hard to achieve even among relatively homogeneous states. This leaves extraterritorial jurisdiction by individual states as the most sensible bet to guarantee corporate accountability. In the next section, I review the practice of extraterritorial jurisdiction in select domestic jurisdictions.

2.7 Practice of Extraterritorial Jurisdiction in Domestic Jurisdictions in the Global North

In this section, I review how extraterritorial jurisdiction has been applied in the United States, the Netherlands, the European Union, the United Kingdom, and Italy to hold MNCs accountable for human rights violations. As noted in section 2.1, the focus is on Western States because many of the MNCs are domiciled in the Global North.

2.8 United States

The analysis of extraterritorial jurisdiction in the United States shall focus on the Alien Tort Claims Act, also known as the Alien Tort Statute (hereinafter "ATS"), and the United States Supreme Court decisions of *Kiobel v. Royal Dutch Petroleum*[79] and *Nestlé USA, Inc. v Doe*[80].

2.8.1 Alien Tort Statute

The ATS is an old and ambiguous Act passed by the First Congress as part of the Judiciary Act of 1789.[81] The Act states 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 or a treaty of the

[77] M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law 39, 40 (Stephen Macedo ed., 2004).
[78] "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (OHCHR, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.
[79] Esther Kiobel et al. v. Royal Dutch Petroleum et al, No. No. 10–1491 (US Supreme Court April 17, 2013).
[80] Nestlé USA, Inc. v. Doe, No. 19-416, 593 (US Supreme Court June 17, 2021).
[81] William Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the Originalists," *UC Law SF International Law Review* 19, no. 2 (January 1, 1996): 221.

United States.'[82] The legislation gained prominence in the 1980s when victims of human rights violations worldwide resorted to it to try to obtain reparation for the damages they had suffered abroad, regardless of the existence of a direct connection between the facts giving rise to the claims and the United States federal courts that would have jurisdiction.[83] Although no case to date brought under this legislation has reached a favourable verdict, partly because several cases have been settled between the alleged victims and the defendant companies.[84] The legislation remains significant in understanding how extraterritorial jurisdiction is interpreted in the United States.

2.8.2 Kiobel v. Royal Dutch Petroleum[85]

The case was brought under the ATS. It was premised on allegations of aiding and abetting the Nigerian Government by three corporations of different nationalities (Royal Dutch Petroleum Co., a Dutch company; Shell Transport and Trading Company, plc, a British enterprise; and Shell Petroleum Development Company of Nigeria, Ltd, a Nigerian subsidiary), which helped the government commit different offences under international law against environmental activists who accused the corporations of environmental damage caused by oil pollution in the Niger Delta and other crimes such as extrajudicial killings, crimes against humanity, torture, and cruel treatment, arbitrary arrest and detention, violations of the rights to life, liberty, security and association, forced exile, and property destruction.

The Court of Appeals of the Second Circuit that received the case dismissed the complaint in 2010 on the grounds that customary international law does not recognise corporate liability. The case was then referred to the Supreme Court. On 17 April 2013, the Supreme Court issued its opinion affirming the decision of the Court of Appeals of the Second Circuit. It dismissed the claim on the basis that customary international law does not recognise corporate liability for violation of the law of nations. Chief Justice Roberts held that a presumption against extraterritoriality applies to claims under the Alien Tort Statute and that nothing in the statute rebuts the presumption.

[82] 28 U.S.C. §. 1350.
[83] Humberto Cantú Rivera, "Chapter 5 - Corporate Accountability in the Field of Human Rights. On Soft Law Standards and the Use of Extraterritorial Measures," in *Duties across Borders: Advancing Human Rights in Transnational Business*, ed. Bård-Anders Andreassen and Võ Khánh Vinh (Cambridge, United Kingdom; Antwerp; Portland: Intersentia, 2016), 113.
[84] Rivera (2016).
[85] 569 U.S. 108 (2013).

Rivera, in his commentary on the decision, argues that even if the majority's position was correct in cautioning the use of American law to solve disputes arising elsewhere on the globe, the decision constitutes an important obstacle to what may be the last hope for victims of corporate human rights abuses.[86] To further bolster this argument, international human rights law supports the idea of universal protection of human rights, and the international court, as we saw in the *Lotus* case, permits substantive laws with extraterritorial effects. The Supreme Court, therefore, erred in dismissing the case on the basis that customary international law does not recognise corporate liability.

2.8.3 Nestlé USA, Inc. v Doe No. 19-416, 593 U.S. (2021)[87]

This is a more recent decision in which the ATS was invoked, and the Supreme Court had to grapple again with the subject of extraterritoriality. The background of this case was that claimants from Mali alleged that they were trafficked into Côte d'Ivoire as children and enslaved to produce cocoa. The corporate defendants, including Nestlé USA, did not own or operate farms in Côte d'Ivoire, but they bought cocoa from farms there and provided the farms with resources, including training, fertilizer, tools, and cash, in exchange for the exclusive rights to purchase their cocoa. On 17 June 2021, the United States Supreme Court reversed a Ninth Circuit decision that had held Nestlé liable for aiding and abetting child slavery under the ATS. The Court reiterated its position in *Kiobel* that there is a general presumption that United States legislation is only domestic in its application. Following this approach, the Court held that the alleged forced labour in Ivory Coast could not be sufficiently linked to Nestlé's conduct in the United States, a nexus required to invoke the jurisdiction of federal courts under the ATS.

US courts were initially popular with claimants because of the ATS, but due to the restrictive interpretation of the Act, claimants and their representatives began to consider European courts as potential venues for business and human rights litigation.[88]

[86] Rivera (2016) at 115.
[87] No. 19-416, 593 U.S. (2021).
[88] Tara Van Ho, "Vedanta Resources Plc and Another v. Lungowe and Others," *American Journal of International Law* 114, no. 1 (January 2020): 110–116, https://doi.org/10.1017/ajil.2019.77.

2.9 The Netherlands

We shall review how extraterritorial jurisdiction has been applied in the Netherlands by considering two court decisions, namely: *Friday Alfred Akpan et al. v. Royal Dutch Shell plc et al*[89] and *Vereninging Milieudefensie v Royal Dutch Shell Plc*[90].

2.9.1 Friday Alfred Akpan et al. v. Royal Dutch Shell plc et al, Court of Appeal The Hague 29 January 2021

This case was brought before the District Court of The Hague. It was based on a claim of environmental and personal damages suffered by the plaintiff due to two oil spills which occurred in 2006 and 2007 in the Ikot Ada Udo region in Nigeria, which were the result of a lack of diligence from the defendants in the maintenance of its oil-producing operations in the region, which resulted in the loss of his means of livelihood.

The District Court found that there was a causal link between the violation of a specific duty of care by the Nigerian subsidiary of the Dutch corporate group and the damages suffered by Akpan and that the Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd committed a tort of negligence against the plaintiff for not sufficiently securing an oil-well to prevent the sabotage that was committed in a simple manner prior to the oil spills. The Court ordered the defendants to pay compensation for the damages suffered by the plaintiffs.

An important point to note about this case is that the court acknowledged the international trend of corporate accountability through extraterritorial jurisdiction. The District Court specifically observed that 'For quite some time […] there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasions.'[91]

2.9.2 Milieudefensie and other associations v Royal Dutch Shell Plc (RDS) C/09/571932 / HA ZA 19-379[92]

In this case, one of the issues in contention before The Hague District Court was whether RDS was complying with the requirement for a reduction of emissions under the Paris Agreement.

[89]Friday Alfred Akpan et al. v. Royal Dutch Shell plc et al, No. Case C/09/337050/ HA ZA 09–1580 (The Hague District Court January 30, 2013).
[90] Vereninging Milieudefensie v Royal Dutch Shell Plc, No. C/09/571932 (The Hague District Court May 26, 2021).
[91]Friday Akpan (supra) at para. 4.5.
[92] C/09/571932 / HA ZA 19-379.

The claimants based their action on the assumption that RDS had obligations stemming from the standard of care provided by the Dutch civil code and soft law instruments endorsed by the company, such as the UNGPs, the UN Global Compact, and the OECD Guidelines for Multinational Enterprises.[93] The Court held that Shell Group policies were contributing to climate change and ordered the oil giant to reduce its greenhouse gas (GHG) emissions. It is worth noting that when examining the standard of care imposed by Dutch law, the Court included the UNGPs, which is significant in hardening the principles.

2.10 European Union

In the European Union (hereinafter "EU"), the Rome II Regulation (Rome II) is instructive in determining the applicable law in cross-border disputes arising out of non- contractual causes of action before courts within the EU.[94] The purpose of the Regulation is to harmonize judicial decisions, and reinforce the foreseeability of the applicable law on a cross-border with the ultimate objective of minimizing the likelihood of conflict of laws.[95]

The general rule is laid down under Article 4, paragraph 1 of Rome II, which provides that the law applicable to a non-contractual obligation not governed by a choice of law agreement shall be the law of the country where the damage occurs. However, Article 7 of the Rome II provides for a special connecting factor regarding environmental damages. A reading of subparagraph III of Article 4 also allows for the implementation of environmental-related implications of individual causes of action. This has prompted arguments that the law of the effective seat of MNCs sued for negligent human rights-related due diligence may constitute a closer connection, especially when MNCs have self-imposed environmental policies that regulate their actions even in third countries.[96]

The other relevant EU regulation on extraterritorial adjudication involving MNCs is the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Regulation (EU) No. 1215/2012 of the European Parliament and

[93] On the use of the UNGPs as interpretative tool see also Chiara Macchi and Josephine Van Zeben, "Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al v Royal Dutch Shell," *Review of European, Comparative & International Environmental Law* 30, no. 3 (November 2021): 409–15, https://doi.org/10.1111/reel.12416.

[94] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II').

[95] Ibid.

[96] Marc-Philippe Weller and Chris Thomale, "Menschenrechtsklagen Gegen Deutsche Unternehmen*," *Zeitschrift Für Unternehmens- Und Gesellschaftsrecht* 46, no. 4 (January 14, 2017), https://doi.org/10.1515/zgr-2017-0022., p 525.

Council of December 12, 2012 (Brussels I Regulation).[97] Article 4(1) of the Brussels I Regulation extends the jurisdiction of domestic courts over all persons domiciled in their respective EU member states. This provision encouraged more extraterritorial jurisdiction corporate accountability civil suits, especially in the UK when it was still part of the EU because it prevents courts from declining jurisdiction on the basis of *forum non conveniens*.[98]

The EU is also notable for finally passing the Corporate Sustainability Due Diligence Directive (hereinafter "CSDDD"), which sets human rights standards for large companies operating in the European Union and requires member states to transpose the directive into their national legislation.[99] The CSDDD was inspired by the French Duty of Vigilance law (Mathilde Cohen, personal communication, June 13, 2024). However, the adoption of the CSDDD has been criticized for failing to adequately provide for meaningful stakeholder engagement. There was a public consultation using an online portal, but in practice, this is not accessible to stakeholders in the Global South, such as victims of corporate abuses of MNCs (Virginie Rouas, personal communication, June 17, 2024).

