

**Holding Multinational Corporations Accountable for Human Rights
Violations under International, African Regional and South African
Law**

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ALLSHA028

Submitted in accordance with requirements for the degree:

MASTERS OF LAW

Focus in Public Law

At the

University of Cape Town

Supervisor: Professor D. Chirwa

2016

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Chapter 1

Introductory Chapter

1. INTRODUCTION

The fact that Multinational Corporations, hereinafter referred to as MNCs, exercise a great deal of economic power is undisputed. They are formidable players in the world economy and a capable of exercising control over global trade, investment, and technology transfers and so on.¹ As result of this economic power, MNCs are capable of exerting significant political leverage in both international and domestic spheres.² Flowing from their economic and political power, MNCs are uniquely positioned to affect, both positively and negatively, human rights.

MNCs can be defined as an enterprise that operates within more than one country.³ A more legal definition of MNC would be a ‘collection of corporate entities, each having its own juridical identity and national origin, but each in some way connected by a system of centralised management and control, normally exercised from the seat of primary ownership’.⁴ The growth of MNC activity in developing countries has given rise to the debate about their responsibility to the host countries and its citizens.⁵ MNCs have become almost as powerful, if not more so, than some of the countries within which they operate, therefore they are in the same position as the host state to potentially violate human rights.⁶ For this reason, MNCs must be held accountable for human rights violations to the same extent that states are expected to be accountable. It is also important that MNC activities be legally regulated in order to prevent such violations from occurring in the first place.

This thesis will focus on examining MNCs violation of human rights with specific reference to the environment and child labour. This paper will critique existing measures South Africa has adopted and implemented to prevent MNCs from

¹ David Kinley and Junko Tadaki, ‘The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) *Sydney Centre Working Paper 4* 933 – 1021.

² *Ibid* at 933.

³ Muzaffar Eroglu *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (2008) MPG Books Ltd: London at 23.

⁴ Muzaffar Eroglu *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (2008) MPG Books Ltd: London at 23.

⁵ *Ibid*.

⁶ Ratna Kapur, ‘From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations’ (1990) 10 *Boston College Third World Law Journal* 1 – 43 at 1.

⁶ *Ibid*.

committing such harmful practices and to hold them accountable for violating the aforementioned rights. This will be done by focusing in particular on MNCs operating in the extractive industry in South Africa. The study will consider the nature of human rights violations MNCs in this sector have been accused of and how, if at all, they are being held accountable. Lastly, this thesis will provide recommendations in respect to better prevention and accountability of MNCs of human rights violations.

2. STATEMENT OF THE PROBLEM

The activities, intentionally or unintentionally, of MNCs have often resulted in great violations on human rights. The specific rights often infringed by MNCs are environmental rights and labour rights. For example, on 3 December 1983, in Bhopal, India, 27 tons of toxic gas poured out of a chemical factory, resulting in a nearby village in the country being engulfed in a lethal poison.⁷ About 25 000 people died as a result of the leak and more than 120000 people are still suffering as a result of the poisonous gas.⁸ The gas leak also polluted the groundwater that the villagers consume. This gas leak was caused Union Carbide Corporation (hereafter referred to as Union Carbide), the MNC that controlled the chemical factory. The executives of this company knew of the potentially unsafe condition, yet did not do anything to avert the disaster.⁹ This incident could have been avoided if the MNC prioritised safety of its employees and the environment over maximising profit. Union Carbide, now owned by Dow Chemical, has still not cleaned the mess and the villagers in the area still have no alternative to drinking the polluted groundwater.¹⁰ The aftermath of the disaster saw the stock price of Union Carbide *rise* by two United States (US) dollars per share. The rise in share price arose after the announcement that a \$470 million settlement between the company and the Indian government had been reached.¹¹ This sum was meant to cover past, present and future liabilities relating to the disaster. This amount is incomparable to the amount of damage and suffering that

⁷ Anniki Laine, 'Integrated Reporting: Fostering Human Rights Accountability for Multinational Corporations' (2015) 47 *The Geo. Wash. Int'l L. Rev.* 639 – 667 at 639.

⁸ *Ibid.*

⁹ *Ibid.* at 640. Safety systems of the factory had been deactivated for economic reasons months before the leak: Dominique Lapiere and Javier Moro *Five Past Midnight in Bhopal* (2002) Simon and Schuster Ltd: London.

¹⁰ Laine *op cit* note 7 at 640.

¹¹ *Ibid.*

was caused to the Indian villagers. This agreement meant that United Carbide was able to avoid admitting fault in the disaster but claiming moral responsibility for it.¹²

Another example of MNC activities harming the environment is the explosion of British Petroleum's (hereafter referred to as BP) Deepwater Horizon oilrig in April 2010 resulted in 170 million gallons of oil spilling into the Gulf.¹³ The explosion killed 11 people, while the resulting spill left thousands of birds, sea turtles and other marine mammals dead or injured six months after the spill. Long term impacts of the spill include ill sea creatures, decrease in fish and wildlife populations and decline in commercial fisheries.¹⁴ A law suit were filed against BP by the US Department of Justice in New Orleans Federal Court citing BP as having caused the spill due to gross negligence and willful misconduct.¹⁵ BP, however, rejected this argument admitting mere negligence and argued that others were equally responsible.¹⁶ The Federal Judge rejected BP's argument and found them to be grossly negligent. BP may face a fine up to \$18 billion.

Another example is MNC Thor Chemical Inc. of Great Britain operating in Kwazulu-Natal, South Africa being accused of poisoning workers and putting surrounding community at risk from mercury exposure. Mercury shipments were shipped from other countries and placed at their plantation located in the province.¹⁷ During a 1989 investigation by US journalists the severity of the pollution was discovered. Water samples taken from the Mngeweni river showed that 1.5 millions parts per billion sediment to be toxic.¹⁸ This river flows into the river that supplies most of Durban's drinking water. Soon after these findings were made public, three workers were found to be suffering from long-term mercury exposure with one of them dying of the effects.¹⁹ More workers got injured as result of mercury exposure thereafter as well.

¹² Ibid.

¹³ National Wildlife Federation, 'How does the BP Spill Impact Wildlife and Habitat?' (2010), available at <http://www.nwf.org/What-We-Do/Protect-Habitat/Gulf-Restoration/Oil-Spill/Effects-on-Wildlife.aspx>, accessed on 19 March 2016.

¹⁴ Ibid.

¹⁵ Margaret Cronin Fisk et al, 'BP Found Grossly Negligent in 2010 Gulf of Mexico Spill' *Bloomberg Business* 5 September 2014, available at <http://www.bloomberg.com/news/articles/2014-09-04/bp-found-grossly-negligent-in-2010-gulf-of-mexico-spill>, accessed 19 March 2016.

¹⁶ Ibid.

¹⁷ University of Michigan, 'Environmental Justice Case Studies', available at <http://www.umich.edu/~snre492/Jones/thorchem.htm>, accessed on 29 April 2016.

¹⁸ Ibid.

¹⁹ Ibid.

Due to public pressure, the South African government, at the time, ordered Thor Chemicals to clean up the pollution. The company did not take the risk of potential threat seriously, arguing that the level of mercury had diminished or disappeared downstream.²⁰ The Department of Water Board (DWA) routinely sampled the water to test for the level of mercury. On one occasion the DWA had ordered Thor Chemicals to close down for four weeks as result of a negative result obtained in the water sampling.²¹ Soon after, however, Thor Chemicals was given a new license to continue its operations. Despite continuing investigations in 1994 of Thor Chemicals, the Department of Environmental Affairs praised the company as undergoing ‘sensible operations and sound work.’²² There has been litigation surrounding Thor Chemicals; after the deaths of the workers, the company was criminally charged by Great Britain and in 1994 a claim was filed against the company in a London High Court in which it was alleged that Thor Chemicals was negligent in allowing the transfer of defective mercury production from England to South Africa and that they failed to protect their workers from a preventable death.²³

The international attention, the public outcry and litigation against Thor Chemicals had instrumental effects on the international trade of toxic waste.²⁴ The European community had agreed not to export hazardous toxic waste to 68 of its former colonies. In addition, the Basel Convention²⁵ had been signed by all industrial nations except the US and New Zealand by 1994. Despite the treaty not coming into force until the end of 1997, countries that continued to export waste to the countries were subject to strict requirements, for example, they must submit details on the composition of the wastes, the methods of recycling and the destination of residues or pollution from the recycling.²⁶ Various other companies were also investigated as a result. Unfortunately, the only penalty imposed on Thor Chemicals was a fine of R14 500.²⁷

Along with causing immense damage to the environment that results in deaths of human, animals and plant life, MNCs are also known to utilise child labour. Child

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ United Nation, ‘Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal’ (1997).

²⁶ University of Michigan op cit note 17.

²⁷ Ibid.

labour is defined by the International Labour Organisation (hereafter referred to as the ILO) as work that deprives children of their ‘childhood, potential and their dignity and that is harmful to physical and mental development’.²⁸ MNCs often employ child labour as a means to maximise profit in order to be more competitive and, therefore, successful.²⁹ Children, generally, require less pay and are, therefore, more profitable for the company to employ. The sports company Nike is a MNC guilty of utilising child labour. Vietnam is just one of the country in which they operate in where many girl children are found working in their manufacturing facilities.³⁰ Many of these children work seven days a week and, at least, 14 hours a day, while earning only in 20c (US currency) per hour.³¹ In addition, they are subjected to poor working conditions: they work in dark, hot rooms in a poorly ventilated environment that frequently smells of glue.³² Another MNC guilty of child labour is the computer-making computer, Apple. The company, however, admitted to the use of child labour and has taken steps against the practice.³³ Other companies that are suspected and/or prosecuted for using child labour include GAP, Levi Strauss, Speedo, Coca Cola, Adidas and various others.³⁴

It is clear that the activities of MNCs are problematic and that steps need to be taken to regulate it.

