

**UNTYING THE GORDIAN KNOT:  
RE-ASSESSING THE IMPACT OF BUSINESS  
AND HUMAN RIGHTS PRINCIPLES ON  
EXTRACTIVE RESOURCE GOVERNANCE IN  
SUB-SAHARAN AFRICA**

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*“Turn him to any cause of policy,  
The Gordian knot of it he will unloose,  
Familiar as his garter.”<sup>1</sup>*

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1. WILLIAM SHAKESPEARE, THE LIFE OF HENRY THE FIFTH act 1, sc. 1.

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I. INTRODUCTION

Let us consider a hypothetical situation: Obioma is an indigene of Adele, a local community, rich in oil and gas in Federal Republic of Ouchi. Obioma has never appreciated the continuous flaring of gas by *Osusu*, a multi-national corporation (MNC) which has resulted in the darkening of the sky in his hometown of Adele. After careful thought of the environmental degradation, oil pollution, gas flaring resulting in acidic rain, he considers that the activities of *Osusu* had infringed his fundamental human rights. He enlisted the services of an NGO.

Initially, they engaged in a *name and shame* approach to get the company to change. Obioma travelled approximately 800 kilometers to the corporate head office of *Osusu* to report his grievances. He was shocked that there was no grievance mechanism in place by the company. Firstly, at the company’s front gate was an inscription: “Direct all queries and complaints to the following numbers . . . .” The indicated numbers were written with paint marks which were almost fading. He managed to get the numbers after straining his eyes. The response he got from the first call was that the owner of the number had left the services of the company. The second number never went through. Dissatisfied, he went back to his community without any success. If those numbers were genuinely complaint numbers, the firm would have taken measures to update its record to know when a staff in charge of complaints has relocated or left the company. The numbers would be written legibly and boldly. The hypothetical situation above is just a reflection of the level of impunity and destruction perpetrated by MNCs in weak zones. This unfortunately is the bane of extractive resource governance in resource rich, sub-Saharan African nations.

Experiences in some resource rich African countries have shown that MNCs neither care much about the effects of their activities, nor do they create a grievance mechanism to resolve conflicts arising from their operations. The African continent hosts over two-thirds of

the world's reserves of platinum, which are essential in the electronic industry.<sup>2</sup> These resources present both challenges and prospects. However, countries in the Global South can leverage the resources to accelerate broad-based economic development, poverty reduction, and prosperity for their citizens. Unfortunately, harnessing the benefits of the resources have been problematic,<sup>3</sup> for not only have these countries failed to reap the benefits of the resources, but the development of the resources has in fact triggered violent conflicts, destroyed the environment, exacerbated inequalities across gender and geography, displaced communities, and undermined democratic governance. However, there are also instances where effective management of the resources has produced sustainable and equitable human development.<sup>4</sup> It is generally believed that what makes the difference between countries in the Global North and those of the Global South is the design and implementation of a broad set of policies and programs.<sup>5</sup>

The Ruggie Framework and the Guiding Principles for its implementation place great emphasis on states as duty bearers under international law. Corporations, on the other hand, are mere subjects.

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2. See *African Economic Outlook 2013: Structural Transformation and Natural Resources*, AFRICAN DEVELOPMENT BANK 40 (2013) (citing Africa's share of global production of PGMs in 2010 as 74%).

3. See Hany Besada, Franklyn Lisk & Phillip Martin, *Regulating Extraction in Africa: Towards a Framework for Accountability in the Global South*, 2(1) GOVERNANCE IN AFRICA 1, 1 (2015) (“[M]any countries do not reap the full benefits of their extractive resource endowments.”).

4. *Id.* at 8 (noting Botswana as a prime example of how best to use natural resources to expedite economic growth and development, while enforcing policies to process its mined diamonds locally and creating a strong private sector aimed at transforming its development path towards achieving sustainable outcomes); see JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 39 (2002) (explaining Botswana's negotiations for control of diamond mines); see also *Equity in Extractives: Stewarding Africa's Natural Resources for All*, AFRICAN PROGRESS PANEL 14 (2013), [http://app-cdn.acwupload.co.uk/wp-content/uploads/2013/08/2013\\_APR\\_Equity\\_in\\_Extractives\\_25062013\\_ENG\\_HR.pdf](http://app-cdn.acwupload.co.uk/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf) (citing the World Bank's categorization of Botswana in the upper-middle class average income group of Africa's resource rich countries).

5. See generally Bonnie Campbell, *Introduction*, in *MINING IN AFRICA: REGULATION AND DEVELOPMENT* 1, 18-19 (Bonnie Campbell ed., 2009) (stating the ultimate goal of the Extractive Industries Review is to raise “social and environmental considerations so they are balanced with economic considerations in efforts at poverty alleviation through sustainable development”).

Remarkably, in most resource rich, conflict ridden African countries, corporations are the largest beneficiaries of illicit minerals being exploited. In the Eastern part of the Democratic Republic of the Congo (DRC), warlords and guerillas control mineral resources in that part of the country. The State becomes helpless in enforcing certain minimum international human rights thresholds because it does not have control over the guerillas, yet MNCs continue to conduct business with these revolutionaries, thus maximizing profit at the detriment of the local population.

This article challenges the notion that corporations cannot be held accountable for human rights violations under international law. It particularly discusses the extent of corporate accountability for human rights violations in Sub-Saharan Africa. Part one is the introduction. Part two focusses on contextual analysis of some case studies in the Global South to explore the extent of governance gaps brought by globalization. Part two also argues for the reputational model of compliance by states as a means of fulfilling their duty to protect human rights. Part three discusses the implementation of the Guiding Principles. Part four considers the various approaches through which the Guiding Principles, though voluntary, can be implemented in resource rich but weak states. Part four also discusses local participation in resource governance. It argues that the free, prior and informed consent rule developed by the United Nations should be implemented. This will give the local communities a say on matters that affect them. Part five concludes the article.

## II. CONTEXTUAL FRAMEWORK AND PERSPECTIVES FROM THE GLOBAL SOUTH

To put the issues in perspective, I begin this article with some case studies. Analyzing the extent of atrocities that has plagued mineral exploitation in the DRC, Margot Wallstrom observed that “the number of women and children raped in the DRC has risen dramatically because of a surge in rebel militia activity. . .in times of fighting you usually see also rape, refugees, stealing, killing and the burning of houses going up.”<sup>6</sup> It seems, therefore, that the proceeds of mineral

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6. E.g., *DR Congo Rape Study 'Questionable'*, BBC (May 18, 2011), <http://www.bbc.com/news/world-africa-13448513> (reporting that Margot Wallstrom described DR Congo as “the rape capital of the world”).

exploitation are controlled and go to the warlords who can appropriate it. Still on the DRC, a Congolese gynecologist, Dennis Mukwege, has become so distraught with the stories he gets from his patients. One of them goes thus:

Every day, ten new women and girls who have been raped show up at the hospital. Many have been so sadistically attacked from the inside out, butchered by bayonets and assaulted with chunks of wood, that their reproductive and digestive systems are beyond repair. . .the culprits are described as young men with guns. . .home grown militias called the Mai-Mai who slick themselves with oil before marching into battle. . .my oldest patient was 75, youngest 3. Some of these girls whose insides have been destroyed are so young that they don't understand what happened to them. They ask me if they will ever be able to have children, and it's hard to look into their eyes.<sup>7</sup>

While countries in the Global North, with or without oil, have been more peaceful and prosperous, many countries in the Global South, particularly those with vast natural resources are getting poorer, and domestic growth is declining at an alarming proportion.<sup>8</sup> For these countries, extracting resources tends to energize corruption, damage institutions, and destroy social fabric.<sup>9</sup> The vast natural resources do not commensurate with the level of poverty and quality of life of their citizens.

In Nigeria, the *Ogoni* experience has shown how a community can suffer tremendous environmental degradation due to the deleterious effects of corporate bodies. This community was able to achieve its crusade against the then Nigeria's military junta and major oil com-

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7. Jeffrey Gentleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES (Oct. 7, 2007), <http://www.nytimes.com/2007/10/07/world/africa/07congo.html>.

8. See *Evolution of average income in Gabon, 1950-2015*, WORLD WEALTH & INCOME DATABASE, <http://wid.world/country/gabon/> (charting Gabon's average income and showing it has fallen by half since 1976); see generally *African Economic Outlook 2013: Structural Transformation and Natural Resources*, supra note 2, at 92-93, 122, 163-65, 178-79, 181-82 (describing the stymied growth of various African nations due in large part to Guerilla warfare).