Experts have also been sceptical about member states' intentions in passing the CSDDD. The Directives were largely driven by economic rather than human rights concerns. Member states were seemingly more interested in harmonizing the obligations of their companies across the EU. The fact that the Directives can potentially improve the human rights situation in the Global South because of their extraterritorial reach is simply a bonus for European states that are using them as a virtual signalling tool (Marion Lupin, personal communication, June 17, 2024).

2.11 United Kingdom

The strategy in English Courts has mainly centered on claimants bringing actions against MNCs under the law of negligence. A common trend is proving that a parent company assumed a duty of care, often by relying on a parent company's claims that it oversees the operations of subsidiaries.[100] UK jurisprudence is also relevant for the development of the law on

[97] Came into force on January 10, 2015, replacing Brussels I Regulation (EC) No. 44/2001 ("Brussels I")
[98] Richard Meeran, "Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations," in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, ed. Surya Deva and David Bilchitz (Cambridge, 2013), 380.
[99] "European Union Finally Adopts Corporate Sustainability Due Diligence Directive," Debevoise, June 17, 2024, https://www.debevoise.com/insights/publications/2024/06/european-union-finally-adopts-corporate-sustain.
[100] See, for example, Court of Appeal, Chandler v. Cape Plc [2012] EWCA Civ 525; Court of Appeal, AAA & Others v. Unilever Plc and Unilever Tea Kenya Ltd. [2018] EWCA Civ 1532; Court of Appeal, Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd. [2018] EWCA Civ 191

extraterritorial jurisdiction because of the principle of substantial justice, which empowers courts with jurisdiction if there is a real risk that substantial justice will not be obtainable in a foreign jurisdiction.[101] The rules of civil procedure of England also provide that a claim against an English defendant can "anchor" the case, allowing the courts to exercise jurisdiction over another "necessary or proper party" to the claim.[102] This allows a foreign subsidiary to be added as a necessary or proper party in a case against a parent company.[103]

2.11.1 Chandler v Cape Plc [2012] EWCA Civ 525

In the case of *Chandler v Cape plc*[104], the Court of Appeal upheld a High Court decision that a parent company owed a direct duty of care towards an employee of one of its subsidiaries to ensure a safe system of work. In her commentary on the decision, Sadie Whittam argues that the case acknowledged modern business realities: that the operations of a parent company and its subsidiary are frequently highly integrated. It is, therefore, not unusual for MNCs to organize their businesses on a global basis and centralize certain group functions.[105]

Chandler is highly significant in business and human rights litigation, which led some scholars to contend that subsequent decisions considerably widened the scope for assuming a duty of care of parent companies.[106] Indeed, in the latter cases of *Lungowe v Vedanta Plc*[107] and *Okpabi and others v Royal Dutch Shell*[108] before the UK Supreme Court, what was at stake was the parent-subsidiary relationship and an examination of whether the former could be held responsible for the human rights abuses of the latter.

2.11.2 Lungowe v Vedanta Plc [2019] UKSC 20

The background of the case was that the claimants, 1,826 Zambian nationals, mostly farmers, filed a civil suit in the UK contending that the Nchanga Copper Mine polluted watercourses they rely on for personal consumption and farming purposes. KCM owned and operated the Nchanga Copper mine whilst Vedanta and the Zambian government jointly owned KCM. The

[101] Vedanta Resources Plc and another v Lungowe and others.
[102] Civil Procedure Rules, Practice Direction 6B.
[103] Juan José Álvarez Rubio and Katerina Yiannibas, eds., *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (London New York, NY: Routledge, Taylor & Francis Group, 2017).
[104] [2012] EWCA Civ 525.
[105] Sadie Whittam, "Responsible Parenting: When Might UK-Domiciled Parent Companies Be Held Liable for the Actions of Their Foreign Subsidiaries?," *Company Lawyer*, no. 12 (July 2, 2021): 389–97.
[106] Dalia Palombo, "Two Critical Issues in the UK Business and Human Rights Litigation," Business & Human Rights Resource Centre, September 11, 2018, https://www.business-humanrights.org/en/blog/two-critical-issues-in-the-uk-business-and-human-rights-litigation/.
[107] Vedanta case (supra)
[108] UK Supreme Court judgment of 12 February 2021 *Okpabi and others v Royal Dutch Shell Plc and another* [UKSC] 3

claimants argued that Vedanta set health, safety, and environmental standards that KCM was to comply with, and exercised a "very high level of control and direction" over the subsidiary.

The defendants argued that the claimants were wrongfully pursuing Vedanta to force KCM to defend itself in English courts. The trial court held that the claimants would be denied "access to justice" if the case were heard in Zambia because they would be unable to secure a suitable and experienced legal team to represent them. Lord Briggs, on appeal, found that the trial court had correctly arrived at the conclusion. This was premised on the finding that whereas Zambian courts were competent to hear the case, the absence of adequate finances in Zambia to facilitate the highly complex litigation, which required the composition of a legal team with requisite resources and experience, would impede the claimants' right to access to justice.

In her analysis of the decision, Van Ho Tara argues that the Court's recognition that concerns over "substantial justice" arise when claimants cannot secure appropriate legal counsel for complex claims may prove important in future business and human rights cases. This argument is credible because extraterritorial jurisdiction allows victims of human rights violations to commence suits in jurisdictions where sufficient legal assistance is guaranteed to achieve substantial justice.[109]

2.12 Italy

Litigation of extraterritorial disputes to attain corporate accountability has also occurred in Italy. In 2017, the Nigerian Ikebiri community filed a civil suit against the Italian oil giant ENI and its subsidiary, the Nigerian Agip Oil Company Limited (NAOC), through their representative, Ododo Francis Timi, for the environmental damage that occurred in Nigeria in 2010.[110] The Court established jurisdiction against the defendants pursuant to the *Tribunale di Milano*, under Articles 3 of the Italian law No. 218 of 1995[111] and Article 4 of the Brussels I Recast Regulation *(supra)*. Although the case was eventually settled in May 2019, it set a precedent for recognition of extraterritorial jurisdiction for corporate accountability in Italy following similar approaches in the UK and the Netherlands.

[109] Tara Van Ho (2020)

[110] Friends of Earth Europe, "'ENI and the Nigerian Ikebiri Case,' Press Briefing," May 4, 2017, https://www.foeeurope.org/sites/default/files/extractive_industries/2017/foee-eni-ikebiri-case-briefing-040517.pdf.

[111] Act No. 218/1995 Reform of the Italian system of private international law, 31 May 1995, published in Gazzetta Ufficiale, Supplemento Ordinario No. 128, 3 June 1995.

2.13 Is Extraterritorial Jurisdiction a norm under customary international law?

As discussed in the literature reviewed under section 1.7, there have been attempts in academic scholarship to examine whether there is a mandatory obligation for states to exercise extraterritorial jurisdiction under international law, but the question has not been settled. As noted in section 2.1, the ILC has the mandate of states to codify international law. However, it has not made any progress in the development of the law on the subject of extraterritorial jurisdiction. In this section, I briefly discuss the principles in identification of customary international law in relation to extraterritorial jurisdiction. I must hastily add a caveat that an exhaustive determination of the existence of a principle of customary law requires an extensive review of domestic jurisprudence of several states with different legal systems. Such an examination is beyond the scope of this thesis. The purpose of this section is to review *prima facie* whether any strides are being taken in the organic development of customary international law in relation to extraterritorial jurisdiction.

2.13.1 Defining customary international law

Customary international law refers to unwritten law deriving from practice accepted as law.[112] It remains one of the vital sources of international law outlined under Article 38, paragraph 1, of the Statute of the ICJ, which refers, in subparagraph (b), to "international custom, as evidence of a general practice accepted as law."[113]

2.13.2 Identification of customary international law

While defining customary international law is relatively straightforward, identification of the same is much more complex because it requires a rigorous examination of state practice. According to the ILC, identification of a rule of customary international law involves an inquiry into two distinct, yet related questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).[114] This approach has been confirmed in a number of ICJ decisions, including the North Sea Continental Shelf case.[115]

[112]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 2015 I.C.J. Reports 3 (International Court of Justice 2015).
[113] Statute of the International Court of Justice.
[114]Draft conclusion 2 of the "Draft Conclusions on the Identification of Customary International Law, with Commentaries" (United Nations, 2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.
[115]North Sea Continental Shelf, I.C.J. Reports 1969 3 (February 20, 1969), at pp. 44, para. 77.

2.13.3 Crystallization of the obligation of corporate accountability

In the section 2.7, I set out to discuss a number of domestic court decisions on extraterritorial jurisdiction. Do these decisions have any role in the crystallization of the obligation of corporate accountability? International law scholars have for many years argued that domestic court decisions play a significant role in the determination of customary international law.[116] A string of ICJ decisions have cited domestic court decisions as proof of state practice[117] but perhaps none underscored the relevance of domestic decisions more than the ICJ *Jurisdictional Immunities of the State* case.[118]

In the *Jurisdictional Immunities of the State* case, Italy relied on some cases from Greek national courts, such as *Prefecture of Voiotia v Germany*,[119] that rejected Germany immunity for offences perpetrated by German soldiers during the Second World War to advance the averment that Germany was not entitled to immunity. The ICJ in reaching its finding that customary international law supported a broad view of state immunity extensively analysed state practice by reviewing domestic court decisions of different states from several regions which confirms the relevance of such decisions in the establishment of customary international law.

In a passage, the ICJ gave a distinction between internal and collective uniformity as follows:

'For State Practice to create a rule of customary law, it must be virtually uniform, both internally and collectively. 'Internal' uniformity means that each State whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question. 'Collective' uniformity means that different States must not have engaged in substantially different conduct, some doing one thing and some another.'[120]

Relating the above passage to the cursory review of the selected domestic jurisdictions discussed in this thesis, there is a clear lack of uniformity by states in the usage of extraterritorial jurisdiction in enforcement of corporate accountability because of the contradicting practice in countries such as the United States.

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[116] Ian Brownlie, *Principles of Public International Law*, p. 23. 7th ed. (Oxford University Press, 2008).
[117] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), [2002] ICJ Rep 3 (International Court of Justice 2002).
[118] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), No. General List No 143 (International Court of Justice February 3, 2012).
[119] Areios Pagos, (2007) 129 ILR 513 (Greek Court of Cassation 2000).
[120] Cf Jurisdictional Immunities of the State case (supra) at p. 76.

Therefore, Bernaz was right in contending that the safe position is to assume that there is no mandatory obligation under international law for states to exercise extraterritorial jurisdiction to hold MNCs accountable for human rights violations and that the law is still developing in this area.[121] However, it is indisputable, especially in the European states reviewed in this thesis, that there has been a consistent application of extraterritorial jurisdiction to hold MNCs in those jurisdictions.