3. OBJECTS AND PURPOSE OF THE RESEARCH

The main question that this thesis wishes to address is how are MNCs being prevented from committing and being held accountable for human rights violations, with specific reference to environmental rights and the illegal use of child labour in International, African Regional and South African Law. Furthermore, if determined that South African Law does not adequately hold accountable for and prevent MNCs committing human rights violation nor held accountable where they do, this thesis

²⁸ International Labour Organisation, ‘What is Child Labour’ (2015), available at <http://www.ilo.org/ipec/facts/lang--en/index.htm>, accessed on 24 March 2016.

²⁹ Amy Humphries and Juliette Guiot, ‘Child Labour’ (2012) *Human Rights Youth Forum*, available at <https://mismun2012.wikispaces.com/file/view/Child+Labour.doc>, accessed on 24 March 2016 at 5.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid at 7.

will provide recommendations and suggestions as to how they can be better held accountable.

4. RESEARCH METHODOLOGY

The research methods to be employed in the duration of this thesis will be primarily desktop research. This thesis will be examining and critiquing international law, African regional law and South African domestic law on accountability of MNCs.

The international law that will be looked at in this thesis include the 1948 Universal Declaration of Human Rights³⁵ and to what extent, if at all, it can be applied to MNCs and the Charter of the United Nations³⁶ to the extent that it may be an enforcement mechanism. Other relevant materials include the OECD Guidelines for Multinational Enterprises³⁷ and the UN Guiding Principles for Business and Human Rights.³⁸

As this thesis will be looking at particular human rights violations committed by MNCs in the form of environmental harm and child labour use, it will be examining and critiquing international law that specifically deals with these issues.

This thesis will critique international environmental law and its ability to be utilised against MNCs that harm the environment. The two main international environmental law instruments that have been developed are the 1972 Stockholm Declaration on the Human Environment³⁹ and the 1992 follow-up the Rio Declaration on Environment and Development.⁴⁰

³⁵ UN General Assembly, Universal Declaration of Human Rights, (10 December 1948) 217 A III. Hereafter referred to as UDHR.

³⁶ United Nations, Charter of the United Nations (1945) 1 UNTS XVI. Hereafter referred to as the UN Charter.

³⁷ OECD, 'Guidelines For Multinational Enterprises' (OECD) OECD Publishing, available at http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en, accessed on 29 April 2016. Hereafter referred to as the OECD Guidelines.

³⁸ United Nations, 'Guiding Principles on Business and Human Rights' (2011) HR/PUB/11/04. Hereafter referred to as the UN Guiding Principles.

³⁹ United Nations, 'Stockholm Declaration on the Human Environment' (1972), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503>, accessed on 29 April 2016. Hereafter referred to as the Stockholm Declaration.

⁴⁰ United Nations, 'Rio Declaration on Environment and Development' (1992), available at <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>, accessed on 29 April 2016. Hereafter referred to as the Rio Declaration.

An important source of international law that deals specifically with the rights of children is the UN Convention of the Rights of the Child.⁴¹ The CRC is an important law that deals specifically with the rights of children including a provision that prohibits the use of child labour.⁴² Conventions and recommendations of the International Labour Organisation (hereafter referred to as the ILO) on child labour will also be examined and critiqued in this thesis. The Minimum Age⁴³ and the Worst Forms of Child Labour Convention⁴⁴ will be two of the ILO Conventions that will be studied.

As this thesis is looking at MNC accountability in South Africa is it useful to examine the relevant African regional system on the subject. The African Charter on Human and People's Rights⁴⁵ as well as the African Charter on the Rights and Welfare of the Child⁴⁶ will be examined. An important case of the African Commission that is relevant to this thesis is *Social and Economic Rights Actions Centre and Another v Nigeria*.⁴⁷ This was a landmark case decided by the African Commission of Human and People Rights that dealt with, albeit indirectly, with violation of human rights by MNCs.

Finally, this thesis will look at the South African law that may be utilised in order to prevent MNCs from committing human rights violations and hold them accountable where they have committed such violations. The 1996 Constitution of the country will be the analysed with making specific reference to provisions of environmental protection, children and labour rights. This thesis will also briefly mention enforcement and accountability mechanisms found in South African delictual and criminal law. The Companies Act⁴⁸ will also be considered in this thesis. As regards South African environmental law, the National Environmental Management Act⁴⁹ is the most relevant legislation. Its provisions involving the rights and duties of state and non-state actors and its enforcement mechanisms will be examined and

⁴¹ UN General Assembly, 'Convention on the Rights of the Child' (1989). Hereafter referred to as the UN Children's Convention.

⁴² Ibid, article 32.

⁴³ International Labour Convention, 'Minimum Age Convention' (1973) C138.

⁴⁴ International Labour Organisation, 'Worst Form of Labour Convention' (1999) C182.

⁴⁵ Organisation of African Unity, 'African Charter on People's and Human Rights' (1981). Hereafter referred to as the AU Charter.

⁴⁶ Organisation of African Unity, 'African Charter on the Rights and Welfare of the Child' (1990). Hereafter referred to as the African Children's Charter.

⁴⁷ (2001) AHRLR 60 (ACHPR 2001). Hereafter referred to as the *SERAC* case.

⁴⁸ Act 71 of 2008.

⁴⁹ Act 107 of 1998. Hereafter referred to as NEMA.

critiqued. This thesis will also briefly mention other South African environmental law.⁵⁰ Relevant case law will also be discussed.

Furthermore, the Children's Act⁵¹, Labour Relations Act⁵² and the Basic Conditions of Employment Act⁵³ as far as they relate to the prohibition of the use of child labour by MNCs will also be examined and critiqued.

In addition to discussing the abovementioned sources of law, this thesis will discuss the manner in which human rights violations by MNCs are being addressed in South Africa in practice. This chapter will discuss human rights violations committed by the Extractive Industry in South Africa and how adequately South African Law has dealt with these violations and how they have prevented, if at all, further violations.⁵⁴

Various books, journal articles, legal cases, and legislation and other references will be utilised in aid of developing this thesis and to provide an analysis of the various legal instruments in place to hold MNCs accountable for human rights violations.

5. LITERATURE REVIEW

The topic of MNC accountability has been discussed and assessed by various academics in the legal field all of which have given their own recommendations on how to adequately address this serious issue. Some of these recommendations will be discussed below.

Laine promotes the use of integrated reporting, which includes reporting on the MNCs environmental impact, working conditions and the corporations' financial performance to the government of the country in which they are operating.⁵⁵ She argues that states should make it mandatory for MNCs operating in their countries to participate in the process of integrated reporting. Laine argues that Integrated Reporting, by providing information about how the MNCs interact with the

⁵⁰ Other South African environmental legislation that this thesis may look at is Environment Conservation Act 73 of 1989, hereafter referred to as ECA, and the Mineral And Petroleum Resources Development Act 28 of 2002, hereafter referred to as MPRDA.

⁵¹ Act 38 of 2005.

⁵² Act 66 of 1995. Hereafter referred to as the LRA.

⁵³ Act 75 of 1997. Hereafter referred to as the BCEA.

⁵⁴ SD Kanga and OO Ajoku, 'Reflections On How To Address The Violations Of Human Rights By Extractive Industries In Africa: A Comparative Analysis Of Nigeria And South Africa' (2014) 17 *Potchefstroom Electronic Law Journal* 453 – 612.

⁵⁵ Laine op cit note 7 at 654.

environment and the communities in which they operate, will provide states with vital material regarding the impact of corporate activities on human rights in their countries and will also serve as a practical means by which states can begin to oversee such activities.⁵⁶

Kapur states that human rights law can remedy any deficit there is in the law to ensure MNCs do not infringe upon the rights of the citizens in whose country they are operating by supplying a common and acceptable regime for all parties.⁵⁷ Kapur states that the appropriate judiciary should invoke the spirit of the UDHR and refrain from adopting narrow definitions in the arena of human rights, so as only to hold states accountable for human rights violations.⁵⁸ She says that in transnational situations the rights of the UDHR should be broadly interpreted to accommodate different value systems.⁵⁹ Kapur believes that international human rights law is the only force that can limit the power of MNCs to inflict harm in the countries in which they operate and that the domestic legal regimes are unable to hold MNCs accountable.⁶⁰

Kinley and Tadaki have argued against the continued reliance on states in which the MNCs operate to hold them accountable for human rights violations. They argue that states, especially developing nations, are ill equipped to hold powerful MNCs accountable for harming the environment and for other human rights abuses, which are not bound by notions of territorial sovereignty.⁶¹ They argue further that the continued inability of countries to regulate the activities of powerful corporations in their countries and still relying exclusively on state responsibility is tantamount to the world 'turning a blind eye to human rights abuses inflicted by the MNCs'.⁶² Kinley and Tadaki have discussed the possibility of an international legal framework to regulate the activities of MNCs, but do go on to say that international regulation should not be a substitute for state responsibility in controlling non-state actors in that state's territory.⁶³ Governments should have primary responsibility in ensuring the human rights protection of their citizens, MNCs should not be expected to replace

⁵⁶ Ibid at 656.

⁵⁷ Kapur op cit note 5 at 40.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid at 41.

⁶¹ Kinley and Tadaki op cit note 1 at 1021.

⁶² Ibid.

⁶³ Ibid at 1022.

states in this regard. They, further, suggest that a collective effort on part of multiple entities, including MNCS, governments, non-government institutions (NGOS) and so on, is needed to make MNC activities visible and accountable under international human rights law.⁶⁴

These differing opinions amongst academics highlight the difficulty in finding a manner in which MNCs can effectively be held accountable for human rights abuses in the countries in which they operate. The fact, however, that there has been debate about this issue emphasises the need to address the issue and to find an effective solution thereto.

6. CONCLUSION AND CHAPTER OUTLINE

In conclusion, this chapter has shown that the activities of MNCs may pose of threat to the enjoyment of human rights of the citizens in the country in which they are operating. Therefore, it is necessary to determine where MNCs are operating in South Africa, how they are being prevented from violating human rights and how they may be held accountable where they have been guilty of human right violations. The question that this thesis seeks to address is ‘what, if any, measures are there in place to prevent and hold accountable MNCs for human rights violations in South Africa?’ This thesis will also address the effectiveness of these measures and where lacking, will recommend manners in which MNCs can be better prevented and held accountable for human rights violations. This chapter has provided an outline of all international, African regional and South African law that will be discussed and analysed in this thesis.