9. See Ivar Kolstad & Arne Wig, *Testing the Pearl Hypothesis: Natural Resources and Trust*, 37 RESOURCES POL'Y 358, 358-67 (2012) (arguing that an indirect influence of natural resources on trust is mediated by inequality, corruption and civil war).

panies<sup>10</sup> through social movements such as the Movement for the Survival of Ogoni People (MOSOP).<sup>11</sup> The comprehensive United Nations Environment Program (UNEP) report in its assessment of about 200 locations in *Ogoni* found that due to the decades of oil exploration and blowouts, oil spillage, oil slicks, gas flaring, and waste discharge, the once alluvial soil of the Niger-Delta is no longer viable for agricultural use and attributes the widespread decay land degradation.<sup>12</sup> Yet, shortly after Nigeria's independence in 1960, Nigeria had a robust agricultural industry. The country relied on agricultural produce for sustenance and was the world's leading exporter of palm oil and ground nuts.<sup>13</sup> Since the discovery of crude oil, however, the-

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10. E.g., *The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria*, HUM. RTS. WATCH 1 (1995), <https://www.hrw.org/legacy/reports/1995/Nigeria.htm> [hereinafter *The Ogoni Crisis*] (noting MOSOP's confrontations against the government and major oil companies, most notably Shell Oil); see, e.g., Olof Linden & Jonas Palsson, *Oil Contamination in Ogoniland, Niger Delta*, 42 AMBIO 685, 685-701 (2013) (analyzing the impact and extent of oil pollution in Ogoniland); accord RHUKS AKO, ENVIRONMENTAL JUSTICE IN DEVELOPING COUNTRIES: PERSPECTIVES FROM AFRICA AND ASIA-PACIFIC 23-41 (2013) (discussing the substantive and procedural issues related to environmental justice in Nigeria); see Susana C. Mijares Pena, *Human Right Violations by Canadian Companies Abroad: Choc v. Hudbay Minerals Inc.*, 5 W. J. OF LEGAL STUD. 1, 1-19 (2014) (arguing that tort liability should exist for human rights violations that result from corporate activities abroad); see also Barisere Rachel Konne, *Inadequate Monitoring and Enforcement in Nigerian Oil Industry: The Case of Shell and Ogoniland*, 47 CORNELL INT'L L.J. 181, 181-204 (2014) (detailing the conflict between the Ogoni people and Shell Oil).

11. Timothy Hunt, *The Politics of Bones: Dr. Owens Wiwa and the Struggle for Nigeria's oil* (McClelland & Stewart 2006); Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 1, 1-58 (2005); e.g., OBIORA CHINEDU OKAFOR, LEGITIMIZING HUMAN RIGHTS NGOS: LESSONS FROM NIGERIA 39-41 (2006) (explaining the origins and emergence of MOSOP); see, e.g., MOVEMENT FOR THE SURVIVAL OF THE Ogoni PEOPLE, <http://mosop.org/> (last visited Aug. 16, 2016) [hereinafter MOSOP] (providing further information about the Ogoni people); see generally Fons Coomans, *The Ogoni Case Before the African Commission on Human and Peoples' Rights*, 52 INT'L & COMP. L.Q. 749, 749-60 (2003) (highlighting the African Commission's promotion of strong economic, social, cultural and collective rights for individuals in African countries).

12. See *Environmental Assessment of Ogoniland*, U.N. ENVIRONMENTAL PROGRAM 9-12 (2011), [http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf) (summarizing UNEP's field observation and scientific investigation findings).

13. E.g., *Palm Oil Value Chain Analysis in the Niger Delta*, FOUNDATION FOR PARTNERSHIP INITIATIVES IN THE NIGER DELTA (PIND) 1 (2011),

se products disappeared. Nigeria, a land of exceptionally fertile oil, remains a net importer of food today.<sup>14</sup>

In South Africa, the *Marikana* incident started as a wildcat strike by workers working at a mine owned by Lonmin, a British company.<sup>15</sup> The company has spent large sums of money on a massive program of expansion, which left it financially vulnerable.<sup>16</sup> It then fired 12,000 striking South African miners after a protracted strike over wages. This incident led to sporadic strikes across the South African mining sector. The strike arose out of poor labor standards. Workers and the local communities were not receiving the dividends of mining and good corporate behavior was absent; youth unemployment was on the increase, the living conditions of the mineworkers was appalling, and growing inequalities were evident.<sup>17</sup> The strike that ensued saw about forty-four platinum miners shot dead by the South African police on August 16, 2012.<sup>18</sup> Black workers are exploited

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<http://www.ndpifoundation.org/images/researchreports/reports/Palm-Oil-Value-Chain-Analysis.pdf> (“Up until the 1960s, Nigeria was the world’s largest producer of palm oil accounting for 43% of global palm oil production.”).

14. Simon Utebor, *Nigeria Spends \$22 bn yearly on Food Imports*, PUNCH (Sept. 12, 2016), <http://punchng.com/conoil-urges-safe-driving-sallah/>.

15. See Proclamation No. 50 of 2012, Published in Government Gazette No. 35680 of 12 September 2012, “Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in The North West Province,” <http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf> (last visited March 17, 2017). See also Oli Abegunde, Causal Factors and the Dynamics of Resource Conflicts in Africa: A Comparative Analysis of Niger Delta and Marikana, 3 INT’L J. HUMAN. & SOC. SCI. INVENTION 27, 33-34 (2014)

(In late January to February 2012, there was tensions between the traditional miners’ union, the National Union of Mineworkers (NUM) and the younger AMCU over strikes and call[s] for pay rises at the Impala platinum mine in Rustenburg in which AMCU was accused of using violent tactics and of trying to impede negotiations to further its own membership drive by unions such as NUM which has been losing support.).

16. See *Lonmin: About Us*, <https://www.lonmin.com/about-us/about-us-overview> (last visited Jan. 30, 2016) (stating that Lonmin’s core operations consist of “eleven shafts and inclines” situated in the Bushveld Igneous Complex in South Africa, which hosts “nearly 80% of global PGM resources”).

17. See *Lonmin an Example of Exploitation*, SAPA (Aug. 17, 2012), [http://www.iol.co.za/business-report/companies/lonmin-an-example-of-exploitation-1365221#.Vj2FX\\_mrTIW](http://www.iol.co.za/business-report/companies/lonmin-an-example-of-exploitation-1365221#.Vj2FX_mrTIW) (citing “lack of employment opportunities for local youth, squalid living conditions, unemployment and growing inequalities” as contributing to exploitation of the mines).

18. *Miners Shot Down*, UHURHU PRODUCTIONS (May 30, 2014),

and work like slaves as rock drillers to this day. Poverty forces many of them to forget their ambition and leave school.<sup>19</sup>

Extractive resource governance has been a significant challenge for countries in the Global South. While corporate organizations lack moral and social license to operate, states fail to defend their citizens against corporate culture of impunity. In drawing a sharp distinction, Leif Weiner argues that compared to resource curse, climate change looks easy.<sup>20</sup> With climate change, the causes and cures are easily understood, the solution would be to “reduce the sum by reducing the summands.”<sup>21</sup> For extraction of natural resources, the supply chain which determines the end users is difficult to account for who and what went wrong. Those who extract resources sell to manufactures who then sell to retailers and eventually gets to the consumers. How then does one determine the guilty party in this chain of distribution? For instance, most, if not all Apple products today bear the inscription: “Made in China” but “Designed in California.” The complexity in this demarcation is that Apple has successfully created a disclaimer for any minerals used in the manufacture of its products. These minerals could have been sourced from the DRC, thereby indirectly contributing to ethnic wars over minerals.

If these extractive resources are managed well in the Global South (which they are often not), they risk contaminating or poisoning the air and water, degrading the environment, and dislocating livelihoods and cultural practices of local communities. Gas flaring, strip mines, oil pollution, and acid rain are examples of the damage exploration of natural resources can cause. Thus, extractive industries have the capability to distort and damage the natural order of things. Only an

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<https://www.youtube.com/watch?v=cbvHU3wxj4E> (showing live footage of the shooting).

19. *Id.*; see Liduduma'lingani Mqomboti, “Miners Shot Down;” *A Haunting and Emotional Documentary*, AFRICA IS A COUNTRY (May 30, 2014), <http://africasacountry.com/2014/05/miners-shot-down-a-haunting-and-emotional-documentary/> (highlighting the poverty by describing Lonmin management’s refusal “to negotiate with the rock drillers’ demands of R12,500 per month” as the core reason for the strike and violence).

20. LEIF WENAR, BLOOD OIL: TYRANTS, VIOLENCE, AND THE RULES THAT RUN THE WORLD (Oxford Univ. Press 2015).

21. *Id.* at xxiii.



effective and extractive resource management can prevent the negative externalities associated with extractive resource project.

#### A. CONCERTED EFFORTS TOWARDS NORM IMPLEMENTATION

The examples from the preceding section reveals the culture of impunity by States and MNCs in the extractive resource governance in some countries of the Global South, particularly in Sub-Saharan Africa. While some countries have done fairly well within this classification, Botswana, Bolivia, and Ecuador for instance, most African states still grapple with leadership and governance management. The polarized debate on the binding versus voluntary nature of the Guiding Principles questionably share the same goal – to strengthen accountability for business-related abuses, however, they only adopt significantly different approaches in achieving that goal. The foregoing is based on two salient observations: Firstly, State governments in Africa are unwilling to enforce their domestic laws or court judgments when it comes to business and human rights disputes.<sup>22</sup> Unfortunately, this is where our efforts should be focused. Rather than externalize responsibility and allow the African continent to be treated like eternal children seeking protection from adults who are miles away from their borders, African leaders should focus attention on implementation programs and policies. Today, Bolivia and Ecuador are under leftist governments, they exercise their sovereignty, yet they ensure that the dignity of their populations is more paramount. African leaders can do the same. Extractive resource management in Africa should not be done by proxy in the Global North. For instance, courts in the United States, and lately, the Netherlands, are enforcing their laws on behalf of *Ogoni* people and other human rights violations occurring abroad, while Nigeria would not, neither will they conduct due diligence on companies and negotiate better

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22. See *Gbemre (on behalf of Iwheraken Community, Delta State) v. Shell Petroleum Dev. Corp.* (2005) FHC/B/CS/53/05 21 (H.C.K.) (Kenya) (noting that the Attorney-General of Nigeria regrettably did not put up any appearances, and/or defend the proceedings); see generally *Gas Flaring Lawsuit (re: Oil Companies in Nigeria)*, BUS. & HUM. RTS. RESOURCE CTR., <https://business-humanrights.org/en/gas-flaring-lawsuit-re-oil-companies-in-nigeria> (last visited Oct. 16, 2015) (explaining *Gbemre v. Shell Petroleum Dev. Corp.* and showing the earliest attempt at seeking judicial enforcement of human rights violation by victims of corporate abuse).

contractual deals on behalf of its citizens.<sup>23</sup>

Secondly, MNCs were simply unprepared for the need to manage the risks of causing or contributing to environmental rights harm through their own activities and business relationships, hence the numerous litigations against them. The fact that this is being litigated means that the MNCs find it difficult to adapt to changing circumstances under the business and human rights regime. Firms operate in highly challenging contexts. When things go wrong, the companies are quick to blame the local community of sabotage. On the other hand, the indigenous people claim that the companies are not doing enough in terms of corporate social responsibility (CSR). The simple logic therefore is if the companies treat the local communities very well, these communities will in turn accept the companies and voluntarily provide security for company the firm's installations. Weak zones can function as "law-free zones" where human rights violations are subject only to self-restraint and litigation in another jurisdiction "based on statutes with extra-territorial reach."<sup>24</sup> The questions that follow therefore are why do companies behave the way they do when it comes to respect for human rights? Where the States fail to fulfill their duty of protecting human rights, should firms also contribute to the failure of the State to uphold certain basic minimum standards of behavior. These questions lead us to briefly examine the implication of non-implementation of normative structures set by the United Nations.