2.14 Conclusion

Many scholars agree that despite there being no binding treaty on business and human rights in force, the UNGPs are a universal endorsement of substantive and procedural standards within the area of business and human rights.[122] It should also be noted that the UNGPs were adopted with no express opposition by States and so they might be considered as evidence of an emerging consensus among States and of new international customs.[123]

The commentary to the UNGPs concludes that States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.[124] However, it cannot be disputed that several European States have incorporated the principles into domestic laws that provide for corporate accountability for human rights abuses, such as the mandatory human rights due diligence laws adopted in France, Germany, and Norway.[125] As already noted in section 2.10, the EU Parliament passed the CSDDD, which requires MNCs to perform mandatory human rights due diligence.[126] This is evidence of the hardening of soft law standards.

UN treaty bodies have also begun suggesting that States have extraterritorial obligations to hold corporations accountable for human rights violations. For instance, the Committee on Economic, Social and Cultural Rights, in its Concluding Observations regarding the United

[121] Bernaz (2013)
[122] Kevin Li, *Reconceiving Extraterritorial Jurisdiction: From Formality to Function*, 1st edition, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht, Volume 313 (Baden-Baden: Nomos, 2022) at p.204, https://doi.org/10.5771/9783748933212.
[123]Justine Nolan, "The Corporate Responsibility to Respect Rights: Soft Law or Not Law?," SSRN Scholarly Paper (Rochester, NY, October 4, 2013), https://papers.ssrn.com/abstract=2338356.
[124] Commentary to Principle 2, UN Guiding Principles.
[125] "Map: Corporate Accountability Legislative Progress in Europe," ECCJ, accessed May 27, 2024, https://corporatejustice.org/publications/map-corporate-accountability-legislative-progress-in-europe/.
[126] "Corporate Sustainability Due Diligence - European Commission," May 24, 2024, https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

Kingdom, held that the country should 'adopt appropriate legislative and administrative measures to ensure the legal liability of companies domiciled under the State party's jurisdiction for violations […] abroad committed directly by these companies or resulting from the activities of their subsidiaries'.[127] In the same vein, the existing silence under treaty law regarding extraterritorial adjudication leads to a permissible use of jurisdiction to preserve and guarantee the rights of victims of human rights violations.[128]

Despite the avenues available in Global North states to hold MNCs accountable, such as the Duty of Vigilance law in France that inspired the drafting of the CSDDD, as noted in section 2.10, there are some technical issues that impede access to an effective remedy in these countries. For instance, ever since the Duty of Vigilance law was passed in France, there have been a number of cases filed on the basis on the law, however, only one case has been concluded on its merits. Cases often remain at the preliminary procedural stage for many years (Mathilde Cohen, personal communication, June 13, 2024).

The effectiveness of extraterritorial jurisdiction in home State courts has also been limited by the lack of political will by governments to hold MNCs accountable because of the financial contribution of MNCs to the Global North economies. For example, TotalEnergies employs 35,000 people in France which makes the government hesitant to issue sanctions against it for violations of human rights.[129] It is also worth noting that the Duty of Vigilance was not initiated by the executive branch of government in France, this perhaps explains why the French government opposed some obligations imposed on companies during discussions on the CSDDD and called for limiting the scope of the Directives. Therefore, the final text of the CSDDD was significantly watered-down due to lobbying by MNCs, which influenced governmental positions (Mathilde Cohen, personal communication, June 13, 2024).

The aim of this chapter was to highlight the historical development of corporate accountability under international law. The other aim was to discuss domestic jurisprudence in select jurisdictions. It is worth restating that the purpose of such a discussion was not to have an exhaustive determination of customary international law but to examine whether any strides

[127] UN Committee on Economic and Social and Cultural Rights (58th session: 2016: Geneva), "Concluding Observations on the 6th Periodic Report of the United Kingdom of Great Britain and Northern Ireland :: Committee on Economic, Social and Cultural Rights," July 14, 2016, https://digitallibrary.un.org/record/834917.

[128] Rivera (2016).

[129] "France: TotalEnergies Commits to Its Employees' Energy Transition," TotalEnergies.com, July 17, 2024, https://totalenergies.com/media/news/press-releases/france-totalenergies-commits-its-employees-energy-transition.

are being taken towards the continuous development of the law in this area. The findings were that there is a generally consistent application of the principle of extraterritorial jurisdiction in some European states, but the principle is still disputed in the US. The discussion also highlighted attempts within the EU to utilize extraterritorial jurisdiction such as through the passing of the CSDDD, however, the actual goal of member states in the development of the Directives is still questionable.

3 Extraterritorial Jurisdiction in the implementation of corporate accountability in Africa

3.1 Introduction

As mentioned in section 1.1, Africa is the most natural resource continent on earth, and this has attracted many MNCs domiciled in the Global North to the continent. Despite Africa's geopolitical significance, it has remained sidelined in the formulation of international policies.[130] There has also been a lack of sufficient consultation of African stakeholders in the adoption of global corporate accountability policies with an extraterritorial reach on the continent. A vivid illustration is the lacklustre involvement of African stakeholders in the CSDDD consultation process. The few human rights defenders and victims of corporate human rights abuses have had to contend with astronomical costs involved in travelling to Brussels to participate in the process. They are subjected to a rigorous visa application process with risks of being denied entry into the EU (Marion Lupin, personal communication, June 17, 2024). Therefore, African solutions to African problems are needed because they understand their context best.[131]

This chapter examines the strategies that have been implemented on the African continent to enforce corporate accountability. As indicated in section 1.4, there is deficient African academic literature on the subject of extraterritorial jurisdiction in the enforcement of corporate accountability of MNCs. To establish the African policy on the subject, I discuss the deliberations of the Working Group on Extractive Industries, Environment and Human Rights in Africa (WGEI) set up by the African Commission, which has formulated African-specific BHR and corporate accountability principles. Other African Union strategies and case law are also discussed to further elucidate the continental corporate accountability approach and dilemmas.

3.2 Business and Human Rights Landscape in Africa

There has been a recent focus on BHR on the African continent because of the increased trade and presence of MNCs, which have human rights implications. Senior officials on the continent have argued that amid rapid economic growth and new investments in land and natural

[130] Adams Oloo, "The Place of Africa in the International Community: Prospects and Obstacles," *OALib* 03, no. 04 (2016): 1–14, https://doi.org/10.4236/oalib.1102549.
[131] "African Solutions to African Problems?," ie edu, November 11, 2021, https://www.ie.edu/blue-talks/african-solutions-to-african-problems/.

resources, there is an increasing awareness of why human rights must be brought into business strategies and operations.[132]

3.2.1 Advocacy for a UN legally binding instrument on BHR

The WGEI issued an 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. In the said note, the WGEI observed that MNCs constitute a source of revenue, representing a substantial part of foreign direct investment that can contribute to socio-economic development.[133]

On the flip side, the WGEI stated that MNCs have been responsible for widespread violations and abuses of the environmental, land, and other socio-economic and collective rights of the people of Africa in the form of dispossession of land and displacement of communities; weak or poorly beneficial terms of concession; environmental degradation and poor labour rights protection; lack of transparency in respect of royalties paid and profits made and avoidance of taxes.[134]

The WGEI further contended that whereas the current legal regime is relevant, it remains inadequate to address the significant power imbalance between MNCs and States, as well as the imbalance between the scope of MNCs' obligations, the gravity of their operations' impact, and the scale of power they wield.[135] Unpacking the WGEI's Advisory note is crucial in understanding the African Commission's policy on corporate accountability of MNCs. The WGEI highlighted core principles which should be incorporated in the proposed binding instrument on BHR.[136] Some of the principles include:

a) Sovereignty and ownership which means that pursuant to Article 21 of the African Charter on Human and Peoples' Rights, there is a duty on States to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies.

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[132] Statement by Michael K. Addo, then chair of the UN Working Group on Business and Human Rights, at the African Forum on Business and Human Rights, Addis Ababa (16–18 September 2014).
[133] "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," African Commission on Human and Peoples' Rights, May 3, 2024, https://achpr.au.int/en/news/communiques/2019-11-04/advisory-note-african-group-geneva-legally-binding-instrument.
[134] Ibid.
[135] Ibid.
[136] Ibid.

b) Transparency and accountability in order to ensure that people have access to information to promote their rights and to hold MNCs and other stakeholders accountable for breaches of human rights.
c) Consultation and participation, which means that people should have the right to effective and genuine consultation and substantive and rigorous participation in decision-making processes that affect their lives and well-being.
d) Protection of vulnerable groups because women, children, the elderly, persons with disabilities, indigenous peoples, rural populations, among others, are often more susceptible to harm from MNCs, and require special protection through binding national and international human rights instruments.
e) Sustainable development which means use of resources to meet human development goals while simultaneously sustaining the ability of natural systems to provide the natural resources and ecosystem services upon which the economy and society depend and without compromising the ability of future generations to do the same.

The WGEI also proposed direct obligations on business enterprises. It opined that while it is the duty and primary responsibility of States to protect human rights and ensure that companies do not violate them, it is equally the responsibility of business enterprises, as entities whose operations carry major social, economic, and environmental impacts, to put in place measures that ensure respect for human rights.[137]

Another important point from the Advisory note is on jurisdiction. The WGEI observed that the principle of "separation of corporate identity" and *forum non conveniens*, when applied together, very often serve business enterprises in avoiding liability in the parent company's home state for the damages caused in other countries, resulting in double standards being applied in relation to developing countries.[138] The WGEI suggested that in order to reduce the likelihood of companies relying on *forum non conveniens* as a jurisdiction bar thus preventing victims from access to justice, the binding instrument must make specific provision for ensuring that home state courts where MNCs are domiciled are clothed with jurisdiction. It is stated further that MNCs should also bear the responsibilities that result from the operation of their subsidiaries.

The WGEI argued that host states, due to jurisdictional and other challenges, are often not in a position to hold business enterprises accountable. To prevent an accountability vacuum,

[137] Ibid.,4.
[138] Ibid.,5.

jurisdiction should be extended to business enterprises' home states and states where the victims are domiciled.[139] It should be recalled that one of the justifications for extraterritorial jurisdiction is that victims are often unable to access justice against MNCs in countries where the human rights violations are perpetrated, hence the need to institute civil suits in countries where parent companies are domiciled (Mathew Renshaw, personal communication, March 19, 2024).