Chapter two will outline, examine and critically analyse all international and African regional law in place to prevent MNCs from committing human rights violations, with specific reference to environmental rights and child labour. The effectiveness of the remedies provided by these laws will be analysed.

Chapter three will outline, examine and critically analyse all the domestic law of South Africa that are in place to hold MNCs from committing human rights violations, with specific reference to the environment and child labour. The effectiveness of these remedies provided by these laws will be analysed.

⁶⁴ Ibid.

Chapter four will discuss how MNCs are being prohibited and held accountable for violation of human rights are addressed in practice in South Africa. This chapter will discuss specifically human rights violations in extractive industries.

Chapter five will be the final chapter in which conclusions will be drawn and recommendations in respect to better prevention and accountability of MNCs of human rights violations.

Chapter 2

Multinational Corporations under International Law and Regional Law

1. INTRODUCTION

This chapter will discuss the international and regional law mechanisms in place to ensure that states protect their citizens from the activities of MNCs, with specific reference to environmental rights and child labour. In addition, this chapter will discuss and critique a few guidelines that directly address MNC responsibility to guarantee their activities do not violate human rights of the citizens of the country in which they are operating. The aim is to discuss and critique the existing body international law that may be used to prevent MNCs from violating human rights, special attention being paid to international and regional measures relating to the protection of the environment and the prevention of child labour. This discussion will form the basis for evaluating the measures that South Africa has taken.

2. INTERNATIONAL LAW

The traditional model of international law holds, firstly, that the primary rules of international law are addressed to states (and state officials), not non-state actors and, second, under the secondary rules of international law only states incur responsibility for breaching the primary rules of international law.⁶⁵ However, this model does not assert that only state conduct can give rise to international law violations. For instance, the secondary rules of international law recognise that '[t]he conduct of a person or group of persons "may give rise to international responsibility" if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.'⁶⁶ It has been argued that the conduct of a corporation might give rise to a violation of international law in 'failed states' if the

⁶⁵ Carlos Vázquez, 'Direct v Indirect Obligations of Corporations Under International Law' (2005) 43 *Columbia Journal of Transnational Law* 927 – 959 at 933.

⁶⁶ Ibid; Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, art. 9., U.N. Doc. A/56/10 (2001).

state does not regulate corporate activities and as a result MNCs commits human rights violations.⁶⁷ The state, however, will be the party to incur responsibility in such a case, as they did not exercise their duty to protect.⁶⁸ This duty provides that provides states have a positive obligation in certain circumstances to prevent private actors such as MNCs from infringing the rights of other individuals.⁶⁹ Similarly, primary rules do, at times, address the conduct of private actors. For example, the Convention on the Elimination of All Forms of Racial Discrimination⁷⁰ expressly addresses the permissibility of race discrimination ‘by any persons, group or organisation’.⁷¹ This provision clearly prohibits MNCs from discriminating against individuals on grounds of race. This Convention, however, does not impose a direct obligation on the MNC not to discriminate on grounds of race but rather imposes on states an obligation to prohibit such discrimination and to hold the MNC accountable where such discrimination has occurred.⁷² These do not constitute exceptions to the traditional model, as the state is held responsible under international law for any violations thereof by MNCs. If international law directly imposes obligations on MNCs, the MNCs will potentially be subject to enforcement mechanisms by an international institution, be it an international court or tribunal.⁷³ This, as well as other manners of having international law directly regulate MNCs, could be beneficial because expecting developing nations to adequately protect their citizens from more powerful MNCs can be difficult, if not impossible.⁷⁴ In addition, direct international regulation of MNC behaviour is advantageous where the mechanisms put in place by domestic law of countries to regulate MNC activities is found wanting.⁷⁵

As it stands under international law, MNCs are indirectly accountable for human rights violations through the state. Along with being able to utilise their own domestic law states can utilise international law in order to hold MNCs accountable for human rights violations.

An important starting point in international human rights law is the UDHR.

⁶⁷ Vázquez op cit note 1 at 933.

⁶⁸ Ibid.

⁶⁹ Sheri Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’ (2009) 1 *Global Responsibility to Protect* 442 – 477 at 448.

⁷⁰ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, (Sept. 28, 1966) 660 U.N.T.S. 195, 218

⁷¹ Ibid, art 2(1)(d).

⁷² Vázquez op cit note 65 at 934.

⁷³ Ibid at 937.

⁷⁴ Kinley and Tadaki op cit note at 938.

⁷⁵ Ibid.

This document is part of the international bill of rights showcasing a universal model of the human rights that all individuals are inherently born with. The UDHR recognises a plethora of rights that people are entitled to: freedom and dignity,⁷⁶ equal protection of the law,⁷⁷ the right to an effective remedy,⁷⁸ and the right to fair and public hearing to an impartial and independent tribunal⁷⁹ and so on. In addition, the preamble of the UDHR states that ‘every individual and every organ of society is bound to abide by its substantive human rights provisions’. In modern times, due to privatisation, many countries have allocated functions that were traditionally the responsibility of the state to corporations.⁸⁰ Therefore, it is logical that the MNCs entrusted to perform functions of the state should also be expected to respect human rights.⁸¹ Some of the UDHR’s provisions have become part of customary international law (CIL) thus making it binding on all states but not on non-state actors.⁸² As will be discussed herein, there are many international instruments that have codified the UDHR standards, but, especially when dealing with human rights violations committed by MNCs, it is the primary responsibility of national governments to protect the human rights of their citizens.⁸³ Therefore, where MNCs have committed human rights violations via their activities in a country, it is the state’s responsibility to ensure that there is an effective remedy available to those who have had their rights infringed and that they have access to a fair and public hearing before an independent and impartial tribunal – as is required by the UDHR.

The manner in which state action or inaction is enforced under international law is found in the Charter of the United Nations and the Statute of the International Court of Justice.⁸⁴ The International Court of Justice (ICJ) is the principal judicial organ of the UN.⁸⁵ Only states may be parties in cases before the ICJ.⁸⁶ The court may hear all matters referred to it and may adjudicate all matters provided for in the UN

⁷⁶ UDHR, art 1.

⁷⁷ Ibid, art 7

⁷⁸ Ibid, art 8

⁷⁹ Ibid art 10.

⁸⁰ Debosmita Nandy and Niketa Singh, ‘Making Transnational Corporations Accountable for Human Rights Violations’ (2009) 2 *NUJS Law Review* 75 – 92 at 80.

⁸¹ Ibid.

⁸² Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996), 25 *GA. J. INT’L & COMP. L.* 289 – 397 at 289.

⁸³ Ibid at 292.

⁸⁴ United Nations, Statute of the International Court of Justice (1945) annexure to the UN Charter.

⁸⁵ UN Charter, art 92.

⁸⁶ ICJ Statute, art 34(1).

Charter or in other treaties and conventions that are in force.⁸⁷ Furthermore, article 32(2) of the ICJ Statute recognises that all states party to the statute may declare they recognise as compulsory and without special agreement, the jurisdiction of the court in all legal disputes involving the interpretation of the treaty, any question of international law, existence of a violation of an international agreement and the nature and extent of the reparation to be made for the breach. In deciding disputes, the ICJ shall apply various international law including conventions, CIL, general principles accepted by nations and in certain cases judicial decisions and academic scholars.⁸⁸ Chapter three of the ICJ statutes outlines the procedure that must be followed in order to have a case heard at the ICJ. While MNCs cannot be brought before the ICJ where they have committed human rights violations, states that have failed or neglected to protect their citizens and environment from MNC activity and/or have failed to hold MNC accountable where required may be brought before the court as was the case in a matter between *Argentina v Uruguay*, which will be discussed briefly below.

As a result of the increasing power of MNCs the international community has developed soft law, that is a written instrument (other than a treaty) that expresses a preference and not an obligation that a state or non-state actor should act (or refrain from acting) in a specified manner,⁸⁹ that directly address human rights violations in the form guiding principles for business that attempts to enable them to operate in a manner that does not infringe human rights. One of such principles is the United Nations Guiding Principles on Business and Human Rights. These UN Guiding Principles recognises states' 'existing obligations to respect, protect and fulfil human rights and fundamental freedoms' as well as the role of MNCs as specialised organs of society performing functions and that they are required to comply with all applicable laws and to respect human rights.⁹⁰ These principles, further, recognises that appropriate and effective remedies must be made available where breached. The Guiding Principles applies to both states and MNCs. However, the principles does not create new international law obligations – neither does it undermine any obligations that a state may have undertaken under international law with regard to human

⁸⁷ Ibid, art 36(1).

⁸⁸ Ibid, art 38(1).

⁸⁹ Dinah Shelton, 'Soft Law' in *Handbook of International Law* (2008) Routledge Press: Washington at 3.

⁹⁰ UN Guiding Principles, at 2.

rights.⁹¹

These Principles go on to say that states should take additional steps to protect their citizens against human rights abuses by MNCs and other business enterprises since it is a foregone conclusion that states are the primary duty-bearers under international human rights law. States should exercise oversight over the activities of MNCs in order to meet their international human rights duties.⁹² The Guiding Principles also lists some of the important responsibilities that corporations have. It is stated that businesses should respect human rights – they should avoid violations and should address any impact on human rights in which they are involved.⁹³ This responsibility refers to internationally recognised human rights – as expressed in the international Bill of Rights (UDHR, ICCPR and ICESCR) and the fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work.⁹⁴ MNCs should have policies in place in order to prevent human rights abuses, these include, a policy committed to meeting these responsibilities, a human rights due diligence process to identify, prevent, mitigate and account for their impacts of human rights.⁹⁵ The principles further state, that where business enterprises have identified that they have adversely affected human rights, they must institute a process of remediation through legitimate processes.⁹⁶ MNCs should, in whatever context, undertake to respect international human rights law and comply with all applicable all wherever they operate.⁹⁷ While these Guiding Principles are commendable in that it brings attention to the international stage that adverse effects that MNCs may have on the enjoyment of human rights, the Principles do not create binding obligations on MNCs, therefore, are unlikely to bring about any significant change.