## B. BASIS FOR COMPLIANCE UNDER INTERNATIONAL LAW

Theories define a concept and through them, we see the underlying perception behind a notion. Although the theories surrounding CSR have been developed since the 19<sup>th</sup> century,<sup>25</sup> the concept continues to evolve as dynamics of globalization increases and economic

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23. *See Doe v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013) (concluding that corporations can face liability for claims brought under the Alien Tort Statute); *see also* Rb. Gravenhge januari 2013 C/09/337050 m.nt. para. 5.1 (Akpan/Royal Dutch Shell PLC) (Neth.) (rendering judgment that the SPDC committed a specific tort of negligence against Akpan).

24. JOHN G. RUGGIE, *JUST BUSINESS, MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* 33 (2013).

25. VED P. NANDA & RALPH LAKE, *THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS* ).

freedom expands. With the increasing debate on business and human rights, CSR has created revolutionary responsibilities for corporate organizations. The enforcement of CSR initiatives has been nuanced by the understanding that the Westphalian regime allows states as duty bearers under international law. Since MNCs have no liability under international law, how may they be found culpable for international human rights violations?<sup>26</sup> While the MNCs domiciled in developed countries comply with all regulatory laws in their home countries, developing countries grapple with enforcing corporate codes of conduct. It is not the intention of this work to discuss extensively the notion of CSR. Suffice it to say that the concept of CSR is pivotal to the actualization of the business and human rights agenda. However, considering the fact that the international community is becoming inundated with nefarious activities of MNCs operating in the extractive industries in weak and conflict zones, a brief discussion of the reputational model of compliance will be carried out.

### *1. Reputational Model*

In the business and human rights debate, the issue has been norm compliance against the argument that soft laws are not laws so to speak. States care about their reputation with international law. A state is respected for being a strong democratic state if it recognizes the rule of law and enforcement of judicial decisions. Any State that does not respect its own laws will have leadership legitimacy problems. It is countries, not companies, that own natural resources; companies only help extract those resources for benefit of the countries primarily.<sup>27</sup>

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26. Cf. Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1693 (2013-2014) (arguing that many countries have backed away from requiring strict compliance with international law for multinational corporations; for example, the United States reinforces this concept in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) which limited the principal of extraterritoriality for multinational corporations).

27. See generally J.R. Mailey, *The Anatomy of the Resource Curse: Predatory Investments in Africa's Extractive Industries*, ACCS SPECIAL REPORT 1-6 (May 2015) (discussing the relationship between a multinational corporation and resource-rich African countries).

At the international level, unfortunately, there has not emerged an enforcement regime strong enough as obtainable under domestic state laws to enforce compliance with international law. The situation is more precarious when such rule of international law is one of normative value.<sup>28</sup> To date, scholars of norm compliance have not been able to sufficiently address the synergy between law and normative values in the compliance debate. Most work has centered on why States obey international law; few works, if any, has extended that debate to the need to comply with commitments arising from normative structures agreed under the auspices of the United Nations.<sup>29</sup> States must have gone through some stages to arrive at legally enforceable agreement. The question that follows is why States would now find it difficult to commit or comply with solemnly agreed rules which they contributed to negotiate.<sup>30</sup>

One emerging school of thought focuses on morality of states to obey international law.<sup>31</sup> The principle of *'uberrimae fidei'* in the law of contract stipulates that contracts must be carried out in good faith.<sup>32</sup> At the onset, Ruggie engaged in a wide stakeholder attempt at contributing to the business and human rights debate. States would have rejected the move and decided not to be part of the consultation

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28. See ANTONIO CASSESE, *INTERNATIONAL LAW* 213-15 (Oxford University Press, 2d ed. 2005) (providing an overview of different approaches to implementing international law on the national level).

29. Compare Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1840-72 (2002) (suggesting numerous reasons why states to decide to comply, or not comply, with international law), with Eduardo Moisés Peñalver, *The Persistent Problem of Obligation in International Law*, 36 STAN. J. INT'L L. 271, 274 (2000) (analyzing the legal obligation of states to comply with international law).

30. Compare Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 473-74 (2005) (suggesting many countries commit to international treaties primarily to increase their international reputation), with Dinah Shelton, *Law, Non-Law and the Problem of 'Soft Law'*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 7-23 (Oxford U. Press, 2000) (highlighting states' reluctance to sign treaties with binding legal obligations).

31. Cf. Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1919 (2002-2003) (critiquing the moral obligation theory, and suggesting states' compliance is based on "prudential behavior").

32. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 115 U.N.T.S. 331 (incorporating the concept expressly in the Vienna Convention).

process. It would be highly inappropriate to now critique the Principles as not having met the aspirations or considered the pressing challenges of the developing countries. It would be also incongruous to now determine that after participating in the events that led to the drafting of the Principles and their subsequent ratification by the Human Rights Council, states can now decide not to implement the provisions of the Guiding Principles.

Numerous reasons account for States' compliance with norms. Harold Koh identifies five reasons: coercion, self-interest, legitimacy, communitarianism, and discursive legal process.<sup>33</sup> Burgstar on his part identifies three reasons: first, actor fears punishment of rule enforcers, second, the actor sees the rule as its own self-interest, and third, the actor feels the rule is legitimate and ought to be obeyed.<sup>34</sup> Two issues are common to these conjectures: self-interest and legitimacy. Bursgtar's first assumption is hinged on the social choice theory that people have to obey laws because the causative value of non-compliance far outweighs the benefits of complying. What then is self-interest in the terms of complying with norms? MNCs find it easy to defy international norms because the best punishment they can get is sanctions. Over time, sanctions have proven not to be a very potent weapon in coercing MNCs to comply with norms, especially when such MNCs wield strong influential powers on States.

States that refuse to comply with commitments under an agreement could risk the possibility of making future commitments with other States. States value their sovereignty and by extension their reputation in the comity of nations. They would not want to mortgage their future by the actions they take today. States will therefore hesitate before compromising that reputation.<sup>35</sup> This goes beyond the political leadership at any particular point in time. The reputational damage, once done, lives with the country for decades. The violation of any agreement, binding or non-binding, must carry severe reputational costs if one thinks of the future effect of non-compliance.<sup>36</sup> It

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33. See Harold Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 623-34 (1998-1999).

34. See Markus Burgstaller, *Amenities and Pitfalls of a Reputational Theory of Compliance with International Law*, 76 NORDIC J. INT'L L. 39, 47 (2007).

35. Guzman, *supra* note 29, at 1849 (considering the level of reputational harm a state will receive if it violates international law).

36. See Robert Cooter, *Do Good Laws Make Good Citizens? An Economic*

is in the light of the foregoing that this article argues that the Ruggie Framework places greater burden on the states in implementing human rights norm. This may result in a change in behavior for the states. Unfortunately, weak states are not eager to have this change in behavior due to benefits from corruption and non-existent institutional mechanisms.

### III. THE BUSINESS AND HUMAN RIGHTS AGENDA: RENEWED FOCUS

#### A. IMPLEMENTATION OF THE GUIDING PRINCIPLES: MATTERS ARISING

Ruggie's task was basically to: identify and clarify standards of corporate responsibility and accountability regarding human rights; elaborate on states' roles in regulating and adjudicating corporate activities; clarify concepts such as 'complicity' and sphere of influence; develop methodologies for human rights impact assessments; and consider state and corporate best practices.<sup>37</sup> The SRSG, after wide spread consultations, eventually drafted the UN Guiding Principles on Business and Human Rights ("GP").<sup>38</sup> On June 16, 2011, the United Nations Human Rights Council Resolution 17/4, en-

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*Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1577-1601 (2000) (stating that obeying a norm imposes direct costs and conveys the reputational benefits, as well as the benefit of avoiding sanctions).

37. Human Rights Council Res. 2005/69 (April 20, 2015). The Ruggie Framework refers to the Framework proposed by the Special Representative of the UN Secretary General (SRSG), Prof. John Ruggie, which encourages all non-state actors to mainstream human right norms into their areas of activities.