The WGEI also called for stipulating the criteria for the applicable law and/or venue between that of the State where the harm occurred or where the business enterprise is domiciled. This is necessary to obliterate the possibility of conflicting laws. In the same vein, the WGEI called for recognition of competent regional courts as an avenue for accessing judicial remedies. This is particularly relevant because litigants have raised preliminary objections challenging the jurisdiction of regional courts. For instance, in *SERAP v. Nigeria*,[140] the defendants raised a preliminary objection contending that the Economic Community of West African States (ECOWAS) Court of Justice was not competent to adjudicate the dispute brought to it because it is neither a member of ECOWAS nor a Community Institution and is not otherwise subject to the jurisdiction of the Court. The Court upheld the preliminary objection that it did not have jurisdiction over the defendants, who are corporations, for alleged violation of human rights.

3.2.2 African Business and Human Rights Forum

Another key initiative has been setting up the African Business and Human Rights Forum, an annual event convening African stakeholders for constructive dialogue and peer learning on strengthening responsible business and corporate accountability in the region.[141] The first Forum was held on 18 September 2014 in Addis Ababa and was convened by the United Nations Working Group on Business and Human Rights, with the support of the African Union Commission, the United Nations Economic Commission for Africa, and the Office of the United Nations High Commissioner for Human Rights. The goal was to make business a force for improving human rights in Africa.[142] The second edition of the Forum focused on local

[139] Ibid.

[140]SERAP v. Nigeria, Ruling, No. ECW/CCJ/APP/08/09 and ECW/CCJ/APP/07/10 (ECOWAS December 10, 2010). Suit No: ECW/CCJ/APP/08/09.

[141] "African Business and Human Rights Forum 2023 - 'For Africa, From Africa,'" OHCHR, accessed May 27, 2024, https://www.ohchr.org/en/events/forums/2023/african-business-and-human-rights-forum-2023-africa-africa.

[142] Statement by Michael K. Addo, then chair of the UN Working Group on Business and Human Rights, at the African Forum on Business and Human Rights, Addis Ababa (16–18 September 2014).

perspectives and solutions to implementing the UNGPs and discussed BHR in the context of the operationalization of the AfCFTA.[143]

3.2.3 Draft AU Policy Framework on Human Rights and Business

In 2017, stakeholder representatives from different African states called for a Policy Framework that includes African norms and standards.[144] The representatives proposed that the policy framework should provide for three levels of obligations. Firstly, the state's duty to protect human rights, anchored in regulatory mechanisms, protection of human rights defenders, and adoption of National Action Plans (hereinafter "NAPs") on BHRs. Secondly, access to remedies. Thirdly, other considerations must focus on the inclusion of human rights obligations under Bilateral Investment Treaties (BITs), regulation of investors, including parent companies that have control over subsidiaries, and states' obligations to emphasise open contracting, beneficial ownership, access to information, consultation and community engagement.

To fulfil the duty to protect human rights, the Draft Policy outlines 14 indicative elements, and these include:

a) adopting national laws, policies, and strategies for regulating human rights-related activities of businesses;
b) synergising national laws and policies with BHR principles and the Draft Policy;
c) creating an enabling environment to implement and enforce the recommendations and decisions of judicial and non-judicial mechanisms at national and regional levels concerning the human and peoples' rights impacts of the businesses that operate on their territories;
d) encouraging a human and peoples' rights culture among the businesses that operate on their territories through support for training programmes and activities;
e) mandating periodic human rights reporting on how businesses address adverse human rights impacts in their spheres of operation;
f) integrating human and peoples' rights risk management into investment contracts that could generate social, economic, or environmental risks;

[143] "The 2nd Africa Business and Human Rights Forum Called for Inclusive Growth That Respects Human Rights | African Union," accessed May 27, 2024, https://au.int/en/pressreleases/20230908/2nd-africa-business-and-human-rights-forum-called-inclusive-growth-respects.
[144] AU Commission, Development of an African Union Policy Framework on Business and Human Rights, Midrand, Johannesburg, 16 February 2017.

g) concluding bilateral and multilateral agreements that adopt human rights with the home states of the transnational companies;
h) engaging with businesses which operate in conflict zones to avoid, identify, assess, mitigate, and redress human and peoples' rights related.

The policy further incorporates seven benchmarks against which to assess the compliance of states with the duty to protect human rights. The policy is designed to act as a roadmap for regulating the impact of business conduct on human rights in Africa and to encourage cohesive implementation of the UNGPs by African states.[145] The African Commission on Human and Peoples' Rights reiterated its commitment to incorporate business and human rights into Africa's legislative framework in a recent resolution.[146]

3.2.4 Development of Reporting Guidelines and Principles

The African Charter on Human and Peoples' Rights (African Charter)[147] established the African Commission on Human and People's Rights (African Commission).[148] The African Commission is a quasi-judicial body mandated to promote and protect human and peoples' rights.[149] Article 62 of the African Charter provides that States shall submit periodic human rights reports. Relying on this Article, as already discussed in section 3.2.1, the African Commission established the WGEI, which published the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment (hereinafter "Guidelines").[150] Article 21 guarantees the right of all peoples to freely dispose of their wealth and natural resources while Article 24 provides for the right of all peoples to a general satisfactory environment, favourable to their development.

[145] Daniel Feldman Edmonds-Camara Mosa Mkhize, Hannah, "2023 African Forum on Business and Human Rights: What Do Companies Need to Know?," Global Policy Watch, September 15, 2023, https://www.globalpolicywatch.com/2023/09/2023-african-forum-on-business-and-human-rights-what-do-companies-need-to-know/.
[146] "Resolution on Business and Human Rights in Africa - ACHPR/Res.550 (LXXIV) 2023," African Commission on Human and Peoples' Rights, May 3, 2024, https://achpr.au.int/index.php/en/adopted-resolutions/550-resolution-business-and-human-rights-africa-achprres550-lxxiv-2023.
[147] Article 30 of the "African Charter on Human and Peoples' Rights ('Banjul Charter')," accessed May 27, 2024, https://www.refworld.org/legal/agreements/oau/1981/en/17306.
[148] Ibid.
[149] Article 45 of the African Charter.
[150] "State Reporting Guidelines and Principles on Articles 21 And 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment," African Commission on Human and Peoples' Rights, October 30, 2021, https://achpr.au.int/en/node/845.

The Guidelines were an important innovation by the WGEI because of the exponential growth of the extractive industry in Africa and the weak national regulatory regimes which have been exploited by MNCs.[151] The Guidelines provide that, in relation to Article 21, the state report should indicate a list of MNCs and subsidiaries involved in natural resource exploitation and the extent of their involvement.[152] Crucially, the Guidelines also recognise the need to report on the judicial and non-judicial complaints mechanisms including the extent to which they are equipped and resourced to adjudicate grievances of affected communities or individuals and data on complaints received and settled through such mechanisms must be provided. The Guidelines also make specific reference to the UNGPs[153] and re-emphasise MNCs' obligations towards rights holders.[154]

3.2.5 Business and human rights under the AfCFTA

The idea of creating a free trade area on the African continent can be traced to the Lagos Plan of Action, signed in 1980.[155] The idea became a reality when the African Continental Free Trade Area (AfCFTA) came into force on 30 May 2019. As of April 2024, 47 states had ratified it.[156] However, it remains to be seen how BHR and corporate accountability principles will be incorporated into the AfCFTA framework, which is still in its formative stages.

3.2.6 Development of National Action Plans (NAPs)

According to the United Nations, a NAP is a political document where the state formulates the priorities and actions it will take to fulfil international, regional, and national obligations concerning the designated topic.[157] In relation to BHR, NAPs help governments to formulate expectations from companies in the field of human rights, and companies to obtain government support in this area, reduce the risks of conflict situations in the field of human rights. They also make it possible to more actively promote the topic of human rights in the business

[151] Ibid., iv.
[152] Ibid., 12.
[153] Ibid., 19.
[154] Ibid., 23.
[155] "Treaty Establishing the African Economic Community, Lagos Plan of Action for the Economic Development of Africa 1980–2000 4 (1980)" (AU, June 3, 1991), https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf.
[156]"African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents - Tralac Trade Law Centre," TRALAC, accessed May 27, 2024, https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html.
[157] "National Action Plan on the UN Guiding Principles on Business and Human Rights Implementation," UNDP, February 8, 2023, https://www.undp.org/kyrgyzstan/news/national-action-plan-un-guiding-principles-business-and-human-rights-implementation."National Action Plan on the UN Guiding Principles on Business and Human Rights implementation."

environment, not only in the country where such a plan is adopted, but also beyond its borders.[158] Few countries have taken the initiative to draft NAPs. Kenya was the first African country to develop a NAP and Kenya's process has provided a good template from which other Africa countries can borrow from.[159]

3.3 Analysis of case law

3.3.1 SERAP v. Nigeria Suit No: ECW/CCJ/APP/08/09 [160]

The background of the case was that the Plaintiff, the Socio-Economic Rights and Accountability Project (SERAP), a human rights NGO in Nigeria, filed an application against the Defendants; the Nigerian government, the state owned Nigerian National Petroleum Corporation (NNPC) and the Shell Petroleum Development Company (SPDC), a subsidiary of Royal Dutch Shell among others for violation of a number of human rights in the Niger Delta including the right to adequate standard of living and the right to a clean and safe environment as a consequence of the impact of oil-related pollution and environmental damage on agriculture and fisheries and oil spills. In addressing the preliminary objections already mentioned above, the Court held that the objection calls for the consideration by the Court of one of the most controversial issues in international law, which relates to the accountability of companies, especially MNCs, for violation or complicity in violation of human rights especially in developing countries.

The Court went on to state that one of the paradoxes that characterized international law at the time was the fact that States and individuals can be held accountable internationally, while companies cannot. The Court, in stating this, acknowledged the ongoing debate in academia on the subject and cited an article by Harold Hongju Koh entitled "Separating Myth from Reality about Corporate Responsibility Litigation," published in the Journal of Economic Law (2004) 263, 265, where the scholar argues that: "If states and individuals can be held liable under international law, then so too should corporations for the simple reason that both states and individuals act through corporations. Given that reality, what legal sense would it make to

[158] Ibid.
[159] "The Kenya National Action Plan on Business and Human Rights – a Case Study on Process, Lessons Learned and Ways Forward" (The Danish Institute for Human Rights, November 19, 2020), https://www.humanrights.dk/publications/kenya-national-action-plan-business-human-rights-case-study-process-lessons-learned.
[160] Suit No: ECW/CCJ/APP/08/09.

let states and individuals immunize themselves from liability for gross violations of Human Rights through the mere artifice of corporate formation?"

The Court also acknowledged the efforts of Professor Ruggie under the UNGPs but upheld the preliminary objection of jurisdiction, holding that the codification process of international law had not yet arrived at a point that allowed the claim against corporations to be brought before International Courts. The Court further held that any attempts to do so had been dismissed on the basis that the companies are not parties to the treaties that the international courts are empowered to enforce. The Court concluded by stating that the only available alternative left to those seeking justice against corporations had been domestic jurisdictions and gave the example of the Alien Tort Claims Act (1789) in the United States that allows victims of human rights violations perpetrated by American companies operating abroad in developing countries to hold such companies accountable in American domestic courts.