In addition to the UN Guiding Principles, there is the Organisation for Economic Co-operation and Development’s Guidelines for Multinational Corporations. The OECD is an international forum where democratic countries address work together to address the economic, social and environmental challenges of globalisation. These principles assert that MNCs should respect human rights and contribute to economic, social and environmental progress with a goal to achieve

⁹¹ Ibid.

⁹² Ibid at 8.

⁹³ Ibid at 13.

⁹⁴ Ibid.

⁹⁵ Ibid at 16.

⁹⁶ Ibid at 24.

⁹⁷ Ibid at 25.

sustainable development.⁹⁸ These principles also state that enterprises/ MNCs should contribute to the abolition of child labour echoing the ILO Declaration to be discussed below.⁹⁹ The OECD has set out implementation procedures; countries that adhere to these principles are encouraged to set up National Contact Points (NCP) in order to undertake promotional activities, handling enquiries for discussion with parties concerned in any matter that covered by the Guidelines.¹⁰⁰ Their role is to promote the effectiveness of these Guidelines. The NCP must operate in a visible, accessible, transparent and accountable manner.¹⁰¹ The NCP shall resolve issues that arise relating to these guidelines in a timely and efficient manner and in accordance with applicable law.¹⁰² The NCP shall meet annually and report to the Investment Committee. This committee will meet periodically to discuss matters covered by the Guidelines. The Committee will assist the NCPs in carrying out their functions, if needed. It will consider reports of the NCP, assist with clarification in interpretation of the Guidelines and make recommendations where necessary to improve the functioning of the NCPs and the effective implementation of the Guidelines.¹⁰³ As is the case with the UN Guiding Principles, these OECD Guidelines are not legally binding on MNCs. Furthermore, these OECD guidelines are not binding on most countries as the current number of states that are members, thus adherents, of the OECD and its Guidelines are 30 – none of which is South Africa.¹⁰⁴ States, however, who do adhere to two abovementioned principles may utilise them in order to regulate the activities of MNCs, to ensure they respect the protection and enjoyment of human rights of the citizens of the country's in which they operate and to hold them accountable where they are guilty of infringing human rights.

The fact that MNCs are not recognised as subjects of international law is problematic because if they were, it is argued, that developing countries would more easily be able to obtain justice against them where MNCs have violated human rights within their country.¹⁰⁵ It has also been argued that if there have been cases where chartered companies, insurgents and belligerents have recognised as subjects under

⁹⁸ OECD Guidelines at 14.

⁹⁹ Ibid at 16.

¹⁰⁰ Ibid at 30.

¹⁰¹ Ibid at 33.

¹⁰² Ibid at 34.

¹⁰³ Ibid at 35.

¹⁰⁴ Ibid at 3.

¹⁰⁵ Nandy and Singh op cit note 80 at 80.

international law, then it is possible that MNCs can be recognised as such as well.¹⁰⁶

The Statute of the International Criminal Court¹⁰⁷ states, at article 25, that the court ‘shall have jurisdiction over natural persons pursuant to this statute.’ The term natural persons clearly exclude entities with legal personality, such as MNCs. The reason behind this is because it is impossible to attach the proof of *mens rea* (fault) on corporations.¹⁰⁸ It can therefore be concluded that despite the fact that the international community recognises that human rights abuses by MNCs need to be addressed, international law does not address the issue comprehensively. There is also a lack of proper enforcement mechanisms for human rights abuses committed by private actors, which proves to be a massive impediment for people seeking relief under international law.

2.1. ENVIRONMENTAL LAW

The two international environmental declarations that will be looked at in this section are the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development. While these Declarations do form part of international soft law, many of the provisions in these Declarations are considered CIL, and therefore binding on all states. Such provisions will be noted in this section as such. The Stockholm Declaration was an attempt at creating a basic common outlook on how to address the challenge of protecting and advancing the environment.¹⁰⁹ The Stockholm Declaration encompasses generally broad environmental policy goals and objectives rather than detailed normative positions.¹¹⁰ Since the formation of the Stockholm Declaration international awareness of the challenges facing the environment has increased significantly, therefore, the international law on the issue has needed to develop. The Rio Declaration had the task of reaffirming existing normative expectations regarding the environment.

¹⁰⁶ Ibid; Malcolm N. Shaw *International law* 5th edition (2003) Cambridge University Press: Cambridge at 177.

¹⁰⁷ UN General Assembly, ‘Rome Statute of the International Criminal Court’ (17 July 1998), available at <http://www.refworld.org/docid/3ae6b3a84.html>, accessed on 30 May 2016.

¹⁰⁸ Nandy and Singh op cit note 80 at 81.

¹⁰⁹ Gunther Handl, ‘Declaration on the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992’ (2012) *United Nations Audiovisual Library of International Law*, available at http://legal.un.org/avl/pdf/ha/dunche/dunche_e, accessed on 30 May 2016 at 1.

¹¹⁰ Ibid.

These two Declarations reflect primarily the well-known international concept of duty to protect. The most significant provision, common to both Declarations, relates to the prevention of environmental harm. The Declarations establishes the responsibility of states to ensure that activities of their own or of which they have control do no cause damage to the environment of other states or to areas beyond its national jurisdiction.¹¹¹ This provision is considered as part of CIL, thus binding on all nations, as was confirmed by the ICJ in its advisory opinion in the *Legality of the Threat of Use of Nuclear Weapons*¹¹² and in the *Case concerning Pulp Mills on the River Uruguay*.¹¹³ In *Pulp Mills*, two companies, one Spanish and the other Finnish, obtained permission from the Uruguayan government to build pulp mills on the Uruguayan river, which is shared by Argentina and Uruguay and is protected by a treaty between the two countries.¹¹⁴ The dispute was whether Uruguay had required permission from Argentina in terms of the treaty to give such permission to the two companies. There was a likelihood of pollution of the river resulting from the activities of the two companies and the existing treaty required each country to ensure prevention of such pollution.¹¹⁵ The ICJ in *Pulp Mills* held that the states obligation of prevention has its origins in due diligence, which forms part of the duty to protect.¹¹⁶ All states have the obligation to not knowingly allow its territory to be used for acts contrary to the rights of other states.¹¹⁷ A State is thus obliged to use all the means at its disposal in order to avoid and prevent activities, which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.¹¹⁸ Since MNCs have to abide the laws of the countries in which they operate, the states should ensure that MNCs operating within their countries are abiding these principles, and where they fail the states may be referred to the ICJ since these principles are binding in nature in that they form part of CIL.

Principle 15 of the Rio Declaration provides that in ‘order to protect the environment, the precautionary approach must be applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full

¹¹¹ Ibid at 4; Stockholm Declaration, principle 21; Rio Declaration, principle 2.

¹¹² ICJ Reports (1996) p 226.

¹¹³ Handl op cit note 109 at 4.

¹¹⁴ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment, ICJ Reports (2010) para 26. The existing treaty was a bilateral one named 1961 Bilateral Treaty of Montevideo.

¹¹⁵ Ibid.

¹¹⁶ Ibid para 101.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ There is controversy about whether this provision has CIL status, but in 2011 the Seabed Chamber of the International Tribunal of the Law of the Sea notes that there is a trend towards this approach being part of CIL.¹¹⁹

The Rio Declaration calls upon states to assess, inform and consult with potentially affected other states, whenever there is a risk of harmful effects on its environment.¹²⁰ These requirements of the Rio Declaration have reached CIL status as supported by international practice.¹²¹ The Stockholm Declaration does not include a similar provision.

Both Declarations’ call for further development of the law relating to environmental liability and compensation.¹²² Most states address the damage to the environment using private-law regimes, such as using the law of delict, and, mostly, not considering the accountability of the state.¹²³ Recent developments in international environmental law, however, may provide a basic foundation for issues relating to environmental liability. These include, the work of the International Law Commission’s draft Principle on Allocation of Loss in the Case of Trans-boundary Harm Arising out of Hazardous Activities and UNEP’s 2010 Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation For Damage Caused by Activities Dangerous to the Environment.¹²⁴ While the international community has made significant progress in the field of international environmental law, the primary responsibility under international law to hold accountable MNCs for environmental harm is that of the state. The States are provided a foundation upon which to develop their own laws in order to ensure that activities within the own territory do not harm the environment of another state. They are required under CIL to ensure that they hold accountable those responsible under their national law.

¹¹⁹ Handl op cit note 109 at 5.

¹²⁰ Ibid. Principle 17 of the Rio Declaration calls for an environmental impact assessment (EIA), principle 18 required emergency notifications and principle 19 calls for routine notification and consultation.

¹²¹ Ibid at 6. One such practice was the International Law Commission’s draft articles on Prevention of Transboundary Harm from Hazardous Activities.

¹²² Stockholm Declaration, principle 22 refers to international law only; Rio Declaration, principle 13 refers to both international and national law.

¹²³ Handl op cit note 109 at 8.

¹²⁴ Ibid.

3.1. CHILD LABOUR

There is a significant amount of international law that deals specifically with rights of children which includes the right of children not to be forced into child labour. This section will now discuss such law.