38. See U.N. Hum. Rts. Office of the High Comm'r, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc HR/PUB/11/04 (2011) [hereinafter *Implementing the United Nations "Protect, Respect and Remedy" Framework*] (creating the first global standard for mitigating and remediating the adverse effects of human rights violation linked to business activities; see also KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, *The UN Guiding Principles on Business and Human Rights: Analysis and Implementation* (2012), <https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf> (discussing new issues that have arisen since the implementation of the Guiding Principles and opportunities to further the Principles, as well as discussion regarding the implementation of the Guiding Principles).

dorsed the GP for implementing the UN “Protect, Respect and Remedy” Framework.<sup>39</sup>

Implementation has become a challenge for developing countries due to corruption, administrative ineptitude, the need to attract foreign direct investment, weak implementation of the laws in existence, and a dearth of laws that can contend with the developments and dynamics of globalization.<sup>40</sup> Furthermore, host states are unwilling to access the remedies available under their laws due to the negative effect it could have on the MNCs and tendency to protect free flow of investments. Developing countries thus live under the impression that any act inimical to the progress of MNCs will see them leave their country since the dictates of globalization permits them to do so.<sup>41</sup> The question therefore is: who should bear responsibility for social responsibility?

Several authors have recently proposed legally binding instruments to be complied with by the MNCs. According to this latest voice, the aim is “to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises.”<sup>42</sup> As a form of endorsement to this, the UN Human Rights Council called for the drafting of a binding instrument

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39. UN General Assembly Resolution A/HRC/RES/17/4, Human Rights and Transnational Corporations and Other Business Enterprises, (6 July 2011). [33<sup>rd</sup> meeting, 16 June 2011, Adopted without a vote]. <https://business-humanrights.org/sites/default/files/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf> (last visited March 7, 2017).

40. *E.g.*, Oil Pipelines Act (2004) Cap. (O7), § 11(5) (Nigeria) (exemplifying that national laws provide remedies for individuals, however, these are the provision that states fail to implement).

41. *See* Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 MINN. J. GLOBAL TRADE 101, 104-05 (2002) (stating that “a corporation’s wealth translates into power in a global economy”). *But see* PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 105 (Oxford U. Press, 2d ed. 2007) (comparing the dependency theory with the bargaining theory, and suggesting that under the bargaining theory states may have more bargaining power with multinational corporations).

42. *Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council*, BUS. HUM. RTS. (Sept. 2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> [hereinafter *Statement at the 24rd Session of the Human Rights Council*].

on business and human rights.<sup>43</sup> The call for this mandatory regime has created a vacuum in the operational culture of the MNCs, they are, therefore, left with a choice either to comply with mandatory norms or seize the hitherto socially responsible projects they have embarked upon. These gaps and the high incidents of human rights violations resulting from unconscionable contractual bargains have further increased the calls for a more transparent, accountable, and human rights based approach to mitigation of human rights violation.<sup>44</sup>

African leaders must craft pragmatic measures to address the teething problems facing the African continent. As discussed earlier, the lessons of *Ogoni* do not seem to reverberate in addressing the social and environmental malaise of the continent. The African Mining Vision prides itself as a developmental mining approach that streamlines social linkages to benefit the continent.<sup>45</sup> We seem to have forgotten rather too quickly that it was in the bid to build economic and social linkage to Nigeria's development through unregulated business practices that resulted in the disastrous testing of drugs on some children in Kano by Pfizer.<sup>46</sup> In that case, Pfizer claimed to have responded to an emergency, the outbreak of bacterial meningitis, measles, and cholera. The medical professionals who operated during this period claimed that children were camped in filthy conditions in hospitals lacking electricity and adequate water.<sup>47</sup> Yet Pfizer only claimed to be doing CSR, albeit in an uncontrolled manner.<sup>48</sup>

When Africa says it needs intervention, without manifest determi-

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43. See Human Rights Council Res. 26/9 (June 26, 2014).

44. Ibrionke T. Odumosu-Ayanu, *Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework*, 15 MELB. J. INT'L L. 473 (2014); see generally James Thuo Gathii, *Incorporating the Third Party Beneficiary Principle in Natural Resource Contracts*, 43 GA. J. INT'L & COMP. L. 93 (2014-2015) (proposing that the Third Party Beneficiary Principle should be recognized and applied in contracts between developing countries and MNCs to create proper standing for violations).

45. See African Mining Vision, *About AMV*, U.N. ECONOMIC COMMISSION FOR AFRICA <http://www.africaminingvision.org/about.html> (providing the African Mining Vision's mission and purpose).

46. See *Abdullahi v. Pfizer, Inc.*, 2005 U.S. Dist. LEXIS 16126, at \*3-14 (S.D.N.Y. Aug. 9, 2005).

47. *Id.* at \*3-16.

48. See *id.* at \*43-52.



nation to solve its problems, the continent will continue to be treated as a child that needs to be helped consistently. From Zimbabwe's president that has refused to leave office despite plunging the country into chaos and economic misery, to the case of the DRC earlier mentioned, the continent will only continue to succumb to the Global North's perception of an infantile continent bogged down by outlandish dogma. In any case, it has not been all bad news for Africa, though, as Botswana has shown a remarkable improvement from its shackles of imperialist dogma to show how to manage resources effectively. Botswana has one of the highest economic growth rates since independence. Botswana's economy depends on mineral resources.<sup>49</sup> Through fiscal discipline and sound economic management, Botswana has transformed itself from one of the poorest countries in the world to a middle-income country with a per capita GDP of \$16,900 in 2016.<sup>50</sup> Where MNCs are interested in mining, they must follow the terms laid down by the host country. Such terms must also have the input of the citizens through local community participation. Mining rights should belong to the indigenous people. If this is the case, most litigants that would flood the courts would be the MNCs as against the local community. The tide should change now. This was the situation in Bolivia when the President announced the intent to re-nationalize the Bolivian hydrocarbon assets.<sup>51</sup> Local laws must be enforced and the rights of indigenous peoples guaranteed. The solution to Africa's problem lies and belongs to Africa. After years of colonization, infrastructural development has declined tremendously, a form of neo-colonization is entrenched. Favoritism and nepotism has become the order of the day, while corruption is growing geometrically. Scholarship should be devoted more to ascertain concerns about Africa's denial of self-responsibility, still at an infantile state, rather than begging favors from the international community often.

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49. See *The World Factbook: Africa: Botswana*, CIA (2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> (stating that diamond mining "accounts for one quarter of GDP, approximately 85% of export earnings").

50. *Id.*

51. See *Push for New Bolivia Constitution*, BBC NEWS (Aug. 6, 2006), <http://news.bbc.co.uk/2/hi/americas/5251306.stm> (stating the purpose of the new constitution was to give "more power to the indigenous majority").

#### IV. LOCAL COMMUNITY PARTICIPATION IN RESOURCE GOVERNANCE

##### A. DIALECTICS OF NATURAL RESOURCE EXPLORATION IN DEVELOPED COUNTRIES VIS-À-VIS DEVELOPING COUNTRIES

While the developed societies have done fairly well in managing their resources, developing countries continue to grapple with the challenges of resource development in the face of huge financial incentives from MNCs. Global and national efforts are needed to limit excessive misuse of natural resources in developing countries. Most weak economies lower human rights standards so that MNCs can operate in their countries. Short-term gains in these countries are illusory and undermine longer term recovery.<sup>52</sup> The long and uncontrolled governance gaps embolden MNCs to operate without sanctions or caution.

Extractive industries do not provide effective complaints mechanisms for grievances related to their activities. This results in the inability of communities affected by their operations to seek for justice at the local level in the first instance. Resource wealth in Africa, where not efficiently managed, can lead to unstable growth, macroeconomic instability,<sup>53</sup> high rates of unemployment, poverty, inequality,<sup>54</sup> environmental degradation, resource-related conflicts,<sup>55</sup> and entrenched corruption.<sup>56</sup> The so-called 'resource curse' theory captures

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52. See Paul Stevens & Evelyn Dietsche, *Resource curse: An Analysis of causes, experiences and possible ways forward*, 36 ENERGY POL'Y 56, 58 (2008) (explaining that the current GDP rebasing of the Nigerian economy and the indicators from other resource-rich African countries does not support the argument that natural resources contribute to the development of a nation as evident in developed nations).

53. E.g., Carolyn Jenkins, *Growth, Capital Accumulation, and Economic Reform in South Africa*, in RESOURCE ABUNDANCE AND ECONOMIC DEVELOPMENT 239, 240-42 (R.M. Auty ed., Oxford U. Press 2001) (describing South Africa's decelerate economic growth).

54. See Michael L. Ross, *How Mineral-Rich States Can Reduce Inequality*, in ESCAPING THE RESOURCE CURSE 249, 252 (Macartan Humphreys, Jeffrey D. Sachs, & Joseph E. Stiglitz eds., Colum. U. Press 2007) (highlighting vertical inequality in mineral-resource rich countries).

55. See Paul Collier & Anke Hoefler, *On the Incidence of Civil War in Africa*, 46.1 J. CONFLICT RESOL. 13, 16-17 (2002) (analyzing the connection countries that export primary commodities and the risk of conflict).