The implications of this decision are twofold. Firstly, the Court acknowledges that there are jurisdictional challenges in instituting civil suits against MNCs in international courts. Secondly, the Court seems to have given a vote of confidence to potential victims of human rights violations perpetrated by MNCs to utilize extraterritorial jurisdiction to file civil suits in countries where those companies are domiciled.

3.3.2 La LIDHO, LE MIDH, LA FIDH & others v Republic of Cote d'Ivoire (the Trafigura case)[161]

This is a recent decision by the African Court on Human and Peoples' Rights delivered on 5 September 2023 and is instructive on the Court's view on corporate accountability of MNCs. The background of this case was that in 2006, a vessel called M.V. Probo Koala, chartered by the multinational company Trafigura Limited, arrived at the port of Abidjan, Côte d'Ivoire, with highly hazardous wastes. The wastes were offloaded from the ship and dumped on several sites in the district of Abidjan and its suburbs. None of these sites had chemical waste treatment facilities. Seventeen people lost their lives as a result of the inhalation of toxic gases, and hundreds of thousands more were affected. The Ivorian League for Human Rights (LIDHO), the Ivorian Human Rights Movement (MIDH), and the International Federation for Human Rights (FIDH) filed an Application before the Court against the Republic of Côte d'Ivoire contending that the government violated a number of human rights including the right to life.

[161]La LIDHO, LE MIDH, LA FIDH & others v Republic of Cote d'Ivoire Application, No. Application 041/2016, accessed May 27, 2024.

On human rights responsibility of MNCs, the Court noted that even though the responsibility to respect the obligations of international law is incumbent primarily on States, it is also true that this responsibility is incumbent on MNCs. The Court cited the UNGPs, which reaffirm the responsibility of enterprises to respect human rights. The Court held that such a responsibility requires enterprises to commit themselves to public policies in prevention and reparation, due diligence in continuous identification of the consequences of their activities, and lastly, setting up procedures aimed at solving problems caused by their action. However, the majority opinion of the Court was that the primary obligation to respect human rights lies with States and that MNCs like Trafigura only have indirect responsibilities.

Justice Blaise Tchikaya, in his dissenting opinion, went further by averring that the Court should horizontally extend the positive obligations contained in the African Charter to the powerful MNCs that mastermind massive human rights violations on the continent and that this horizontal application can be implemented by the Court. He further stated that the phrase "polluter pays" would be meaningless without attaching the concept of liability to it. He called for the revision of the traditional notion of liability, which falls on States, to be expanded to include private individuals who infringe environmental law or life, and that this idea requires a strong judicial contribution.

Some commentators of the decision, such as Nxumalo, have argued that whereas the Court did not directly hold the corporation liable, this case paves the way for future litigation and strengthens the call for direct corporate accountability in Africa. They also argue that the dissenting judgment is a compelling reminder of the human cost of corporate actions and the need for stricter legal frameworks to hold them responsible.[162]

3.4 Conclusion

The primary objective of this chapter was to establish the African policy on the use of extraterritorial jurisdiction in the enforcement of corporate accountability of MNCs. At the forefront of the continent's policy formulation on the subject has been the WGEI, which has advocated for the removal of jurisdictional hurdles such as *forum non conveniens* to ensure that MNCs can be sued in their home state courts through the exercise of extraterritorial jurisdiction, thus facilitating access to justice. The WGEI, as seen in section 3.2.1, has also recommended

[162]Sfiso Nxumalo, Oxford Human Rights Hub, *Beyond State Responsibility: The Trafigura Case and Corporate Accountability in Africa* (blog), February 27, 2024, https://ohrh.law.ox.ac.uk/beyond-state-responsibility-the-trafigura-case-and-corporate-accountability-in-africa/.

adopting African-led solutions to enforce corporate accountability by proposing the recognition of competent regional courts as an avenue for accessing judicial remedies.

Another important milestone of the WGEI worth reiterating here has been the drafting of the Guidelines, which recognise the need to report on the judicial and non-judicial complaints mechanisms as seen in section 3.2.4. Non-judicial mechanisms are crucial in extending justice closer to victims of corporate human rights violations (Deva Surya personal communication, May 29, 2024).

In this chapter, we have also looked at the jurisprudence of the African Court, such as in the *Trafigura case*, which has emphatically stated that MNCs have some obligations under international law to respect human rights. Mention should also be made of Justice Blaise Tchikaya's audacious opinion in proposing that the concept of liability traditionally imposed on states should be expanded to include private individuals such as MNCs. For this to be achieved, African policy markers led by the WGEI must amplify their voices and advocate for an internationally legally binding instrument to hold MNCs accountable for corporate human rights violations.

4 Extraterritorial Jurisdiction in Uganda's Oil Sector

4.1 Introduction

As we have seen in the previous chapters, discussions on extraterritorial jurisdiction and corporate accountability are still ongoing at both the international and regional levels. This chapter looks at Uganda as a national case study. The discussion has increasingly become relevant in Uganda today because of the operations of petroleum MNCs which came into the country to exploit the oil reserves.[163] The most controversial arrangement in the sector has been the development of the East African Crude Oil Pipeline Project (hereinafter "EACOP") which has been criticized by international agencies such as the Intergovernmental Panel on Climate Change (IPCC), which has warned that if the international community is to reach the goals stated in the Paris Agreement and avoid the worst impacts of climate change, no new fossil fuel projects should be built.[164]

The chapter will give a brief historical account of the oil and gas industry in Uganda and document the alleged human rights and environmental law violations in the sector. It will also examine whether the current legal framework in place in Uganda is sufficient to hold MNCs accountable for these violations.

4.2 Legal Framework

Uganda has very progressive laws that are human rights sensitive, and these include a Constitution and Acts of Parliament. The country has also ratified several international instruments.

4.2.1 The Constitution of the Republic of Uganda, 1995

The 1995 Constitution of the Republic of Uganda is the supreme law of the land. Chapter Four of the Constitution provides for various human rights which mirror the International Bill of Rights. Article 20 of the Constitution specifically imposes a direct responsibility on all persons to respect human rights, and this has been interpreted as conferring a responsibility for all non-

[163] Gabriella Wass and Chris Musiime, "Business, Human Rights, and Uganda's Oil; Part II: Protect and Remedy: Implementing State Duties under the UN Framework on Business and Human Rights," November 2013, https://www.banktrack.org/download/business_human_rights_and_uganda_s_oil_part_ii/business_human_rights_and_ugandas_oil_part_ii.pdf.

[164] "Climate Change 2022: Mitigation of Climate Change" (Intergovernmental Panel on Climate Change), accessed May 27, 2024, https://www.ipcc.ch/. The Paris Agreement overarching goal is to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursue efforts "to limit the temperature increase to 1.5°C above pre-industrial levels."

state actors, including MNCs, to respect human rights.[165] The Constitution also guarantees the right to property under Article 26, which prevents the expropriation of property except under certain circumstances and subject to prompt prior payment of fair and adequate compensation. Article 39 provides for the right to a clean and healthy environment.

4.2.2 Domestic legislations

The domestic legislations that are relevant for corporate accountability include:

a) The Human Rights Enforcement Act 2019, framed in accordance with Article 50 of the Constitution, allows any person and/or organization that claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened to seek legal redress.
b) The Children Act, Cap 59, as amended enhances the protection of children's rights and provides for remedies.

4.2.3 Ratification of International and Regional Instruments

Uganda has ratified several international and regional human rights instruments with some BHR aspects. These include but are not limited to the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights and Maputo Protocol. In many court cases including the Supreme Court decision of *Attorney General v. Susan Kigula and others*[166], it has been held that Uganda has ratified the aforementioned international instruments, which are binding on it.

4.2.4 National Action Plan on Business and Human Rights

Uganda passed a five-year National Action Plan on Business and Human Rights in 2021, making it one of the first African countries to do so. The decision to adopt an NAP can be traced to the Universal Periodic Review cycle in 2016, where a recommendation was made to the Government of Uganda to adopt an NAP on business and human rights.[167] Drafting the

[165]"Business and Human Rights In Uganda: A Resource Handbook on the Policy and Legal Framework on Business and Human Rights in Uganda" (Uganda Consortium on Corporate Accountability, September 2018), https://ucca-uganda.org/wp-content/uploads/2020/03/18-11-15-Business-Human-Rights-in-Uganda-Handbook.pdf.
[166] Constitutional Appeal No.3 of 2006.
[167] RRA, "Uganda Passes The National Action Plan on Business and Human Rights.," *Resource Rights Africa* (blog), September 15, 2021, https://resourcerightsafrica.org/for-immediate-release-uganda-passes-the-national-action-plan-on-business-and-human-rights/.

NAP involved government stakeholders such as the Ministry of Gender, Labour and Social Development and the Ministry of Justice and Constitutional Affairs as well as non-state actors including local NGOs such as Initiative for Social and Economic Rights and the Office of the United Nations High Commissioner for Human Rights.[168]

The aim of the NAP is to provide a comprehensive framework to coordinate efforts across sectors to ensure respect for human rights in business operations and eight thematic areas were identified during the consultation process, and these include: land and natural resources; environment; labour rights; revenue transparency; tax exemptions and corruption; social service delivery by private actors; consumer protection; access to remedy; and women, vulnerable and marginalized groups.[169] The NAP highlights two important aspects of enforcing corporate accountability: access to remedy and protection of women and vulnerable and marginalized groups.

On access to remedy, the NAP cites Article 50 of the Constitution, which guarantees judicial remedies for human rights violations by stipulating that any person who claims that his or her fundamental or other right or freedom guaranteed under the Constitution have been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation. The NAP notes that judicial avenues for offering remedies to victims of business-related human rights violations include the Civil Division of the High Court, the Environmental Tribunal, and, in the event of dissatisfaction, an appeal to the Court of Appeal and a further appeal to the Supreme Court is available.[170]

The NAP, however, pointed out that the stakeholder consultations revealed that there are still issues related to access to remedies. The challenges in accessing effective remedies include access to court, inadequate number of judicial officers, high cost of litigation, long distance to court, delayed payment of awards, limited enforcement of judicial decisions, and inadequate internal grievance redress mechanisms. A deduction is made that a delay in dispensing justice puts the affected persons at a risk of loss of livelihoods, food insecurity, and lack of access to basic services like health care, safe and clean water.[171]

[168] "Uganda - National Action Plans on Business and Human Rights," https://globalnaps.org/, accessed May 27, 2024, https://globalnaps.org/country/uganda/.
[169] Ibid.
[170] Ibid.
[171] Uganda National Action Plan on Business and Human Rights, at p. 19.