One of the most important international treaties pertaining to the rights of children specifically is the Convention on the Rights of the Child.¹²⁵ Article 32 prohibits the use of child labour. The provision reads as follows:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - (a) Provide for a minimum age or minimum ages for admission to employment;
 - (b) Provide for appropriate regulation of the hours and conditions of employment;
 - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

The CRC, as with all international treaties enforcement mechanisms apply to states only. However, states that have MNCs operating within their countries may use the CRC to inform their own laws with regard to child labour. States are required to do so as art 32(2) states that parties must take legislative and other means in order to implement and give effect to article 32. State parties are also required to provide appropriate remedies and penalties to ensure effective enforcement. If MNCs are guilty of child labour and the state party, who is a signatory to the CRC, does not do anything to prevent such violation then the state party will be held accountable. A Committee on the Rights of the Child (hereafter the committee), which is established by article 43 of the CRC, is responsible for the implementation of the CRC. State

¹²⁵ United Nations, 'Convention on the Rights of the Child' (1989). Hereafter referred to as the CRC.

parties are required to submit reports to the committee on measures they have taken to implement and enforce the CRC.¹²⁶ These reports are to be made public.¹²⁷ The Committee submits reports to the General Assembly. The Committee is entitled to make recommendations to the State Parties, which is to be reported to the General Assembly.¹²⁸ Therefore, if state parties are not taking measures to prevent MNCs from exploiting children economically, as it required by article 32, the state party may be held accountable.

In addition to the CRC, the ILO has adopted further measures to assist states in protecting their children from child labour. The ILO is a tripartite UN Agency that brings together governments, employers and workers representatives from 187 member states in order to set labour standards, develop policies, and devise programmes promoting decent work for men and women.¹²⁹ Two conventions important to discuss for the purposes of this thesis is the Convention Concerning the Minimum Age for Admission to Employment¹³⁰ and the Convention Concerning the Prohibition and the Immediate Action for the Elimination of Worst Form of Child Labour.¹³¹

The Minimum Age Convention states that all member states must design a national policy for the purposes of abolishing child labour and to raise the employment age to a level consistent with the fullest mental and physical development of young persons.¹³² Article 3(1) of the Convention states that the minimum age for employment, which is by nature likely to cause health, safety and morals of young children to be jeopardised, shall not be less than 18 years. Younger children are permitted to work in 'light-work' that is not likely to be harmful to their health or development and will not prejudice their school attendance and participation in extra-mural school activities.¹³³ Appropriate penalties and other necessary measures must be taken by a competent authority to ensure the effective enforcement

¹²⁶ Ibid, art 44(1).

¹²⁷ Ibid, art 44(6).

¹²⁸ Ibid, art 45(d).

¹²⁹ International Labour Organisation, 'About the ILO' (1996-2016), available at <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>, accessed on 16 May 2016.

¹³⁰ Minimum Age Convention...

¹³¹ ILO, 'Convention Concerning the Prohibition and the Immediate Action for the Elimination of Worst Form of Child Labour No 182 (1999).

¹³² ILO, Minimum Age Convention, art 1.

¹³³ Ibid, art 7(1).

of the Minimum Age Convention's provisions.¹³⁴ States are required to submit reports to the independent Committee of Experts on the Application of Conventions and Recommendations (hereafter the ILO Committee).¹³⁵ The ILO Committee examines the compliance of the member states to the Convention. The ILO Committee may ask for more information from the states should the member states reports lack clarity or are incomplete. The Committee will report to the ILO Conference Committee on the Application of Conventions and Recommendations (hereafter Conference Committee) – who will then hear selected cases.¹³⁶ The Constitution of the ILO¹³⁷ provides for inter-state complaints.¹³⁸ These complaints are examined by Governing Body and communicated to the government in question. The matter may be settled, or a Commission of Inquiry (hereafter COI) may be appointed to consider the matter.¹³⁹ The COI calls witnesses, examines documentation and makes unannounced visits to the member state.¹⁴⁰ The COI, thereafter, writes a report containing its conclusions and recommendations and whether or not they intend referring the complaint to the International Court of Justice (hereafter ICJ).¹⁴¹

The Worst Forms of Child Labour Convention shares a similar article 1 and 10 with the Minimum Age Convention as mentioned above. The enforcement mechanisms of this Convention are the same as explained above with regards to the Minimum Age Convention. The term 'worst forms of child labour' consists of:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

¹³⁴ Ibid, art 10(1).

¹³⁵ Ibid; Jennifer Bol, 'Using International Law to Fight Child Labour: A Case Study of Guatemala and the Inter-American System' (1998) 13 *American University International Law Review* 1135 – 1223 at 1191.

¹³⁶ Bol op cit note 135 at 1191.

¹³⁷ ILO, Constitution of the ILO (1919), available at <http://www.refworld.org/docid/3ddb5391a.html>, accessed on 30 May 2016.

¹³⁸ Ibid.

¹³⁹ Ibid, art 18(2); Bol op cit note 135 at 1193.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹⁴²

Article 5 of the Convention states that each member state must, after consultation with employer and worker organisations, must establish an appropriate mechanism to monitor the implementation the provisions giving effect to this Convention. Therefore, where MNCs are operating in the member's country, the state has so ensure that the MNCs are not employing children in a manner that contravenes the Worst Form Convention. MNCs will also have a hand in the monitoring mechanisms since states have to implement such mechanisms after consultation with employers' organisations. Effective measures to ensure implementations and enforcement of the provisions of this Convention, including penal and other forms of sanctions, must be taken by member states.¹⁴³ A state who has ratified this Convention, is therefore bound to ensure the implementation hereof, and to ensure that MNCs are held accountable by means of sanctions where they have employed child labour in a manner inconsistent with article 3 of this Convention. Where states have failed in this obligation, they may be held accountable in the manner described above and my face a referral to the ICJ.

All the above-mechanisms place in international law place the primary responsibility on states to ensure that MNCs are not employing children in a manner inconsistent with international law. The measures that may be taken by the respective international organisations may only be taken against the states that are members of the ILO and that have ratified the Conventions. The threat of referral to the ICJ may give incentive to states to effectively implement the aforementioned conventions by developing mechanisms within their domestic laws to ensure MNCs are not employing child labour, however, since the Conventions do not create binding rights and obligations on MNCs – the ILO and ICJ may not hold MNCs directly accountable where they have violated the rights of children in this manner.

¹⁴² Worst Forms of Child Labour Convention, art 3.

¹⁴³ Ibid, art 7(1).

3. AFRICAN REGIONAL LAW

African regional law, much like international law, does not hold MNCs directly accountable for human rights violations committed in the country within which they operate. Although, certain provisions of Conventions developed within this regional system can directly impose obligations on a corporation but the state will be held accountable where MNCs have failed to abide these obligations. This system, too, has mechanisms in place ensure that states develop their law in order to ensure that the human rights of their citizens are protected from anyone, including MNCs; in addition there are means in place to hold the state accountable where they have failed in their duties.

The African Charter of Human and Peoples' Rights¹⁴⁴ was enacted before the rise of MNC activity within the African region and therefore does not address the responsibilities of MNCs regarding human rights violations. However, it does place the responsibility on the African states to protect the various human rights of their citizens while taking into account human rights issues that is specific to the African region and bringing mechanisms of accountability closer to the effected people.¹⁴⁵ The Charter provides various mechanisms by which to hold states accountable where they have failed to abide the provisions thereof. These provisions include the right to a satisfactory environment,¹⁴⁶ the right to have their case heard, including the right to appeal in order to have hid or her fundamental rights recognised and protected,¹⁴⁷ and the right to work under equitable and satisfactory condition.¹⁴⁸ The African Commission on Human and Peoples' Right (African Commission) is established by article 30 of the Charter in order to promote human and People's Rights and ensure their protection in Africa. The African Commission may resort to any appropriate investigation method when organisations, states and persons bring issues to their attention.¹⁴⁹ States (who are party to the Charter) may communicate to the African Commission if they have good reason to believe that another state (who is party to

¹⁴⁴ Organisation of African Unity, 'African Charter on Human and People's Rights' (1981). Hereafter referred to as the African Charter.

¹⁴⁵ 12376622 *The Prospects and Challenges of a Regional Human Rights Mechanism For Corporate Responsibility in Africa* (unpublished LLM Thesis University of Pretoria, 2012) 3. Hereafter referred to as UP Thesis.

¹⁴⁶ African Charter, art 24.

¹⁴⁷ Ibid, art 7.

¹⁴⁸ Ibid, art 15.

¹⁴⁹ Ibid, art 46.

this Charter) has violated a provision of the African Charter,¹⁵⁰ after having first notified and sought solution from the alleged infringing state and received no satisfactory response.¹⁵¹ However, a state may refer an issue directly to the African Commission in terms of article 49. All local remedies, if exist, ought to have been exhausted before the Commission will deal with the matter unless clear to the Commission that the procedure of achieving these local remedies would be unduly prolonged.¹⁵² The Commission may ask states for all relevant information and states may be represented before the commission and submit written or oral representations.¹⁵³ In terms of article 52, the Commission must prepare a report stating the facts and its findings. The report must be communicated all parties involved, including the Assembly of Head of States and Government. The commission may make recommendations, as it deems necessary and useful.¹⁵⁴ The Commission may also receive communication regarding alleged violation of the African Charter by a State party from parties other than a state, including Non-Governmental Organisations (NGOs).¹⁵⁵ All measures taken in terms provisions of the Charter are to remain confidential until such time as the Assembly decides otherwise.¹⁵⁶ This provision is problematic since publicity is a massive tool that can be utilised to prevent further human rights violations and is also a strong measure of accountability.¹⁵⁷ The effect of publicity is a significant one as it brings out the resultant shame, which may serve as a deterrent for future human rights violations.¹⁵⁸

Each state is also required to submit a report every two years on the legislative or other measures they have taken in order to give effect to the rights and freedoms recognised by the Charter.¹⁵⁹ The procedure in bringing a matter to the African Commission can be quite a lengthy procedure and by the time the commission can eventually hear a matter the damage done may be irreversible.¹⁶⁰

¹⁵⁰ Ibid, art 48.

¹⁵¹ Ibid, art 47.

¹⁵² Ibid, art 50.

¹⁵³ Ibid, art 51.

¹⁵⁴ Ibid, art 53.

¹⁵⁵ Ibid, art 55(1).

¹⁵⁶ Ibid, art 59(1).

¹⁵⁷ Vincent Obisienunwo Orlu Nmeielle *The African Human Rights System: Its Laws, Practice, and Institution* (2001) Kluwer Law International: Hague 239.

¹⁵⁸ Ibid.

¹⁵⁹ African Charter, art 62.