56. See Terry Lynn Karl, *Ensuring Fairness: The Case of a Transparent Fis-*

these ill effects of resource-dependence in developing countries.<sup>57</sup> In contrast, developed countries have demonstrated the capacity to implement and enforce their laws and policies and engage local communities in the extraction of natural resources.<sup>58</sup> A former Halliburton executive, Albert Stanley is currently serving a two-and-a-half-year jail term after he pled guilty in a US federal court to orchestrating a \$180 million bribery scheme to secure \$6 billion in natural gas deals in Nigeria.<sup>59</sup> The investigation of the bribes traversed four continents (Europe, US, Japan, and Nigeria) over the period of ten years and involved five companies in this countries.<sup>60</sup> Criminal and civil penalties in the case have yielded more than \$1.7 billion in fines, forfeitures and other sanctions.<sup>61</sup> In Nigeria, where the contract and bribery took place, investigations have been shrouded in secrecy. Nobody has been prosecuted and the citizens continue to wallow in

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*cal Social Contract*, in ESCAPING THE RESOURCE CURSE 256, 266 (Macartan Humphreys, Jeffrey D. Sachs, & Joseph E. Stiglitz eds., Colum. U. Press 2007) (noting the lack of transparency when governments are connected to oil extraction). *But see Botswana: 2009-2013 Country Strategy Paper*, AFRICAN DEVELOPMENT BANK 12 (2009), [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/BOTSWANA\\_2009%20%E2%80%93202013%20COUNTRY%20STRATEGY%20PAPER.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/BOTSWANA_2009%20%E2%80%93202013%20COUNTRY%20STRATEGY%20PAPER.pdf) (stating that “as a result of this solid economic management and low levels of corruption (see Section 2), Botswana has earned consistently high credit ratings from rating agencies”).

57. The resource curse refers to a situation where resource-dependent countries grow slowly, lack economic diversification, suffer from environmental degradation, experience corruption, undergo violent conflict, and local communities, mainly indigenous peoples and women, do not fully participate in decision-making. *See generally* Humphreys et al., *Introduction: What is the Problem with Natural Resource Wealth*, in ESCAPING THE RESOURCE CURSE 1 (Macartan Humphreys, Jeffrey D. Sachs, & Joseph E. Stiglitz eds., Colum. U. Press 2007) (explaining the phenomenon of the resource curse).

58. *Cf.* Lee Godden et al., *Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities, and the Role of Law in Economic and Social Sustainability*, 26.1 J. ENERGY & NAT. RESOURCE L. 1, 3, 9-10 (2008) (presenting evidence of key themes which help accommodate indigenous interests in relation to resources).

59. John Rudolf, *Robert Stanley, Former Halliburton Exec, Sentenced in Bribery Scheme*, HUFFINGTON POST (Feb. 24, 2012), [http://www.huffingtonpost.com/2012/02/24/albert-stanley-halliburton-kbr-bribery-sentence\\_n\\_1299760.html](http://www.huffingtonpost.com/2012/02/24/albert-stanley-halliburton-kbr-bribery-sentence_n_1299760.html) (reporting on the investigation and Halliburton’s sentence).

60. *See id.*

61. *See id.*

abject poverty. Yet, it is these same international communities that a country like Nigeria runs to for help in mitigating, addressing and remediating human rights standards. Still in the US, the CEO of a mining company in West Virginia is headed to jail for a mine accident that claimed ten miners lives.<sup>62</sup> Likewise, the CEO of a power company in North Carolina is in trouble for releasing coal ash into ecosystems in the area.<sup>63</sup> There is no hard-fast rule to achieving extractive resource governance other than enforcing laws and setting a precedent to deter future governance gap evident in this industry.

## B. INCORPORATION OF LEGAL FRAMEWORKS IN EXTRACTIVE RESOURCE GOVERNANCE

### 1. Court Assisted Process

One would have expected that potential litigants from low-income countries would find succor in the courts in enforcing their fundamental human rights. For example, the court systems in Nigeria and South Africa are not sufficiently equipped to entertain disputes arising from multijurisdictional or transnational contracts signed by investors and states.<sup>64</sup> While the judges may not be versed in the dynamics surrounding that type of system, most court systems in the Global South do not have the expertise to handle such conflicts. Apart from corruption, litigants, mostly indigenous people do not have the financial capability to prosecute their case. What difference

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62. See Alan Blinder, *Mixed Verdict for Donald Blankenship, Ex-Chief of Massey Energy, After Coal Mine Blast*, N.Y. TIMES (Dec. 3, 2015), [https://www.nytimes.com/2015/12/04/us/donald-blankenship-massey-energy-upper-big-branch-mine.html?\\_r=0](https://www.nytimes.com/2015/12/04/us/donald-blankenship-massey-energy-upper-big-branch-mine.html?_r=0) (describing the charges brought against the CEO and its unprecedented nature).

63. See *Case Summary: Duke Energy Agrees to \$3 Million Cleanup for Coal Ash Release in the Dan River*, EPA, <https://www.epa.gov/enforcement/case-summary-duke-energy-agrees-3-million-cleanup-coal-ash-release-dan-river> (last visited Jan. 15, 2017) [hereinafter *Case Summary: Dan River*] (providing information about the Eden Ash Spill, the power company and the fine imposed against the company by the environmental protection agency).

64. Ruth Hopkins, *Broken Beyond Imagination: South Africa's Justice System*, DAILY MAVERICK (Apr. 15, 2014), <https://www.dailymaverick.co.za/article/2014-04-14-broken-beyond-imagination-south-africas-justice-system/#.WhweBFUrLIU>; see *Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States*, U.N. OFFICE ON DRUGS & CRIME 161-62 (Jan. 2006) (highlighting the fact that the Nigerian law is silent on the validity of contracts).

would it make in a country such as Nigeria where there is no theoretical sophistication or philosophical dimension on the bench, where techniques rules and judges are all too dominated by a crude Austenian legal positivist jurisprudence! What is the imaginativeness required to understand standing in a way that would make even the Ruggie Principles slightly meaningful? To avert this disaster, Litigants thence find themselves caught up between ineffective judicial system and continued violation of their human rights by MNCs. To escape this dilemma, some litigants have approached courts in the Global North to enforce their human rights.<sup>65</sup>

In *Kiobel v. Royal Dutch Petroleum*,<sup>66</sup> the U.S. Supreme Court regrettably held that corporations are immune from tort liability for violations of the law of nations such as torture, genocide or extra judicial killings. Since corporate liability has not attained a discernible, much less universal acceptance among nations of the world, it cannot form the basis of a suit under the Alien Tort Statute. Thankfully, in *Doe v. Nestle USA INC*,<sup>67</sup> the U.S. Court of Appeals for the ninth circuit overturned an earlier order in the case which had dismissed the plaintiff's case brought under the Alien Tort Statute. The action was brought by former child soldiers who were forced to harvest cocoa in the Ivory Coast.<sup>68</sup> They alleged that the defendant corporations aided and abetted child slavery by providing assistance to Ivorian farmers.<sup>69</sup> Though the court found that there was no categorical rule of corporate immunity or liability, courts can look to international law and determine whether corporations are subject to the norms underlying that claim.<sup>70</sup> The court therefore took the view that the prohibition against slavery was universal and could be asserted against corporate defendants in this case.<sup>71</sup> Interestingly, the court concluded that the plaintiff's allegations satisfied the more stringent "purpose"

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65. *E.g.*, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1064 (C.D. Cal. 2010) (holding a cause of action was not adequately plead under the Alien Tort Act by Malians children who were forced to work in labor camps in Cote d'Ivoire).

66. *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1663 (2013).

67. *Doe v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013) (holding "corporations can face liability for claims brought under the Alien Tort Statute") *withdraw*, *Doe I v. Nestle USA*, 766 F.3d. 1013, 1016-17 (9th Cir. 2014).

68. *See Doe I v. Nestle USA*, 766 F.3d at 1016-17.

69. *See id.* at 1017.

70. *See id.* at 1018, 1020.

71. *See id.* at 1022.

standard by suggesting that a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even it meant facilitating child slavery.<sup>72</sup> This was a grand opportunity the Supreme Court lost in the *Kiobel* case to address the issue of corporate liability under international law. This is however a welcome development. Cases such as this will no doubt drive the business and human rights agenda positively forward.

The issue of environmental pollution and guerrilla warfare in mineral resource rich zones are issues of humanitarian tragedy. The effects of climate change and conflicts are issues wide and extensive literature has covered. Hundreds of thousands of innocent lives have been lost as a result of extraction of natural resources from these zones.<sup>73</sup> Besides moral implications, the thinking that companies are only out there to make profits must have found nauseating implication in the minds of the judges as they referred to that idea as “myopic.”<sup>74</sup>

The unfathomable thinking is that some firms believe that respect for human rights norms would inhibit global trade and development. In the United States, for instance, the Bush and Obama administrations fought relentlessly against the application of the Alien Tort Statute to cases of human rights violations abroad.<sup>75</sup> Their argument was that such suits in federal courts raise serious foreign policy concerns.<sup>76</sup> The amicus briefs filed by the US governments in the *Kiobel* Case was on the basis that the courts, by entertaining these cases,

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72. See *id.* at 1024-26 (refusing to decide whether the purpose or knowledge is the appropriated standard to assess aiding and abetting, but agreeing that this was egregious enough that would have satisfied the heightened purpose standard).

73. See, e.g., Patrick MacNeill, *Overview of the Project Undertaken at the NSW Department of Primary Industries as a Vacation Industrial Work Experience Project*, INT'L MINING FATALITY DATABASE 21-23 (2008) (charting the number of fatalities experiences in various countries due to coal mine accidents).

74. *Doe I v. Nestle USA*, 766 F.3d at 1026.

75. See, e.g., Mark A. Drumbl et al., *The Alien Tort Claims Act Under Attack*, 98 AM. SOC'Y OF INT'L L. 49, 51 (2004); Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57.2 HARV. INT'L L.J. 1,4 (2016) (discussing the Obama administration's stance on various international issues).

76. See Drumbl et al., *supra* note 75, at 51 (citing the Bush administration as claiming the lawsuits would “threaten to bankrupt the world economy and seriously impede the conduct of foreign relations”).

were acting inconsistently with the US foreign policy of promoting US investors abroad.<sup>77</sup> Thus, the argument that human rights rules are in conflict with development needs to be rejected at the earliest stage.