On the protection of sensitive groups in the community, the NAP lists international human rights instruments already mentioned above and national legislations that have specific provisions for the protection of vulnerable groups. It notes that despite the positive strides taken to provide legal protection for vulnerable groups, gaps persist, and certain groups remain susceptible to suffer negative consequences of business operations. Women in particular bear the greatest burden of environmental degradation caused by business operations because they have to mitigate the food insecurity.[172]

4.3 Oil discovery in Uganda

The discovery of oil in Uganda can be traced to the colonial period when local communities discovered oil seepages in the country's Albertine region which were documented by Emin Pasha in 1877 and British colonial administrator Frederick Lugard in 1890.[173] The British colonial administration later conducted a geological survey in 1925 to explore the viability of oil production, which confirmed the presence of hydrocarbons in the Albertine Graben.[174]

Petroleum exploration ceased due to decades of political turmoil and instability attributed to the country's independence and subsequent civil wars. It was only after the National Resistance Movement (NRM) took power in 1986 under the leadership of President Yoweri Museveni that the country began taking significant steps towards the resumption of oil exploration. These included training its staff in Norway and signing production-sharing agreements with Tullow Oil, Hardman Resources, and Heritage Oil.[175] In 2006 the Government of Uganda finally announced the commercial viability of the oil deposits in the Albertine region.[176] The region is reported to have 6.5 billion barrels of oil reserves, of which at least 1.4 billion are estimated to be economically recoverable.[177]

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[172] Ibid, at p.20.

[173] Sebastian Wolf and Vishal Aditya Potluri, "Uganda's Oil: How Much, When, and How Will It Be Governed?," in *Mining for Change: Natural Resources and Industry in Africa*, ed. John Page and Finn Tarp (Oxford University Press, 2020), 304–25.

[174] Julius Kiiza, Lawrence Bategeka, and Sarah Ssewanyana, "Righting Resource-Curse Wrongs In Uganda: The Case Of Oil Discovery And The Management Of Popular Expectations," *Research Series*, Research Series, July 2011, https://ideas.repec.org//p/ags/eprcrs/150481.html.

[175] "The African Executive," Uganda Oil: Deal or No Deal for Farmers?, June 28, 2013, https://africanexecutive.com/article/read/7307.

[176] Peter Veit, Carole Excell, and Alisa Zomer, "Avoiding the Resource Curse," January 24, 2011, https://www.wri.org/research/avoiding-resource-curse.

[177] Pamela Mbabazi and Martin Muhangi, "Uganda's Oil Governance Institutions: Fit for Purpose?," *CRPD KU Leuven* Working Paper No. 60 (December 2018), https://soc.kuleuven.be/crpd/files/working-papers/crpd-no-60-mbazi-muhangi-full.pdf.

4.4 What is the EACOP?

The EACOP is a 1443km pipeline that will transport oil produced from Uganda's Lake Albert oilfields to the port of Tanga in Tanzania, where it will be sold to world markets.[178] TotalEnergies is the largest shareholder, with a 62% stake in the joint venture, having acquired the entire stake of a British MNC, Tullow Oil. The Uganda National Oil Company (UNOC) and the Tanzania Petroleum Development Corporation (TPDC) each own 15% stake respectively and the Chinese CNOOC Limited owns 8% stake.[179]

4.5 Alleged human rights violations in the oil sector

a) Government restriction on the operations of NGOs

The National Non-Governmental Organisations Bureau (NGO Bureau) is a governmental agency created under the Non-Governmental Organisations Act of 2016. The NGO Bureau is given authority under the legislation to grant, suspend, blacklist, or revoke licenses of NGOs operating in Uganda. This power has been used by the agency to clamp down on the activities of NGOs under the pretext of combating national security threats and protecting the interests or dignity of the people of Uganda.[180]

NGOs involved in advocacy work related to the EACOP project have been directly targeted by government security forces. For instance, the Africa Institute for Energy Governance (AFIEGO) a leading environmental NGO has been continuously targeted because of its efforts to expose the environmental risks associated with the EACOP project. In October 2021, armed security forces raided AFIEGO field offices in Hoima and Buliisa, as reported by Human Rights Watch (HRW). During the raid, one of AFIEGO's employees was told by security officials that: "You are trying to sabotage government programs. We don't want this office to exist. Leave the work you are doing unless you value it more than your life".[181]

b) Arrests of environmental activists

Article 29 of the Constitution provides for the freedom to assemble and to demonstrate peacefully together with others. The Constitutional Court also declared unconstitutional

[178] "Unlocking East Africa's Potential – EACOP –," accessed May 27, 2024, https://eacop.com/unlocking-east-africas-potential/.
[179] "Our Shareholders – EACOP –," accessed May 27, 2024, https://eacop.com/our-shareholders/.
[180] "Uganda: Harassment of Civil Society Groups | Human Rights Watch," August 27, 2021, https://www.hrw.org/news/2021/08/27/uganda-harassment-civil-society-groups.
[181] Felix Horne, "' Working On Oil Is Forbidden,'" *Human Rights Watch*, November 2, 2023, https://www.hrw.org/report/2023/11/02/working-oil-forbidden/crackdown-against-environmental-defenders-uganda.

provisions of the Public Order and Management Act, 2013, that sought to criminalize unauthorized public meetings and demonstrations.[182] Despite these safeguards in place to guarantee the right to freedom of assembly, environmental activists continue to be threatened and arrested. For example, community leader Jelousy Mugisha and farmer Fred Mwesigwa involved in the case against TotalEnergies in France were intimidated on their return to Uganda. Mugisha was arrested and interrogated by the police, and unknown people attempted to break into Mwesigwa's home two nights in a row and then locked him inside. While being detained at the airport, Mwesigwa was warned by security officers: "You are not supposed to witness in France again. If you go again, you will lose your life."[183]

Many student protesters were arrested and beaten last year before being remanded to a maximum-security prison for protesting against the EACOP. They were charged with the colonial era "common nuisance" offense which Ugandan authorities have used to suppress legitimate protests.[184] This is despite pressure from the United Nations Special Rapporteur on Human Rights Defenders, Mary Lawlor, urging Ugandan authorities to release the student activists after highlighting an emerging pattern in which students peacefully advocating for the protection of human rights and the mitigation of climate change are violently arrested and criminalized.[185]

c) Gross violation of human rights of project affected persons

French NGO Les Amis de La Terre in a report entitled "A Nightmare Named Total: An alarming rise in human rights violations in Uganda and Tanzania", documented gross human rights violations of people affected by the oil project ("PAP"). The organization reported that land-grabbing is the crux of the human rights violations, and this has affected the enjoyment of a number of other rights, including the right to property, the right to an adequate standard of

[182] Muwanga Kivumbi & others v. Attorney General, No. Constitutional Petition No. 56 of 2013 (Constitutional Court of Uganda March 26, 2020).
[183] "Two Defenders Who Testified in the Trial against Total Are at Risk in Uganda," International Federation for Human Rights, December 26, 2019, https://www.fidh.org/en/issues/human-rights-defenders/two-defenders-who-testified-in-the-trial-against-total-are-at-risk-in.
[184] Myrto Tilianaki, "Ugandan Authorities Should Drop Charges Against Environmental Activists | Human Rights Watch," Human Rights Watch, March 11, 2024, https://www.hrw.org/news/2024/03/11/ugandan-authorities-should-drop-charges-against-environmental-activists.
[185] Mary Lawlor UN Special Rapporteur HRDs [@MaryLawlorhrds], Tweet, *Twitter*, February 8, 2024, https://x.com/MaryLawlorhrds/status/1755560227997438065.

living, the right to food, the right to education, the right to health, the right to adequate housing, the right to life, liberty and security.[186] Below we discuss some of the affected rights:

d) Deprivation of the right to food

FIDH and its partners reported that the oil companies set cut off dates without a clear timeline in which effective compensation would take place.[187] Oxfam also noted that TotalEnergies explained to the organization that when the cut-off dates were issued, PAPs were prohibited from adding or improving anything on their land, and this prohibition applied to planting of new perennial crops as this would be considered an improvement."[188] This would have been legitimate, but the problem has been the delay in compensating PAPs in contravention of Article 26 of the Constitution, which requires adequate and prior compensation before people are deprived of their land. The Constitutional Court of Uganda has also held that a law that does not provide for prior payment of compensation before the government compulsorily acquires or takes possession of a person's property is unconstitutional.[189] In the same vein, the African Commission held in the *Endorois* case that compensation should be full, prompt, fair, and just.[190]

The denial of PAPs access to their land before compensation has affected their right to food. Some of the respondents in the Les Amis de La Terre inquiry lamented that anyone who tries to use the land is tortured, and families have suffered famine as a result of not being allowed to grow crops.[191]

[186] "A Nightmare Named Total: An Alarming Rise in Human Rights Violations in Uganda and Tanzania" (Les Amis de La Terre France, October 2020), https://www.amisdelaterre.org/wp-content/uploads/2020/11/a-nightmare-named-total-oct2020-foe-france-survie.pdf. (hereinafter "Les Amis de La Terre Report")

[187] "New Oil, Same Business? At a Crossroads to Avert Catastrophe in Uganda" (International Federation for Human Rights (FIDH) and Foundation for Human Rights Initiative (FHRI), September 1, 2020), https://www.fidh.org/IMG/pdf/new_oil_same_business-2.pdf. (hereinafter "FIDH Report")

[188] "Empty Promises Down the Line? A Human Rights Impact Assessment of the East African Crude Oil Pipeline" (Oxfam International, September 2020), https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621045/rr-empty-promises-down-line-101020-en.pdf.

[189] Advocates for Natural Resources Governance and Development, Irumba Asumani, Peter Magelah vs. Attorney General Uganda and National Roads Authority, No. Constitutional Petition No. 40 of 2013 (Constitutional Court of Uganda November 8, 2013).

[190] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, No. 276/2003 (African Commission on Human and People's Rights February 4, 2010).