¹⁶⁰ Deborah Wangusa, *Multinational Corporations, Human Rights and Child Labour* (unpublished LLM Thesis, University of Pretoria 2013) 40

An important case heard by African Commission which held a state accountable for failing in its duty to protect its citizens from human rights violations committed by an MNC operating in their country is *Social and Economic Rights Actions Centre (SERAC) and Another v Nigeria*.¹⁶¹ SERAC and the Centre for Economic and Social Rights (CESC) communicated to the African Commission that the military government of Nigeria had been directly involved with oil production of the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (Shell), whose activities had caused severe environmental degradation including contamination of the environment which resulted in health problems of the Ogoni people, who inhabited the area (Ogoniland).¹⁶² It was alleged that NNPC and Shell had exploited oil reserves in Ogoniland with no regard for the health of the people or environment. They disposed toxic waste into the environment in violation of international environmental standards. The MNC and state company failed to maintain its facilities causing several avoidable oil spills in very close proximity with the villages.¹⁶³ The spills resulted in the contamination of the water, air and soil and caused serious long and short-term health impacts – including skin infections, respiratory ailments, cancer and reproductive problems.¹⁶⁴ It was argued that the Nigerian government condoned and assisted in the MNCs violations by placing legal and military powers of the state at the disposal of the oil companies.¹⁶⁵ In addition, the government has not monitored the MNCs nor have they insisted on safety measures that are standard procedure within the oil industry thus failing in its duty to protect. Furthermore, information regarding the activities of the MNC was withheld from the effected people and no opportunity was given to the local community to consult with the MNC before beginning the operations.¹⁶⁶ The Ogoni community attempt to non-violently protest the actions of the MNCs / Shell were quashed by the military by means of their homes and villages being destroyed and having their food source threatened.¹⁶⁷ In their actions, it was argued that the Nigerian government had violated several provisions of the African Charter.¹⁶⁸ The African

¹⁶¹ (2001) AHRLR 60 (ACHPR 2001).

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid. It was argued that articles 2, 4, 14, 16, 18(1), 21 and 24 were violated.

Commission held that Nigeria had infringed the Charter and have appealed to the government to protect the environment, health and livelihood of the Ogoniland people by conducting investigations and prosecuting all organisations involved in human rights violations of the Ogoni people, including Shell, ensuring adequate compensation for the victims, undertaking a comprehensive clean-up and restoration of the environment, enabling environmental and social impact mechanisms and by providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely affected by the oil operations.¹⁶⁹ While this judgment is to be commended for it incentivises states to put mechanisms in place to ensure MNCs do not violate human rights as well as to ensure accountability of the corporation where they are guilty of violating human rights, the African Commission was not able to directly hold accountable the MNC for its violations. This case displays the manner in which a state facilitated the human rights violations of an MNC. In cases where the MNC is more powerful than the state in question, it might be difficult for such state to prevent MNCs from violating the environment in order to maximise their profits.

There might be a benefit of enabling the African Commission to directly hold the MNC accountable in order to act as a deterrent for future human rights violations or creating a separate commission in order to hold accountable MNCs from violating human rights.

In addition to having the African Commission being able to adjudicate issues relating to infringement of the African Charter, there has also been the establishment of an African Court on Peoples' and Human Rights.¹⁷⁰ Article 34(6) of the Protocol requires a state party to sign a declaration accepting the competence of the court before a person or an NGO can approach the court. To this date, only six African countries have signed such a declaration.¹⁷¹ There has not been much success at the African court. The court has suffered from financial difficulties, lack of resources and from judgments not being properly enforced.¹⁷²

¹⁶⁹ Ibid.

¹⁷⁰ African Union, Protocol to the African Charter on Human and People's Rights on the Establishment of African Court on Human and Peoples' Rights (1998), available at <http://www.achpr.org/instruments/court-establishment/>, accessed on 1 June 2016.

¹⁷¹ These countries are Burkina Faso, Malawi, Mali, Rwanda, Ghana and Tanzania.

¹⁷² Carolyn Scanlon Martorana 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human & Peoples' Rights?' (2008) 2 *George Washington International Law Review* 583 at 602.

4. CONCLUSION

This chapter has demonstrated the nature in which international and regional law can be utilised to prohibit MNCs from violating human rights in the countries in which they operate.

While international and regional law do not directly hold MNCs accountable for human rights violations they do, at times, attempt to directly impose obligations on them but would hold the state accountable where MNCs have acted in contravention of such Conventions. States are held accountable on the basis that they have failed to adequately protect their citizens from the activities of MNCs. As shown in the *Pulp Mills* heard by the ICJ and *SERAC* case by the African Commission states will be held accountable for where they have failed to take measures to prevent human rights violations and environmental degradation perpetrated by an MNC within their territory.

Criticisms of these laws and the enforcement mechanisms that come with it are that MNCs lack direct accountability to an international institution. Many of the states in which the MNCs operate are developing countries and are frequently less powerful than the MNCs operating within their country and therefore might have it difficult to regulate the activities of MNCs and hold them accountable where required. In addition, domestic law in place to protect their citizens from human rights violations by MNCs might not be an adequate for various reasons. Having an international institution such as a court or tribunal to directly hold MNCs accountable might assist states unable or unwilling to do so themselves and might motivate the MNCs to ensure that its activities do not harm the citizens of the country in which they are operating.

Furthermore with regards to African regional law, the procedure to take cases to the African Commission is such a lengthy one that by the time the matters final gets to the Commission the damage done by the MNC and the relevant state for not taking measures to regulate the MNC's activities might be beyond repair. Furthermore, the African court established has not seen much success either for various reasons including lack of resources, funding and poor enforcement of judgments.

Chapter 3

Multinational Corporations under South African Law

1. INTRODUCTION

This chapter will outline, discuss and critique all laws that may be used to prevent MNCs from committing human rights violations and to hold them accountable where they are guilty of committing human rights violations.

South Africa has demonstrated a commitment to protection of human rights through the enactment of the 1996 Constitution and various Acts of Parliament enacted to give effect to these Constitutional rights. These Constitutional provisions and legislation include specific laws that prohibit child labour and protect the environment and provide mechanisms to ensure accountability of anyone who violates these laws. South African company law may also play a role in ensuring MNCs do not

MNCs operating in South Africa have the legal obligations to abide the laws of the country including laws that prohibit child labour and prohibit degradation of the South African environment. Any violation of such laws leaves the MNCs open to various sanctions under South African laws.

This chapter will discuss the applicability of the the South African Bill of Rights to corporations, the possibility of corporations being held criminally liable for serious human rights violations, and specific prohibiting child labour and protecting the environment.

2. LEGAL FRAMEWORK GOVERNING MNCS OPERATING IN SOUTH AFRICA

2.1. The South African Constitution

The Constitution is the most supreme law of South Africa and any law or conduct inconsistent with it is invalid.¹⁷³ In addition to applying to all law and binding all organs of state, the Constitution binds all natural and juristic persons (including

¹⁷³ Constitution of the Republic of South Africa, 1996, s 2 and s 172.

companies) ‘if, and to the extent that, it is applicable taking into account the nature of the right and the nature of the duty imposed by the right’.¹⁷⁴

The Constitutional Court, when interpreting this provision, had regard for the intensity of the constitutional right in question.¹⁷⁵ The meaning of the phrase appears to have something to do with the scope of the right. For s 8(2) to be applicable the person alleging a Bill of Rights violation must be expressly identified as bearers of the constitutional right as well as the potential for the specified right to be invaded by someone other than the state.¹⁷⁶ Therefore, in certain cases the Constitution is directly applicable where MNCs operating in South Africa have violated a constitutional right of South African citizens. In addition, the Constitution and the Bill of Rights establish a normative value system that must be respected whenever the common law or legislation is being interpreted.¹⁷⁷ This is termed indirect application. In this scenario, the Constitution does not override ordinary law or generate its own remedies, but rather demands furtherance of its values mediated through the operation of ordinary law.¹⁷⁸ The indirect form of application of Bill of Rights, especially where litigation is between private actors, is the preferred form for various reasons, one of which being, the principle of avoidance, which provides that constitutional issues should be avoided, where possible.¹⁷⁹ Another reason constitutional remedies are not as appropriate or flexible as common-law remedies would be.¹⁸⁰ So, therefore, where ordinary law is considered with regards to whether a MNC has infringed the human rights of those living in South Africa, the Constitution would apply, either directly or indirectly.

One of the rights contained in the Constitution includes the right freedom and security of the person¹⁸¹ – meaning that companies must take steps to ensure that the working environment of its employees does not violate this right. In a Constitutional Court case an applicant, a miner, had contracted tuberculosis and chronic obstructed airways due to his exposure to harmful substances during his employment.¹⁸² is a

¹⁷⁴ Ibid, s 8.

¹⁷⁵ *Khumalo v Hlomisa* 2002 (5) SA 401 (CC).

¹⁷⁶ Ibid.

¹⁷⁷ Iain Currie and Johan De Waal, *The Bill of Rights Handbook* 6th Ed (2013) Juta Co and Ltd: Cape Town at 31. Constitution, s 39 (2).

¹⁷⁸ Ibid at 31.

¹⁷⁹ Ibid at 25

¹⁸⁰ Ibid at 46.

¹⁸¹ Constitution, s 12.