The primary duty to protect human rights falls on the state. However, in the DRC case highlighted above, the state is not and has never been present.<sup>78</sup> The resources are controlled by guerillas. Business is still ongoing, and minerals are extracted and exported from the country. Cell phones are churned out in large quantities and the by-products of these properties are from minerals extracted mostly from these weak zones.<sup>79</sup> If states are solely charged with human rights obligations, and the duty of due diligence falls on them, how do we ensure that the government of DRC has due diligence obligations to make sure those violations which are occurring in those places are attributable to the state? There are lots of problems in weak governance zones. Notably, bad actors who are mostly non-state armed groups.

Ruggies Principles reproduces the distinction between voluntary and binding initiatives. It creates a responsibility which rethinks how businesses should approach human rights.<sup>80</sup> The problem with these rules is not that they are inadequate. It is a problem of enforcement. For instance, Nigeria has numerous rules and regulations on the best practices for managing the extraction of natural resources. However,

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77. See Brief for Respondent at 25-31, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2011) (No. 10-1491), 2011 WL 6425363, at 25-31 [hereinafter *Kiobel Brief*].

78. See Gentleman, *supra* note 7 (“The justice system and the military still barely function, and United Nations officials say Congolese government troops are among the worst offenders when it comes to rape. Large swaths of the country . . . remain authority-free zones where civilians are at the mercy of heavily armed groups.”).

79. See *Cell Phone Mineral Answer Key*, MINERALS EDUCATION COALITION (2013) [https://mineralseducationcoalition.org/wp-content/uploads/10\\_9\\_13cellphoneanswer.pdf](https://mineralseducationcoalition.org/wp-content/uploads/10_9_13cellphoneanswer.pdf) (providing charts of the major mineral used to produce cell phones and the leading countries exporting those minerals).

80. See generally John Ruggie, Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, annex I, ¶¶ 1-15 (Mar. 21, 2011) [hereinafter Ruggie, *Guiding Principles on Business and Human Rights*] (listing and explaining the general principals).

these rules are only good on paper. The enforcement regime is either deficient or nonexistent. Apart from strengthening local institutions charged with domestic implementation and enforcement of these laws, what should be emphasized is that if an MNC goes to these weak zones, the mere fact that host countries do not enforce their laws should not be an avenue to aid and abet corrupt governments or turn a blind eye to human rights enforcements. MNCs should not disregard these rules and principles. If these principles applied to the MNCs, the notorious *Ogoni* and *Marikana* disasters would not have occurred. In effect, therefore, if Nigerian government is violating the rights of indigenous peoples of the Niger-Delta, MNCs should not be complicit. This connivance should also extend to third parties directly responsible to the MNCs. This would erode the application of separate legal personality principle usually used by the MNCs to avoid liability. For example, an MNC employs the services of state funded security forces to protect its installations. In the process of protection, these forces become involved in human rights violations in the local community. It will be incongruous for the MNC to deny responsibility but instead allocate liability to the state as objects and those with sole obligation to protect human rights under international law. This raises some complications under domestic law. Although the Supreme Court dodged the question of corporate liability for the acts of third parties in the *Kiobel* case, drawing the nexus in that relationship is necessary in building the case for liability against MNCs.<sup>81</sup> This the court did successfully so far in *Doe v. Nestle USA, INC.*<sup>82</sup>

## 2. *The Third-Party Beneficiary Rule*

Another way of incorporating legal frameworks in extractive resource governance is through the Third-Party Beneficiary Rule (TPBR). Contract law provides reciprocal responsibilities between

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81. See *Kiobel*, *supra* note 66.

82. *Doe v. Nestle USA, Inc.*, 738 F.3d 1048, 1051 (9th Cir. 2013) (citing the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009) which held that “a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime”).



both parties. Any party that is not privy to any contractual relationship is not expected to enjoy benefits derivable from the contract. The reason for this is simple. Promises exchanged between consenting people are meant to be carried out in good faith between those two people. Where one fulfills his obligations and the other does not, a breach of the contract has occurred. This gives rise to repudiation of the contract or other remedies available in contract law.<sup>83</sup> Contractual bargain therefore enhances the wealth of the contracting parties as it creates value through exchange and allowing the contracting parties to make reliable plans.<sup>84</sup> This invariably formed the basis for what has now been widely accepted as the doctrine of privity of contract.<sup>85</sup>

Under the TPBR, a third person, not a party to the contract can sue to enforce a promise made for his or her benefit under the contract, though he was not a party to the contract.<sup>86</sup> In the United States, the

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83. See, e.g., GREG ABBOTT & DOUG COULSON, *BUSINESS & COMMERCIAL LITIGATION* § 19:172 (Tex. Prac. Guide 2016-2017); see generally David Campbell, *Better than Fuller: A Two Interests Model of Remedies for Breach of Contract*, 78 MOD. L. REV. 296 (2015) (arguing the restitution interest should be eliminated as contract remedy); Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUMBIA L. REV. 1145 (1970) (providing remedies obtainable under contract law).

84. See, e.g., Melvin Aaron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 743-44 (1982) (discussing the benefits of bargaining); cf. Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432, 1459-64 (1985) (explaining how various remedies act as incentives to perform the contract).

85. See Jesse W. Lilienthal, *Privity of Contract*, 1 HARV. L. REV. 226, 226-32 (1887) (quoting *Lake Ontario Shore Railroad Co. v. Curtiss*, 80 N.Y. 219 (1880), “The general rule is, that when two persons, for a consideration sufficient as between themselves, covenant to do some act, which if done would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other”).

86. See RESTATEMENT (SECOND) OF CONTRACTS § 304 (Am. Law Inst. 1981) (noting “parties to a contract have the power, if they so intend, to create a right in a third party”); see also Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary R.*, 98 HARV. L. REV. 1109, 1111-12 (1985) (stating that a third party’s ability to enforce a contract is a well-accepted concept in the United States); cf. Marissa Marco, *Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party-Beneficiary Status for Project-Affected Communities*, 34 FORDHAM INT’L L.J. 452, 455 (2011) (suggesting the Equator Principles should adopt the concept of third-party-beneficiary interests in order for communities to ensure compliance with the Equator Princi-

TPBR has been applied in a number of cases.<sup>87</sup> There is growing and emerging literature on this principle. What is important from the literature is the intention of the parties as at the time the contract was negotiated. Extractive resource contracts between the states and investors are for the exploration of natural resources within the State.

Modern approach to the TPBR tends towards the applicability of the rule to resource extraction projects. This is evident in low income countries, particularly in Africa where landed property and natural resources belong to the State, though the State holds it in trust for use to the benefit of the people.<sup>88</sup> Gathii's seminal work on this rule four reasons why the TPBR should be applied to resource extraction contracts.<sup>89</sup> His most important reason is that the rule is consistent with the wishes of the parties to the contract, though, he claims that this right of a third party is remedial and not substantive.<sup>90</sup>

Strictly, the application of the Rule goes beyond the mere intention of the parties.<sup>91</sup> An extractive resource contract entered into be-

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ples by MNCs).

87. See RESTATEMENT (SECOND) OF CONTRACTS § 304 (providing for the recognition of the third party principle); see also *Dutton v. Poole* (1678) 83 Eng. Rep. 523 (K.B.) (finding a third party to be privy to the contract because she was the intended beneficiary); see also *Maneely v. United States*, 68 Ct. Cl. 623 (1929) (holding the plaintiff was an intended third-party beneficiary and was allowed to bring a claim for damages).

88. See Land Use Act (1990) § 1, ch. 202 (Nigeria); see also Mineral and Petroleum Resources Development Act of 2002, GG 23922, § 2 (10 Oct. 2002); see also Petroleum Exploration and Production Law (1984), § 1 (Ghana); see also CONSTITUTION OF THE REPUBLIC OF GHANA, (1996), § 257(6) (Ghana).

89. See Gathii, *supra* note 44, at 114 (stating his four reasons that the TPBR is consistent with resource extraction are: (1) third party wishes are consistent with the wishes of the parties to the contract; (2) resource contracts are made for the benefit of the public; (3) it is necessary on the grounds of justice and mortality; and (4) it is essential on public policy grounds).

90. See, e.g., *Guiding Principles on Business and Human Rights*, *supra* note 38, at ¶¶ 25.

91. See *Olson v. Etheridge*, 686 N.E.2d 563, 569 (Ill. 1997) (adopting a modern view on the duty of a beneficiary to a contract, the Court held that third-party beneficiaries to a contract only obtain vested rights in a contract when one of the three vesting circumstances set forth in section 311(3) Restatement (second) of Contracts is satisfied); see also Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1378 (1992) (suggesting "intent" is ambiguous and is not clearly defined); cf. Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON

tween government and investors which does not have the input of local communities does not deserve the consideration of an academic critique. Local communities are ultimate beneficiaries of State projects. Due to the insensitivity of governments in the past, there have been high levels of distrust between local communities, governments and investors. However, throughout the planning, decision making, execution and implementation stages of the various projects, local communities were not aware of these projects. They have no sufficient participatory rights, likewise, their enforceable rights are limited. Without entrenched local community participation in natural resource contract, the TPBR will be a mere charade.

A new approach is thus suggested, which should mandate MNC to enter into contractual relationships with local communities through enforceable Memorandums of Understanding instead of the State. In the alternative, where they enter into contractual relationship with the State, there must be an incidental contractual relationship with the local community. It is in this context it can truly be said that the Rule has the intention of the citizens at heart. The rule will thence enjoy the concept of 'free, prior and informed consent' that is key to achieving the participatory development right under the United Nations. In Canada, the indigenous populations known as First Nations are always consulted before any project in their locality is done.<sup>92</sup> African states must adapt this practice to their various local communities.