[191] Les Amis de La Terre Report, at p. 10.

e) Inadequate and unfair compensation

The PAPs have complained about how the monetary compensation remains largely inadequate, with neither the communities nor the local authorities sufficiently involved in setting the compensation rates.[192]The FIDH has reported that the oil companies have shared minimal information with PAPs and lacked a community-based approach when establishing compensation rates.[193]

f) Decline in realization of the right to education

Limited access to land of PAPs has meant loss of income as a result many families are no longer able to pay school fees and have been forced to pull their children out of school. A young PAP living in Buliisa District narrated how the delayed compensation forced him to drop out of school and how this was now a general trend in the District.[194]

g) Flawed grievance mechanism

According to Friends of the Earth France, the grievance mechanisms set up by Total Energies are neither effective, reliable, or independent.[195] The complaints are handled by Total Energies' subcontractors, the same people who are involved in allegedly violating the rights of PAPs and cannot, therefore, be considered to be independent.[196]

4.6 Environmental destruction

The oilfields lie in one of the world's most sensitive and ecologically diverse areas, at the crossroads of Lake Albert, Africa's seventh largest lake and the headwaters of Africa's main basins for the Nile and Congo rivers. Over 400 kilometers of the pipeline runs alongside Africa's largest lake, Lake Victoria, a primary water source for more than 40 million people.[197]

4.7 European Parliament concerns regarding EACOP

On 15 September 2022, the European Parliament issued a resolution contending that the construction and operational phases of the EACOP are expected to cause serious adverse impacts for communities within the oil extraction and pipeline areas, including jeopardising

[192] Les Amis de La Terre Report, at p. 19.
[193] FIDH Report, p.54.
[194] Les Amis de La Terre Report, at p. 15.
[195]"Serious Breaches of the Duty of Vigilance Law: The Case of Total in Uganda" (Friends of the Earth France and Survie, June 2019), https://www.amisdelaterre.org/wp-content/uploads/2020/03/report-totaluganda-foefrance-survie-2019-compressed.pdf.
[196] Les Amis de La Terre Report, at p. 19.
[197] "EACOP: A Disaster in the Making" (Les Amis de la Terre France and Survie, October 2022), https://www.amisdelaterre.org/wpcontent/uploads/2022/10/eacop-a-disaster-in-the-making-foe-france-and-survie-oct-2022.

water resources and irremediably harming the livelihoods of farmers. The resolution further refers to a communication of 24 January 2022 of four United Nations Special Rapporteurs on the situation of human rights defenders expressing their concerns regarding the arrests, intimidation, and judicial harassment of human rights defenders and non-governmental organizations (NGOs) working in the oil and gas sector in Uganda.

4.8 EACOP Litigation

4.8.1 Center for Food and Adequate Living Rights (CEFROHT) & 3 Others v. The Attorney General of the Republic of Uganda & 2 Others Reference No. 39 of 2020[198]

On November 6, 2020, four civil society organisations, namely Centre for Food and Adequate Living Rights (CEFROHT)-Uganda, Africa Institute for Energy Governance (AFIEGO) from Uganda, Natural Justice from Kenya, and Centre for Strategic Litigation from Tanzania filed a court case against the at the East African Court of Justice (hereinafter "EACJ"). The Applicants argued that the EACOP project contravenes the EAC Treaty, Protocol for Sustainable Development of the Lake Victoria basin, Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, and the African Charter on Human and People's Rights.

The Applicants further contended that the project, if allowed, would harm fragile ecosystems in areas rich in biodiversity and the livelihoods of tens of thousands of local people. They sought a permanent injunction preventing the Respondents from constructing the pipeline in protected areas in Uganda and Tanzania and an order that the Respondents compensate all the project-affected persons for the loss already incurred due to the restrictions issued on their property by the EACOP project developers. The Governments of Uganda and Tanzania raised a preliminary objection that the suit was barred by time.

The EACJ delivered a ruling on November 29, 2023, upholding the preliminary objection raised by the Respondents. The Court held that the case was filed out of the required timeframe and was thus time barred. It opined that the Applicants should have filed the case as early as 2017 rather than in 2020. The Court concluded that it did not have jurisdiction to hear the matter.

[198] Center for Food and Adequate Living Rights (CEFROHT) & 3 Others v. The Attorney General of the Republic of Uganda & 2 Others Reference No. 39 of 2020, No. Reference No. 39 of 2020 (n.d.).

The Applicants expressed their dissatisfaction with the ruling in their post ruling statements. This is aptly summarized by a statement by Lucien Limacher an officer of Natural Justice official one of the Applicants of the case:

"The Court of First Instance of the East African Court of Justice failed to provide civil society with the chance to argue their case. *This judgment marks a continuation of how the global north and various government institutions in Africa are blind to the destruction of the environment and the impact oil and gas has on the climate. Profit is valued above livelihoods and the environment...*"[199](emphasis added)

The Applicants vowed to appeal the ruling to EACJ's Appeals Division. Indeed, an appeal was filed, and the appellate court directed the parties to the case to file written submissions in order to determine whether the First Instance Court has jurisdiction to hear the case.[200] Despite the positive step in deciding to appeal against the ruling, one central question still looms large, was Limacher right in concluding that African governments are so profit-driven driven, which has blinded them to the destruction of the environment by the oil and gas industry? Is extraterritorial jurisdiction the answer to these questions?

4.8.2 Case against Total Energies in France

In October 2019, six NGOs namely: Friends of the Earth France, Survie (France), AFIEGO, CRED, NAPE/Friends of the Earth Uganda, and NAVODA (Uganda), filed a civil suit against Total Energies in the Nanterre Civil court in France based on France's "duty of vigilance" law contending that the company had violated human rights and destroyed the environment in connection with its EACOP project (that we highlighted in sections 4.4 and 4.5). The "duty of vigilance" law, which came into force in 2017, requires companies of a certain size to publish in their management report a vigilance plan on the reasonable measures taken to identify risks and prevent potential serious violations of human rights and fundamental freedoms, human and environmental health and safety, not only in relation to the company's own activities but also those of its subcontractors and suppliers with whom it has an established commercial relationship.[201] The outcome of the case was highly anticipated because it was the first suit to

[199] https://naturaljustice.org/east-africa-court-of-justice-hands-down-judgment-frustrating-civil-societys-pursuit-of-justice-in-eacop-case/

[200] "EACJ to Rule on Lower Chamber Hearing Oil Pipeline Project Case," *The East African*, February 21, 2024, https://www.theeastafrican.co.ke/tea/news/east-africa/eacj-to-hear-case-challenging-construction-of-eacop-4532322.

[201] "The Law on the Duty of Vigilance – List of Companies Subject to the Duty of Vigilance," accessed May 27, 2024, https://vigilance-plan.org/the-law/.

invoke the “duty of vigilance” law and activists hoped it would set a legal precedent to halt projects deemed harmful to the environment and human rights. The case was dismissed on February 28, 2023, as the court rendered the claim "inadmissible," stating that the plaintiffs did not correctly follow court procedures.[202]

According to the French court, the plaintiffs submitted accounts to the court that were "substantially different" from those that were presented to Total Energies in a formal notice in 2019 when the case was initiated. The court held that the plaintiffs gave Total Energies the first formal notice dated June 2019, and which was based on the due diligence plan drawn up in 2018. The judge intimated that the plaintiffs should have based their formal notice on the latest known compliance plan, namely the one published by Total Energies in 2022 for the year 2021.[203]

Regardless of what one thinks of the *ratio decidendi* of the court, it is undeniable that this case exposes the technical challenges of extraterritorial jurisdiction in pursuit of corporate accountability in home courts. In the words of Dickens Kamugisha, the director of AFIEGO a co-plaintiff in the suit, “This decision is a huge disappointment for the civil society organizations and affected communities in Uganda who had placed their hopes in the French justice system…”[204]

4.9 Conclusion

The aim of this chapter was to explain and demonstrate to the reader the domestic level mechanisms in place to enforce corporate accountability in Uganda's oil sector. As pointed out in section 4.2, Uganda has very robust human rights laws. Uganda has also been one of the pioneers on the African continent in the adoption of the NAPs that, state that judicial avenues for offering access to remedies to victims of business-related human rights violations are available through Uganda's Courts of Judicature.

Despite Uganda's progressive laws, the realization of rights of vulnerable people affected by the EACOP has almost been a myth. As highlighted in section 4.5, the activities of local NGOs involved in advocacy against the EACOP continue to be clamped down, student activists are

[202] “French Court Dismisses Case against TotalEnergies East Africa Oil Project,” *Le Monde*, February 28, 2023, https://www.lemonde.fr/en/police-and-justice/article/2023/02/28/french-court-dismisses-case-against-totalenergies-east-africa-oil-project_6017688_105.html.
[203] “Friends of the Earth et al. v. Total,” *Climate Change Litigation* (blog), accessed May 27, 2024, https://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/.
[204] Ibid.

being arrested, and the grievance mechanisms set up by Total Energies have proven to be unreliable. The independence and impartiality of the Ugandan judiciary has also been questionable which has rendered many judicial attempts to hold actors in the oil and gas industry accountable almost futile.

We have also seen in this chapter that extraterritorial jurisdiction through adjudication of EACOP related disputes may not be the silver bullet in enforcement of corporate accountability of MNCs. This is due to the fact that EACOP litigation discussed in section 4.8 has been met with technical challenges in foreign courts, such as the East African Court of Justice in Tanzania and the Nanterre Civil Court in France. The challenges of extraterritorial jurisdiction in enforcement of corporate accountability therefore calls into question the need for alternative and complementary solutions in enforcement of corporate accountability and these are considered in the next chapter.

5 Extraterritorial Jurisdiction: The Answer to Corporate Accountability Gaps?

5.1 Normative Challenges

5.1.2 Conflict of laws

A battle for supremacy will always be probable whenever competing normative orders on a subject exist across different jurisdictions. This has led some commentators to contend that conflicts of law may arise from the concurrent exercise of jurisdiction by two different countries in relation to the same set of facts and against the same company.[205] Even the International Law Commission has called for caution when dealing with extraterritorial jurisdiction by observing that:

"The assertion of extraterritorial jurisdiction by a State is entitled to recognition by other States only to the extent that it is consistent with international law. In the event that one State exercises extraterritorial jurisdiction that another State judges excessive the other State may oppose such an exercise of jurisdiction in a number of different ways. Examples of such opposition have included diplomatic protests; non-recognition of laws, orders, and judgments; legislative measures such as 'blocking statutes' and 'claw-back statutes'; judicial measures such as injunctions; and the institution of international proceedings".[206]

5.1.3 Forum Non Conveniens

Forum non conveniens is a common law doctrine which acts as a jurisdictional obstacle in countries such as Canada, Australia and the United States.[207] The doctrine justifies denial of jurisdiction in a domestic court when it deems that another forum is more suitable for a particular action. In *Owusu v Jackson*,[208] the European Court of Justice (ECJ) considered the application of the *forum non conveniens* doctrine where the English Court had jurisdiction under the equivalent provision of the Recast Brussels Regulation's predecessor, Council Regulation (EC) No 44/2001 (the Brussels Regulation). The ECJ held that the jurisdiction conferred by Article 2 of the Brussels Regulation was mandatory even without any factors otherwise connecting the case to the member state.

[205] "Conflicts of Jurisdiction | Eurojust," European Union Agency for Criminal Justice Cooperation, accessed July 17, 2024, https://www.eurojust.europa.eu/judicial-cooperation/instruments/conflicts-jurisdiction.
[206] "Report of the International Law Commission" (UN International Law Commission, 2006), https://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf.
[207] Richard Meeran, "Multinational Human Rights Litigation in the UK: A Retrospective," *Business and Human Rights Journal* 6, no. 2 (2021): 255–69.
[208] Andrew Owusu v N B Jackson and Others, No. Case C-281/02 (ECJ March 1, 2005).