¹⁸² *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC).

right that is worded as protection from either public or private source.¹⁸³ The court's analysis of s 12 in this matter, however, amounted to a protection from the legislature (public source) as opposed to protection from the company (the private source). This analysis would constitute a hurdle in the development of human rights (constitutional) litigation against companies since this development is dependent upon the progress of horizontal application of the Constitution on MNCs.¹⁸⁴ While the claim was based on a delict – it is significant in the effect that it has against a company. The court gave leave to the applicant to pursue the matter. A more direct approach that could have succeeded would have been to challenge the matter as a violation of the right to health or even the right to an environment that is not harmful to health and wellbeing.¹⁸⁵ This could have challenged just how far the courts were willing to go in recognition of the human rights responsibilities of companies.¹⁸⁶

Another important right that can be used to challenge the activities of MNCs in South Africa, albeit indirectly, is the right to just administrative action.¹⁸⁷ This is illustrated in the case of *The Director: Mineral Development Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*.¹⁸⁸ This case concerned an application of the *audi alteram partem* (hear the other side) rule in the granting of a mining licence. The court held because the Constitution included environmental rights as fundamental justiciable human rights, the necessary implication requires that environmental considerations be accorded appropriate recognised and respect in the administrative process.¹⁸⁹ It was found, amongst other reasons, that since the operations of Sasol could potentially destroy the Rietspruit Wetland, threaten flora and fauna, cause severe air, noise and water pollution, and decrease the value of the properties of the people living in the affected area the *audi alteram partem* rule applied in this matter and that interested parties ought to have been notified of the company's application for a mining licence and they should have

¹⁸³ Ibid [14] – [19]; Lise Smit, 'Human Rights Litigation Against Companies in South African Courts: A Response to *Mankayi v Anglo-Gold Ashanti* 2011 (3) SA 237 (CC)' *SAHRJ* 354 – 373 at 357.

¹⁸⁴ Ibid.

¹⁸⁵ M Gwanyana, 'The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities' (2015) 18 *PER* 3012 – 3131 at 3116.

¹⁸⁶ Ibid.

¹⁸⁷ Constitution, s 33(1). This section states that 'Everyone has the right to just administrative action that is lawful, reasonable and procedurally fair'.

¹⁸⁸ 1999 (2) SA 709 (SCA).

¹⁸⁹ Ibid para 20; David McDonald *Environmental Justice in South Africa* (2002) University of Cape Town Press: Cape Town at 173.

been given an opportunity to be heard.¹⁹⁰ NGO and any other interested parties (which is a broad range of people as result of section 38¹⁹¹ of the Constitution) may challenge a decision of a government authority to grant MNCs various operational licences that have the potential to damage the environment and/or decrease their enjoyment to the environment under administrative law. The court held that such decisions are one of an administrative nature and are therefore subject to judicial review should administrative process¹⁹² not have been adequately followed.

The various people that will be affected by the activities of MNCS in South Africa are not in the best position to have their issues heard in a court of law. While the Constitution guarantees everyone the right to justice not everyone has easy access to justice.¹⁹³ The litigation process is one that is extremely costly thus its only wealthy South Africans that have this access to justice. While there are various organisations such as Legal Aid South Africa that do provide free access to legal services this is not always an option for all South Africans and also because of such a heavy backlog of cases that such organisations are embattled with it they are not always able to assist with all matters or simply do not have the resources to ‘take on’ a wealthy MNC at court. This would mean that indigent people suffering at the hands on MNCs lack financial muscle and education in order to take the corporations at court.¹⁹⁴

¹⁹⁰ Ibid para 20.

¹⁹¹ Section 38 of the Constitution states that

Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

¹⁹² The Promotion of Administrative Justice Act 3 of 2000 was enacted to ‘give affect to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative actions as contemplated by s 33 of the Constitution of the Republic of South Africa, 1996’.

¹⁹³ Kamga and Ajoku op cit note 54 at 480.

¹⁹⁴ Ibid.

2.2. South African Company Law

The South African Companies Act¹⁹⁵ has taken significant steps towards mainstream human rights. One of the purposes of the Companies Act is to ‘promote the compliance with the Bill of Rights as provided for in the Constitution, in the application of company law’.¹⁹⁶ Previously, company and constitutional law were seen as separate disciplines with a limited scope for overlap but now the reference to the Constitution in the Act means that one needs to refer to the Constitution when considering the Companies Act.¹⁹⁷ Section 7 of the Companies Act dismisses the idea that only states and individuals are bound by constitutional obligations¹⁹⁸ Corporations operating in South Africa are also bound by the Constitution.

One of the many functions of the Companies Act regulates the duties of directors. Section 73(3)(b) of the Act provides that the directors must act in the best interests of the company. The Companies Act does not define the term ‘best interests’. At common law, the directors owe their duties to the shareholders as a collective.¹⁹⁹ Furthermore, in *South African Fabrics v Millman*²⁰⁰ that court held that the term interests in this context are only those of the company and its members.²⁰¹ The Constitution and section 7 of the Companies Act brings into question whether the courts interpretation of the term ‘best interests’ is still applicable today. In addition, s 158 of the Companies Act²⁰² would imply that the position ought to be developed to be more in line with the Bill of Rights. Companies are now situated within a constitutional framework; therefore, it is argued that the position expressed in the

¹⁹⁵ Act 71 of 2008.

¹⁹⁶ Ibid, s 7(a).

¹⁹⁷ Gwanyana op cit note 183 at 3107.

¹⁹⁸ Ibid at 3108.

¹⁹⁹ Ibid at 3109; *Fisheries Development Corporation v Jorgensen* 1989 (4) SA 156 (W).

²⁰⁰ 1972(4) SA 592(A).

²⁰¹ Gwanyana op cit note 185 at 3109.

²⁰² Section 158 of the Companies Act provides as follows:

Remedies to promote purpose of Act

When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act—

(a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and

(b) the Commission, the Panel, the Companies Tribunal or a court—

(i) must promote the spirit, purpose and objects of this Act; and

(ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.

Millman case no longer reflects the true position of the law.²⁰³ The position, therefore, should be that when the directors are acting in the best interests of the company they should give consideration to the values of the Constitution and the Bill of Rights.²⁰⁴ The Companies Act does not fundamentally change the nature of the company but simply reinforces the idea that companies, as well as the state and individuals, must act in accordance with the Constitution. In *Bester v Wright*²⁰⁵, it was held that if a director does not act in accordance with the Companies Act and any other applicable law, that he or she would be in breach of their fiduciary duties.²⁰⁶ Therefore, should a director disregard the Bill of Rights then he will be in violation of his fiduciary duties.

Should a director of company be guilty of breaching a fiduciary he or she may be held personally liable for any loss sustained by the company in terms of s 77 of the Company's Act. Therefore, a director of an MNC may be held accountable if he breaches his or her fiduciary duties which it has been argued above should include instances where such director has acted contrary to the Constitution.

Due to s 8 of the Constitution (mentioned above), creating juristic persons that can pursue maximisation of profit at the expense of human rights is legally impossible.²⁰⁷ Under the Constitution a company can no longer claim that its adherence to human rights norms is voluntary. The exercise of corporate power is permitted only to the extent that it does not violate the Bill of Rights.²⁰⁸

2.3. Criminal Liability Of Corporations

The crime committed by corporations has increased over the years – these include health and safety regulation violations, environmental degradation and child labour. Corporate responsibility, in the domestic sphere, can be regulated by civil law redress as well as criminal sanctions.²⁰⁹ In the more serious cases of wrongdoing on the part of the corporation, civil law redress may not be sufficient to address the wrong committed. The severe sanctions offered by criminal law would be a big step forward

²⁰³ Gwanyana op cit note 185 at 3110.

²⁰⁴ Ibid at 3111.

²⁰⁵ 2011 (2) SA 75 (WCC).

²⁰⁶ Gwanyana op cit note 185 at 3111.

²⁰⁷ Ibid at 3114.

²⁰⁸ Ibid.

²⁰⁹ Jonathan Burchell, 'Criminal Liability of Corporations' in Jonathan Burchell *South African Criminal Law: Volume 1 General Principles of Criminal Law 4th edition* (2011) Juta and Co Ltd: Cape Town 468 – 481 at 468.

in changing patterns of behaviour of corporations.²¹⁰ There are a few theories of corporate criminal liability. One of these theories is one of vicarious liability, which imputes the conduct of the corporation to the corporation itself.²¹¹ The South African Criminal Procedure Act²¹² imputes the conduct of the director or employee to the corporation, but extends responsibility beyond the normal rules of vicarious liability by including liability of the corporation for the conduct of the employee not only acting in the course and scope of his employment, but also ‘furthering of endeavouring to further the interests of the corporation.’

Another theory of criminal corporate liability is the principle of aggregation where a conviction is based on the derivative, but collective, responsibility determined by the aggregation of conduct and states of mind within the corporation.²¹³ This principle is based on the principle of collective responsibility.²¹⁴ This theory was applied in the US case of *United States v Bank of New England*.²¹⁵ The court accepted the concept of collective knowledge in the context of criminal corporate liability in the basis that corporations compartmentalise knowledge – by subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the knowledge of the corporation of a particular operation.²¹⁶

The organisational model of liability that determines fault by examining the institutional practices and corporate policies of the institution is another theory of corporate criminal liability.²¹⁷ Under this model, a negligent omission to prevent harm or to guard against the risk of occurrence, rather than a positive action, is made punishable.²¹⁸

Traditionally, criminal law emphasises human fault rather than corporate fault. It was argued that since corporations lacked ‘a body to be kicked’ or a

²¹⁰ Ibid at 469.

²¹¹ Ibid at 470; This was adopted as a theory by the US Supreme Court in the case *New York Central and Hudson Railroad Co v United States* 212 US 481 (1909).

²¹² CPA, s 332(1).

²¹³ Burchell op cit note 209 at 470; Louise Jordaan, ‘New Perspectives on the Criminal Liability of Corporate Bodies’ in Jonathan Burchell et al *Criminal Justice in a New Society: Essays in Honour of Solly Leeman* (2003) Acta Juridica: Cape Town 48 – 72 at 58.

²¹⁴ Ibid.

²¹⁵ 484 US 943 (1987).

²¹⁶ Ibid at 856; Jordaan op cit note 213 at 58.

²¹⁷ Burchell op cit note 209 at 470.

²¹⁸ Jordaan op cit note 213 at 62.

‘soul to be damned’ they are unable to be convicted of criminal offences.²¹⁹ Many countries, however, have developed their law in this regard and, therefore, do not adhere to this anymore. South Africa imputes criminal liability on corporations in terms of s 332(1) of the CPA, as mentioned above. In terms of this section, where a corporation is charged with a fault-based crime the fault of the director or employee who committed the crime will be imputed to the corporation.²²⁰ In *R v Bennett Co (Pty) Ltd*²²¹, decided on a similarly worded s 332(1), the negligence of an employee was imputed to the company, resulting in the conviction of the company for culpable homicide.