Further, indigenous peoples have historically been cut off from any decisions that affect them. They thus become vulnerable, suffering from a lack of political representation and decision making concerning matters that affects them.<sup>93</sup> Even though these contracts con-

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POVERTY L. & POL'Y 287, 287 (2010) (noting "community groups that seek to become involved in city-sponsored redevelopment projects have limited avenues of participation from which to choose" and need to rely on the third-party beneficiary, even when their intention is different than the contracting parties).

92. See *Consulting with First Nations*, BRITISH COLUMBIA (last accessed Feb. 11, 2017), <http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations> (requiring consultation on "land and resource decision that could impact their aboriginal interests").

93. See Phillipe Hanna & Frank Vanclay, *Indigenous Peoples and the Concept of Free, Prior and Informed Consent*, 31 IMPACT ASSESSMENT AND PROJECT APPRAISAL 146, 152 (2013), <http://dx.doi.org/10.1080/14615517.2013.780373> (noting the implementation of free, prior and informed consent can create illusion

form to the wishes of the people, practically, the implementation is weak. If indigenous communities had been involved in the planning and execution of the contract, the enforcement of TPBR would have been easily implementable and naturally enforceable on the MNCs.<sup>94</sup> In adducing evidence in support of this assertion, Gathii claims that the financial resources obtained from investors through the contracts are used towards public projects, such as roads, or for paying for public education and health.<sup>95</sup> As much as this is theoretically applicable, the reverse is the case in local communities where resources are extracted. This has been the bane of failed CSR. Laws do not cure all of the social ills occasioned by globalization and the insatiable quest for industrialization. The firm is not only a legal creation, but a moral compass with social and ethical responsibilities that extend to shareholders and other constituents in a state, including the local communities.<sup>96</sup> The obligation of business is to consider, weigh, and balance the needs of the firm's stakeholders<sup>97</sup> Due to moral imperatives, a corporation must be able to balance these obligations in a way that puts emphasis on the society. It is an undeniable fact that government representation of local communities, especially when it has to do with resource extraction projects, is often ludicrous due to lack of capacity, lack of interest or conflict of interest.<sup>98</sup> Evidence suggests that due to high level of corruption and weak govern-

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it is being achieved, but in reality, excludes many community members from participating in decision-making); see generally S. Mahanty, C.L. McDermott, 'How does 'Free, Prior and Informed Consent' (FPIC) Impact Social Equity? Lessons from Mining and Forestry and Their Implications for REDD+', 35 LAND USE POLICY 406, (2013) (examining how the principle of "free, prior, and informed consent" has impacted social equality and why).

94. Cf. George (Rock) Pring & Susan Y. Noe, *The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development*, in DONALD M. ZILLMAN, ET. AL., HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 59-64 (Oxford Univ. Press 2002) (discussing the necessity of including the indigenous community's participation in decision).

95. See Gathii, *supra* note 44, at 116.

96. See, e.g., LUO YADONG, GLOBAL DIMENSIONS OF CORPORATE GOVERNANCE 198-99 (Blackwell Publishing 2007) (highlighting that a corporate's social responsibility is an ethical duty).

97. See *id.*

98. See Odumosu-Ayanu, *supra* note 44, at 478 (suggesting international standing exists and may be the best source of a legal resolution).

ance mechanisms, most constituent units of the federal republic enter into public-private initiatives in a way to indirectly expand infrastructural developments in their space.<sup>99</sup>

If a government truly enters into contracts on behalf of its people, then they should be direct beneficiaries of the proceeds of the contracts. Accordingly, they should be allowed to sue on the contract. After all, the issue of permanent sovereignty over natural resources lies with the people and not the government *per se*.<sup>100</sup> Article 21(1) of the African Charter on Human and Peoples Rights,<sup>101</sup> guarantees the right of all peoples to freely dispose of their wealth and natural resources.<sup>102</sup> This right is to be exercised in the exclusive interest of the people.<sup>103</sup> This right is for the benefit of the people and it has to be exercised on behalf of the people. What this argument portends for Nigeria is that a people-centered agreement between MNCs and government that would drastically endanger the environment, citizenry or communities are open to possible censure<sup>104</sup>. This point proceeds on the recognition that sustainable exploitation of the environment takes cognizance of the rights of future generations yet unborn.

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99. Lagos is one of the 36 states in the Federal Republic of Nigeria. It is a cosmopolitan State and as such, there has been a pressure to develop the States infrastructure. Even in the face of federal governments neglect. The State has been able to pursue giant strides. *See Lagos Denies Terminating Controversial Concession Deal On Lekki-Epe Highway*, WILL NEWSPAPER (Aug. 28, 2013), <http://thewillnigeria.com/news/lagos-denies-terminating-controversial-concession-deal-on-lekki-epe-highway/> (accessed 11 August, 2016) (providing the text of a press release regarding the deal from the Lagos government).

100. *See* G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962); *see also* Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 66-67 (2006) (arguing that natural resource extraction should be at the benefit of the citizens of the nation).

101. Org. of African Unity [OAU], African Charter on Human and People's Rights (Banjul Charter), art. 21(1), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (June 27, 1981), <http://www.refworld.org/docid/3ae6b3630.html> [hereinafter Banjul Charter].

102. *See id.* at art. 21(1).

103. *See id.*

104. *See* Abegunde, *supra* note 15, at 34 (stating that to avoid conflict and exploitation, the government, resource bearing community, natural resource workers, and multinational corporations must all be in agreement about terms of contracts and those terms must improve the living conditions of surrounding communities in the present and future).

Natural resource extraction activities in resource rich Global South countries are riddled with woes and conflict. It is therefore not immediately clear how the rule will attract justice and morality in a country such as Nigeria where value systems are deficient and corruption is the order of the day. Local communities lack interest in development projects even in their community. This is due to long years of deceit perpetrated by the government and insensitivity of the MNCs. Even where judgments are given, who bears the burden of enforcement particularly where the judgment is against the government?<sup>105</sup> The state has failed over the years and the institutional reforms needed have never been done and where it did, it never worked. Where the right institutions are put in place, practice will merge with theory. Furthermore, the socio-political, historical and economic history of the indigenous peoples contributes to the regime of non-inclusivity. Indigenous people must actively participate in the realization of their right to development.<sup>106</sup>

### 3. *Community Development Agreements*

Contracts are meant to be sacrosanct. The terms of any legally agreed contract must be complied with, exceptions being unconscionable bargain or such agreements did not meet the thresholds of a valid contract.<sup>107</sup> Community Development Agreements (CDAs) constitute another genre of contract.<sup>108</sup> This type of agreement has become important considering the debate about the possibility of TPBR which would have been an exception to privity of contract. This agreement involves investors and communities. Unlike con-

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105. See, e.g., *Gbemre (on behalf of Iwheraken Community, Delta State) v. Shell Petroleum Dev. Corp.* (2005) FHC/B/CS/53/05 21 (H.C.K.) (Kenya) (holding that respondents were restrained from “further flaring of gas in applicants’ community and are to take immediate steps to stop the further flaring of gas in the applicants’ community”).

106. See G.A. Res. 41/128, ¶¶ 2-3 (Dec. 4, 1986) (providing that all individuals in a community have a right to participate in development).

107. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 17-18, 20, 22, and 208 (showing that in most common law countries, for there to be a valid contract, there must be offer, acceptance, consideration, intention to enter legal relations and capacity to contract).

108. See Leland T. Saito, *How Low Income Residents Can Benefit from Urban Development: The LA Live Community Benefits Agreement*, 11 CITY & COMMUNITY 129, 130 (2012) (discussing Community Benefit Agreements and examining the CBA’s impact on addressing structural inequality).

tracts between investors and governments, which gives rise to TPBR, this type of contract directly involves the community. Thus, the local community is involved in contract making. Besides, when investors enter into contract with government, they are legally allowed to carry out their exploration activities in the local community.<sup>109</sup> While they possess this legal license, they do not have the social license to operate, hence the frequent and heightened tension between the investors and local communities. Social responsibility arises from social power. While it is true that MNCs may have the requisite legal basis for conducting activities in the extractive industries in Nigeria and South Africa, they certainly lack the social license to operate. This is evident in the Niger-Delta and Marikana incidents.<sup>110</sup> Firms have the tremendous influence over governments especially when such powers extend to issues such as environment, community development and human rights.<sup>111</sup> To avoid criminal or civil prosecution, managers must ensure their firms comply with relevant laws. By so doing, they avoid distracting court cases, punitive fines, and distrust from their host community.

In March 2015, France passed a law mandating big supermarkets to sign contracts with a charity group to ensure donating food to charities instead of destroying those food that were not sold.<sup>112</sup> The pertinent question is why do we need a law for something that seems logical? Since you do not use a product, give it to charity, you do not make a profit on it. Perhaps, the supermarkets could argue that if they give to charities for free, what they will not use again, though still edible, this could discourage individuals to give to those charities that would want to buy again in their own supermarket. There is something logical when making your business in the best way, looking for what is in your best interest. Those who therefore hold tenaciously to Friedman's conception of the irrationality of CSR has lost

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109. *See id.*

110. *See* Abegunde, *supra* note 15, at 32 (discussing the violent conflict of the Ogoni people in the Niger Delta).

111. *See Guiding Principles on Business and Human Rights, supra* note 38, at ¶¶ 11, 13 (establishing that a business has the responsibility to respect human rights, avoid causing or contributing to violations of human rights, and prevent or mitigate any violations that are directly caused by its operations).