The implication of the definition was it became virtually impossible for defendant corporations domiciled in England to challenge the jurisdiction of English courts on the basis of *forum non conveniens*. Following the exit of the UK from the EU, the Recast Brussels Regulation no longer applies in the UK, and neither are English courts bound by *Owusu v Jackson (supra)*.[209] Considering EACOP is registered in the UK,[210] and many MNCs are domiciled there, it highly probable that extraterritorial civil suits instituted against UK based MNCs will be challenged on the ground of *forum non conveniens* (Mathew Renshaw, personal communication, March 19, 2024).

5.1.4 Fears of Infringement of Sovereignty

The application of extraterritorial jurisdiction inevitably raises concerns of interference with the sovereignty of foreign states. Therefore, in instances where home state courts exercise jurisdiction over MNCs, suspicions may arise that this infringes upon the territorial jurisdiction of host states.[211] TWAIL scholars such as Chimni have traced the origins of extraterritorial jurisdiction to the colonial period, where colonial powers set up consular courts in colonies. During the late nineteenth and early twentieth centuries, Western powers imposed a system known as extraterritoriality in Japan, the Ottoman empire, and China. Western extraterritorial courts not local courts had jurisdiction in these colonial territories.[212]

Kayaoglu succinctly observes that the colonial powers use of extraterritorial jurisdiction was a form of legal imperialism which he defines as an extension of a state's legal authority into another state and limitation of legal authority of the target state over issues that may affect people, commercial interest, and security of the imperial state.[213] From the definition, it is clear that the absence of cohesive laws and institutions and the necessity to promote the commercial interests of the imperial powers is what drove the development of extraterritorial jurisdiction in the colonial context.[214] Out of the colonial context, it can be argued that extraterritorial jurisdiction could be used as a tool to entrench neo-colonialism.

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[209] Fred Kuchlin and Dan Wyatt, "Back to the Future: The Return to Prominence of Forum Non Conveniens," *ThoughtLeaders4 Disputes Magazine*, no. 3 (n.d.), https://thoughtleaders4.com/images/uploads/news/Article8_Back_to_the_Future_The_Return_to_Prominence_of_Forum_Non_Conveniens.pdf.

[210] "Overview – EACOP –," accessed May 27, 2024, https://eacop.com/overview/.

[211] Daimler AG v. Bauman, 571 U.S. 117 (2014), No. 11-965 (U.S. Supreme Court January 14, 2014).

[212] Chimni, "The International Law of Jurisdiction: A TWAIL Perspective."

[213] Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, 1st ed. (Cambridge University Press, 2010), https://doi.org/10.1017/CBO9780511730252.

[214] Ibid., 12.

5.1.5 Looking outside extraterritorial jurisdiction

Legal anthropologists have argued that many people avoid litigation because winning in court often comes at an astronomical cost in terms of money, delay, personal pain, and the remedies afforded by legal victories can often fall short of what is required for justice, either individually or collectively.[215] The normative challenges of extraterritorial jurisdiction have made it an undesirable route in achieving corporate accountability of MNCs. In section 5.2, we shall consider alternatives to extraterritorial jurisdiction.

5.2 Alternative Approaches to Attain Corporate Accountability

5.2.1 The Malabo Promise

Drawing on the TWAIL approaches, African states have emphasized the need for African solutions to African problems. One proposed avenue for achieving this objective has been setting up a specialized African court that can also hold corporations criminally accountable. In June 2014, the AU met in Malabo, Equatorial Guinea, at the twenty-third Ordinary Session of the Assembly, where it adopted the Protocol on Amendments to the Protocol on the Statute to the African Court of Justice and Human Rights, commonly known as the Malabo Protocol.[216]

The Protocol's novelty is that it introduces the notion of corporate criminal responsibility, which is a welcome addition to international criminal law, which has long focused on individual responsibility.[217] Pursuant to Article 46C of the Protocol, the Court has jurisdiction over legal persons alongside natural persons, and this includes MNCs. The Protocol also prohibits the illicit exploitation of natural resources without complying with norms relating to the protection of the natural environment and the security of the people and the staff.[218]

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[215] Michael McCann, "Litigation and Legal Mobilization," in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keigh E. Whittington (Oxford: Oxford University Press, 2008), 522–40.

[216] Jessie Chella, "A Review of the Malabo Protocol on the Statute of the African Court of Justice and Human Rights," *ILA Reporter* (blog), January 4, 2021, https://ilareporter.org.au/2021/01/a-review-of-the-malabo-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights-part-i-jurisdiction-over-international-crimes-jessie-chella/.

[217] Larissa van den Herik and Elies van Sliedregt, "International Criminal Law and the Malabo Protocol – About Scholarly Reception, Rebellion and Role Models," *Grotius Centre Working Paper Series*, no. 2017/066-ICL (2017), https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/grotius-centre/working-paper-series/2017-066-icl.pdf.

[218] Article 28L*bis* of the Malabo Protocol.

Michalakea argues that the corporate criminal liability provision will particularly contribute to a regional quest for justice and accountability against corporate impunity.[219]

However, the Protocol will not solve all the corporate accountability gaps on its own. Michalakea has rightly pointed out that it will be challenging to exercise jurisdiction over transnational companies, seated and operating in different States across Africa and beyond, and this will require legal assistance from other States that are not parties to the Malabo Protocol.[220] The Protocol has also struggled to receive much needed support it needs to come into force. Article 11 of the Protocol provides that it shall enter into force 30 days after 15 members deposit instruments of ratification with the court, but no state has ratified the Protocol yet.[221]

5.2.2 Mediation and Arbitration

In 2019, the Hague Rules on Business and Human Rights Arbitration (the Hague Rules) were enacted, providing a framework for businesses and victims of human rights abuses to address their dispute in an arbitral tribunal rather than a domestic court.[222] The Hague Rules were developed by a diverse team of international practitioners and scholars under the auspices of the Centre for International Legal Cooperation.[223]

The theoretical and practical constraints that limit the effectiveness of conventional dispute resolution mechanisms is what encouraged the development and adoption of the Hague Rules on Arbitration Relating to Business and Human Rights.[224] Whilst arbitration can bridge the gaps and meet the challenges inherent in the judicial mechanisms of the host state and home state, it can only play an auxiliary role. Arbitration has some normative challenges, one of which is that it is based on consent. Put simply, there must be an arbitration clause or agreement referring the parties to arbitration.[225] This can be remedied by incorporating arbitration clauses into community development agreements executed between MNCs and local communities.

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[219] Taygeti Michalakea, "Article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and Its Contours," *International Human Rights Law Review* 7, no. 2 (November 29, 2018): 225–48, https://doi.org/10.1163/22131035-00702003.
[220] Ibid., p.236
[221] Chella (2021)
[222] Bruno Simma, "The Hague Rules on Business and Human Rights Arbitration," *Center for International Legal Cooperation*, January 1, 2019, https://repository.law.umich.edu/other/238.
[223] Ibid.
[224] Nathalie Bernasconi-Osterwalder, "The Hague Rules on Business and Human Rights Arbitration: What Role in Improving Avenues for Victims to Access Justice? – Investment Treaty News," October 7, 2022, https://www.iisd.org/itn/en/2022/10/07/the-hague-rules-on-business-and-human-rights-arbitration-what-role-in-improving-avenues-for-victims-to-access-justice-nathalie-bernasconi-osterwalder/.
[225] Ibid.

Despite its advantages, which ensure faster delivery of an effective remedy, arbitration is complex. It will often require the services of highly specialized lawyers, and most arbitration agreements will often indicate European countries as the preferred arbitration seats. This could further restrict access to justice for vulnerable victims to the benefit of MNCs, which have access to a deep pool of resources and often hire the best lawyers. In the alternative, mediation could be utilized because it is less formal and is based in the local jurisdictions.

5.3 Research Findings

It is worth repeating the overarching research question here for ease of reference:

Is extraterritorial jurisdiction a viable avenue to hold MNCs in Uganda's oil sector accountable for alleged human rights violations?

Based on the central research question, this paper made several findings, which are enumerated below:

1. Despite the extensive exercise of extraterritorial jurisdiction across several international jurisdictions in holding MNCs accountable for human rights violations, there is no unanimous consensus on its crystallization under international law.
2. European home state courts have generally been receptive to the idea of holding MNCs domiciled in their jurisdiction accountable for human rights violations.
3. The African Union is rigorously advancing efforts to develop a strong regional framework for holding MNCs accountable for human rights violations, such as drafting the Malabo protocol that gives the African court jurisdiction over corporate entities. However, there is still a lack of political will from states, as evidenced by the lack of ratification of the Protocol and the fact that few states have drafted NAPs.
4. Uganda has a comprehensive legal and judicial framework on corporate accountability. Despite this commendable framework, victims of corporate human rights violations in the oil and gas sector have inadequate access to an effective remedy.
5. The affected persons of the EACOP project domestically do not have an independent and impartial grievance mechanism despite concerns about the deprivation of land without prior and adequate compensation.
6. Litigation of EACOP disputes, both domestically and extraterritorially, as an avenue to hold MNCs accountable has not been effective so far because of doctrinal challenges. For example, EACOP cases in France and East Africa have been dismissed.

7. The alternative avenues to obtain an effective remedy, which include the proposal to set up an African Regional Court that has jurisdiction over MNCs and the use of arbitration and mediation, have some unique advantages for providing homegrown solutions. However, these alternatives have some limitations, pointing to the need for concerted efforts from both litigation and alternative options being utilized complementarily to hold MNCs accountable.

5.4 Conclusion

This thesis has attempted to show the different efforts at international, regional, and domestic levels in the enforcement of corporate accountability of MNCs through extraterritorial jurisdiction. Chapter 2 focused on the jurisprudence of select Global North jurisdictions to demonstrate how extraterritorial jurisdiction has been applied and interpreted through judicial and legislative interventions. As established from the research findings in section 5.3, there is a lack of consensus in applying the principle, with jurisdictions such as the US opting to take a more restrictive approach in applying extraterritorial jurisdiction.

The absence of a clear consensus in the international arena prompted an examination of Africa's policy on the subject with an emphasis on 'African solutions to African problems' in Chapter 3. Save for the commendable efforts of the WGEI in advancing African perspectives on corporate accountability on a global stage; there have been few homegrown initiatives. As explained in section 1.1, this is perhaps because many of the MNCs operating on the African continent are domiciled in the Global North. Chapter 4 was grounded in the theory and practice of corporate accountability in Uganda's oil and gas sector. As enumerated in the research findings in section 5.3, despite a robust human rights framework in Uganda, victims of corporate human rights violations in the sector continue to face challenges with access to an effective remedy. In section 5.1, we considered some factors that impede extraterritorial jurisdiction in enforcing corporate accountability. However, not all hope is lost; as submitted in section 5.2, alternative solutions, which include mediation and arbitration, are needed to complement extraterritorial jurisdiction in the enforcement of corporate accountability.

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