112. *See, e.g., France to Ban Food Waste in Supermarkets, AL JAZEERA* (May 22, 2015, 8:14 AM), <http://www.aljazeera.com/news/2015/05/france-food-waste-supermarkets-150522070410772.html>.

the deep meaning of evolution of ethical modernization which responsible firms are aligning with today.

For victims of human rights violations, a basis for empowerment, participation in project execution and implementation and an avenue for assessing governments and business conduct are necessary for reversing the risks associated with resource exploitation. Some jurisdictions have taken a step further to ensure that CDAs are statutorily provided for.<sup>113</sup> Contracts that take cognizance of the rights of the indigenous peoples, thereby giving them an opportunity to negotiate terms of the contract, almost always have

the potential to integrate the main stakeholders within one framework, address democratic deficits in the law and oil and gas regulation, allow actors to negotiate interests, benefits and obligations, facilitate cordial relationships as well as responsibilities on the part of all the actors and the stronger relationships in turn contribute to sustainable exploitation of resources and responsible management of project development.<sup>114</sup>

Evidence lends support to the fact that negotiating CDAs has reversed negative impact of large projects which shows the disparities in the economic and political resources controlled by investors and local communities.<sup>115</sup> CDAs have the potential of addressing the interests of the local community. Even where the government through its agencies and parastatals have the best of intentions, MNCs have the capability to influence these officials so that they can subvert any positive development impact on the community.

The West Africa Gas Pipeline project is an example that readily comes to mind. It is a regional pipeline project that transmits gas from Nigeria to Benin, Togo and Ghana.<sup>116</sup> Undoubtedly, this type of project would lead to the destruction and/or relocation of properties. It would also have the potential of destroying livelihoods, damaging plantation and displacing residents from their homelands. The pro-

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113. See Odumosu-Ayanu, *supra* note 44, at 491-92 (considering the effectiveness of domestic statutes and regulations).

114. *Id.* at 510.

115. See Saito, *supra* note 108, at 129.

116. See Treaty on the West African Gas Pipeline Project Between the Republic of Benin, the Republic of Ghana, the Federal Republic of Nigeria, and the Republic of Togo, Jan. 31, 2003, WAGP art. II(3) [hereinafter WAGP Treaty] (establishing the governance system of the pipeline).



gram which started in 1982 was finally endorsed by the World Bank in 1992 as a commercial and feasible project, capable of supplying gas to the West African region.<sup>117</sup> The Heads of the four African States signed an Agreement in 1995 and on August 11, 1999, a Memorandum of Understanding was signed by the governments of Nigeria, Benin, Togo and Ghana.<sup>118</sup> In February 2000, an Inter-Governmental Agreement was signed.<sup>119</sup> Furthermore, Clause 20.3 of the WAGP International Project Agreement provides that land owners who are impacted by the activities of the Company or project and lose their lands as a result will be entitled to “fair compensation for disturbance or damage.”<sup>120</sup> This might not be a much needed legal empowerment for the local people, but it is a significant improvement from earlier practice where companies and States take land from the natives without recourse to any form of compensation.<sup>121</sup>

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117. See, e.g., Ese Awhotu, *Gains, Constraints of the \$1.8 Billion West Africa Gas Pipeline Project*, ALL AFRICA (Dec. 1, 2009), <http://allafrica.com/stories/200912020110.html> (stating that there was some resistance to the project because of political and economic uncertainties, but the support of the World Bank helped the countries involved come to an agreement over the project).

118. See WAGP Treaty, *supra* note 116, preamble.

119. See West African Gas Pipeline Act (2004) (681), § 13 (Ghana) (enacting a law that domesticates the gas pipeline and providing that “The Company shall pay to any affected legitimate land owners or lawful occupiers of land entered pursuant to the exercise of the rights of the license holder under section 12, fair compensation for disturbance or damage caused by the activities of the Company or project contractors on such land”); see generally *About the Pipeline*, WAPCO, [http://wagpco.com/index.php?option=com\\_content&view=article&id=122&Itemid=85](http://wagpco.com/index.php?option=com_content&view=article&id=122&Itemid=85) (providing details about the pipeline and its product).

120. WAGP Treaty, *supra* note 116, art. 13(1).

121. See, e.g., Natives Land Act 27 of 1913 § 10 (S. Afr.) (regulating the acquisition of land by the native black people and being used as a tool by the then repressive apartheid government to indicate that only certain areas of the country could be owned by the natives, but it has been replaced by the current land reform process which focuses on restitution, land tenure and land redistribution); see also William G. Moseley & Brent McCusker, *Fighting Fire with a Broken Tea Cup: A Comparative Analysis of South Africa’s Land-Redistribution Program*, 98(3) GEOGRAPHICAL REV. 322, 324-25 (2008) (discussing the Native Land Act); see also Klaus Deininger, *Making Negotiated Land Reform Work: Initial Experience from Colombia, Brazil and South Africa*, 27 WORLD DEV. 651, 652-53 668 (1999).

## V. CONCLUSION

This article has considered various approaches aimed at ensuring that the Guiding Principles assist improved extractive resource governance in the extractive sector. It has discussed problems that present obstacles against the implementation of the Guiding Principles in the extractive resource industry in the Global South, particularly in Sub-Saharan Africa. These include corruption, civil conflict, and authoritarianism. A consideration of the issues concerning corporate liability for human rights violations borders on awareness that the companies should consider that they owe it a moral duty to abide by human rights norms and laws. Some may argue that the main purpose of a company is to make profit. However, making profit does not translate to hurting human beings or damaging their means of livelihood. Where the activities of these MNCs would result in environmental degradation and violation of human rights, companies must immediately remediate such acts. While the Global South needs the cooperation of the Global North in development aid, countries in the Global South must show spirited efforts at addressing the challenges that face them domestically. African states, for instance, are managed by corrupt, inept and a cabal system. The citizens are continually impoverished and increasingly violent?

States should be more concerned about both reputational and direct sanctions for their conduct. They have an obligation to protect human rights by enforcing all human rights standards so as not to breach their commitments under international law. Unfortunately, UN treaties and Customary International Law do not provide for regulation of business enterprise.<sup>122</sup> Admittedly, the Guiding Principles which guide corporate businesses, are not legally mandatory. A reputational theory, however, would label as international law any commitment that materially alters state incentives.<sup>123</sup> These commitments, allow us to understand the workings of international obligations within a reputational theoretical framework. It explains

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122. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute] (stating that the ICJ shall decide cases in accordance with international law, conventions, customs, and general principles of law of civilized nations).

123. See Guzman, *supra* note 29, at 1825.

why such agreements exist and why they are so popular.<sup>124</sup> Resolutions, declarations and agreements represent commitments by a state which, if breached, will have a reputational impact.<sup>125</sup> With this in the background, human rights principles will become naturally mandatory for the MNCs. The ultimate objective is to decrease the gap between developed and developing countries in managing extractive resources governance creditably. Local communities must be involved and adequately represented in planning, execution and implementation of resource extraction projects through either TPBR or Impact Benefit Agreements. Increasing participation of local communities is key to the business and human rights agenda. No doubt, Memorandum of Understanding and CDAs, as argued in this paper, have the potential of addressing the interests of the local community.

Until we de-emphasize financial incentive as the goal of political governance, turning resource wealth into improved standard of living for the people will only be a mirage. Issues of weak enforcement of rules and regulations, bad labor standards, environmental pollution, corruption, and lack of political will must be aggressively addressed. Hilson expresses the concern that most Sub-Saharan African countries encounter two major challenges which have impacted on their growth trajectory. First, the timing to bring extractive industries to fruition happened when the countries just attained independence.

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124. *See id.*

125. The impact may even extend beyond the scope of the agreement. For example, the Basel Accord was negotiated and agreed to by the central bankers of twelve countries in 1988. Although not a treaty and, as a result, not considered binding under traditional definitions of international law, a central banker whose country failed to supervise banking activity in a manner consistent with the Accord would surely face a loss of influence in the international regulation of banking and make it more difficult to enter into future negotiations. There is an incentive not to promise too much and an encouragement to honor such agreements. Such agreements as this can change state behavior. The reputational cost of a failure to honor the Basel Accord could easily extend beyond the banking arena. To the extent that such action is perceived as a signal that a country does not take the promises of its negotiators seriously in the absence of a formal international legal commitment, such action could undermine all efforts to negotiate non-binding agreements. It should be noted that those who negotiate these agreements on behalf of their countries have the authority to bring domestic regulations into compliance with the agreements. *See generally* Duncan E. Alford, *Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI*, 26 GEO. WASH. J. INT'L L. & ECON. 241, 259 (1992).

This significantly put the governments to a test.<sup>126</sup> Instead of development, the new-found wealth soon turned the fragile democracies into autocratic governments. A form of neo-colonialism emerged. Second, the financial burden occasioned by the huge investments in oil and gas projects deprived the fragile democracies of much needed financial reprieve to embark on the projects.<sup>127</sup>

It is hoped that a fusion of the recommendations made in this work will untie the Gordian knot of self-enrichment of political leaders where the proceeds of oil are used to enrich themselves and leave the local community in anguish and impoverishment. These oil companies fully aware of the level of decadence in governance and with sophisticated machinery of lobby and maneuvering perpetuate dictators or democratic nuisance so they can continue their impunity. Contracts are shrouded in secrecy; award of development initiatives are carried out without regard to immediate needs of the local community.

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126. See Gavin Hilson, *Corporate Social Responsibility in the Extractive Industries, Experiences from Developing Countries*, 37 *RESOURCES POL'Y* 131, 133 (2012) (analyzing how MNC have embraced corporate social responsibility in response to criticism of their actions in developing countries).

127. See *id.*