Criminal corporate liability extends to crimes based on intention, negligence and strict liability. This was emphasised in *Ex Parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie*.²²² This judgment affirms that fault in the form of intention or negligence is required on the part of someone in the company.

As regards sentencing, it is suggested, rather conservatively by many, that the most appropriate sanction for corporations who have been guilty of committing crimes is the fine, especially since corporations cannot be imprisoned.²²³ However, it has been argued there is a far wider range of possible sanctions that may be imposed upon the convicted corporation. For example, publicity as a court-ordered sanction designed to have a punitive impact upon the corporation, corporate probation, and/or restraint immobilisation, ceasing trade or be deregistered.²²⁴ Since sentencing is a matter at the discretion of the court, there is no legal barrier to a South African court invoking one of the aforementioned sanctions.²²⁵

3. CHILD LABOUR

The Constitution has a section specifically recognising the rights of children.²²⁶ This provision holds that every child has the right to be protected from exploitative labour practices²²⁷ and not to be required or permitted to perform work or provide services

²¹⁹ Burchell op cit note 209 at 470.

²²⁰ Ibid at 475.

²²¹ 1941 TPD 194.

²²² 1992 (4) SA 804 (A).

²²³ Burchell op cit note 209 at 480.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Constitution, s 28.

²²⁷ Ibid, s 28(1)(e).

that are inappropriate for the age of the child, or put the child's well-being, education, physical or mental health, or spiritual, moral or social development at risk.²²⁸ Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child. This provision mirrors the international and regional law concerning children provisions as discussed in the previous chapter. This provision is also similarly reflected in the Children 's Act.²²⁹

The definition section of the Children's Act states that abuse in relation to a child means any form of harm or ill-treatment deliberately inflicted on a child, which includes, amongst others, a labour practice that exploits a child.²³⁰ It further states child labour as 'work by a child which – (a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and (b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development.' Any MNC employing children in such a manner is guilty of contravening the Children's Act. Section 141 deals with the instance of child labour and exploitation of children. Any person (including juristic person) who uses, procures or employs a child for child labour (or in contravention of the BCEA) must be reported to the Department of Labour by a social worker or social service professional who becomes aware of such contraventions.²³¹ Section 150(2) of the Act also identifies a child who is victim of child labour as a child who may be in need of care and protection. Such a circumstance must be referred for an investigation by a social worker.

Chapter six of the BCEA focuses on the prohibition of child labour. The Act states that no child under the age of 15 or who is under the minimum school-leaving age may be employed. Anyone in contravention of such provision and child labour (as defined by the Children's Act – mentioned above) is guilty of an offence.²³² It is further an offence to assist an employer to employ a child in contravention of the BCEA and discriminate against a person who refuses to be employed in contravention of the Act.²³³ MNCs employing children under the age of 15 are committing a criminal offence and may be dealt with under the normal criminal justice process.

²²⁸ Ibid, s 28(1)(f).

²²⁹ Act 38 of 2005, s 7.

²³⁰ Ibid, s 1.

²³¹ Children's Act, s 141(1)(e) and s 142 (2)(b).

²³² BCEA, s 43.

²³³ Ibid, s 46.

The enforcement mechanisms of the BCEA are found in chapter 10 of the Act. Labour inspectors, appointed by the Minister of Labour, are tasked to promote, monitor and enforce compliance with South African Labour law by advising employers and employees on their rights and obligations, conducting inspections, investigating complaints, endeavouring to secure compliance with labour law.²³⁴ These inspectors have power of entry (to the workplace)²³⁵ and powers to question and inspect.²³⁶ Any inspector that has reasonable grounds to believe that an employer is not acting in compliance with the Act, he or she must attempt to secure a written undertaking from the employer to rectify his actions. The labour inspector may also issue a compliance order against an employer he believes, on reasonable grounds, has not been complying with a provision of the Act.²³⁷ A compliance order may also be made an order of the labour court on application by the Director-General of Labour.²³⁸

The Department of Labour developed a Child Labour Programme of Action for South Africa²³⁹ in order to eliminate child labour, which affects an estimated one million children in South Africa. The aims of the CLPA include promoting new legislative measures against the worst forms of child labour, strengthening national capacity to enforce legislative measures and increasing public awareness and social mobilisation against the worst forms of child labour.

4. MNCS AND ENVIRONMENTAL LAW

Section 24 of the Constitution provides the following:

Everyone has the right

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and

²³⁴ Ibid, s 64.

²³⁵ Ibid, s 65

²³⁶ Ibid, s 66

²³⁷ Ibid, s 68 and 69.

²³⁸ Ibid, s 73.

²³⁹ Department of Labour *Child Labour Programme of Action for South Africa* (2008 – 2012) Department of Labour: Pretoria. Hereafter referred to as CLPA.

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

Due to s 8(2) of the Constitution, and the fact that many non-state actors, including MNCs, undertake activities that may detrimentally affect the environment, it is argued that this section applies both vertically (i.e. it binds the state) but also horizontally (i.e. it binds natural and juristic persons).²⁴⁰

Various Acts of Parliament have been enacted to give realisation to the aforementioned constitutional right as is required by s 24 which states that environmental protection must occur through reasonable legislative and other measures. The court in *Government of the Republic of South Africa v Grootboom*,²⁴¹ when interpreting another socio-economic right (the right to housing) indicated that reasonable legislative measures were not itself sufficient and that the state has an obligation to devise a programme to address the right in question that was reasonable in both conception and implementation.²⁴² That programme must be a widespread one that coordinates efforts amongst all three branches of government and must be balanced and flexible. A reasonable programme must balance short, medium and long-term needs.²⁴³ This reasoning should also apply to interpretation of the environmental right. The enacting of 'reasonable legislation and other measures' is not enough if the implementation aspect is lacking.

The National Environmental Management Act (NEMA),²⁴⁴ National Water Act (NWA),²⁴⁵ and the Environmental Conservation Act,²⁴⁶ and the Minerals and Petroleum Resources Development Act²⁴⁷ are the main legislation enacted to give effect to s 24 of the Constitution. This section will discuss NEMA in more detail, before discussing the MPRDA. The next chapter will be focusing on the human rights violations committed by mining companies in South Africa.

²⁴⁰ Currie and de Waal op cit note 177 at 527.

²⁴¹ 2001 (1) SA 46 (CC).

²⁴² David Bilchitz, 'Can the Environmental Rights in the South African Constitution Offer Protection to the Interests of Animals' (year), available at <https://www.uj.ac.za/faculties/law/saifac/PublishingImages/Pages/default/The%20Environmental%20Rights%20and%20Animal%20Interests.pdf>, accessed on 31 July 2016 at 6.

²⁴³ Ibid.

²⁴⁴ Act 107 of 1998.

²⁴⁵ Act 36 of 1998.

²⁴⁶ Act 73 of 1989.

²⁴⁷ Act 28 of 2002. Hereafter MPRDA.

4.1.National Environmental Management Act

In terms of NEMA, ‘every person [(including juristic person²⁴⁸)] who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring or, in so far as such harm to the environment is authorised by law or cannot be reasonably avoided or stopped, to minimise and rectify such pollution or degradation of the environment.’²⁴⁹ The persons on whom the above duty is imposed, include the owner of the land or premises, a person in control or has a right to use the land or premises on or in which any activity is or was performed or if any other situation exists which could or did cause pollution environmental degradation.²⁵⁰ Therefore, if an MNC has been granted permission by appropriate authorities to undertake various activities on South African land or premises, in terms of s 28(1) and (2) of NEMA, they will have the aforementioned obligation imposed upon them. The measures as referred to in s 28(1) may include measures to:

- (a) investigate, assess and evaluate the impact on the environment:
- (b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment:
- (c) cease, modify or control any act, activity or process causing the pollution or degradation;
- (d) contain or prevent the movement of pollutants or the causant of degradation:
- (e) eliminate any source of the pollution or degradation: or
- (f) remedy the effects of the pollution or degradation.²⁵¹

Any person upon whom this duty is imposed by be directed to take any necessary and reasonable measures, if they have failed to do so on their own, by the Director-General of Environmental Affairs and Tourism or provincial head of department, in terms of s 28(4) of NEMA. The Director-General may take measures to remedy a situation should the obligated person fail to comply with a directive under s 28(4).²⁵²

²⁴⁸ NEMA, s 1(XXIII): “‘Person’ includes a juristic person’.

²⁴⁹ NEMA, s 28(1).

²⁵⁰ Ibid, s 28(2).

²⁵¹ Ibid, s 28(3).

²⁵² Ibid, s 28(7).

The Director-General may recover any costs from the person who directly or indirectly contributed to the pollution or degradation, the owner of the land at the time when the pollution occurred, the person in control of the land or had the right to use such land, or any person that negligently failed to prevent the activity from being undertaken or the situation from coming about.²⁵³ Section 32 of NEMA deals with who has locus standi to enforce environmental laws. The Act states that any person, or group thereof, may seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA, or any other statutory provision concerned with the protection of the environment or use of natural resources - in that person's interests, on behalf of another who is unable to institute proceedings, in interests of a class of persons whose interests are affected, in the public interest or in the interest of protecting the environment.²⁵⁴ This is a broad approach as concerns legal standing in NEMA, which is in line with the enforcement of rights provision (s 38) in the Constitution. NEMA, as mentioned, is the legislation that is intended to realise the environmental rights afforded to everyone in South Africa by the Constitution, therefore, it is only apt where the Act provides measures to enforce its provisions that legal standing should adopt the broad approach as provided for by the Constitution.²⁵⁵ This broad approach to standing as provided by NEMA serves to increase access to justice, which is a constitutional right that everyone is entitled to.

In the case of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others*²⁵⁶, the applicant (owner of immovable property in industrial area of Port Elizabeth (PE)) sought an order investigating, evaluating, and assessing the impact of noxious gases emitted from the first respondent's tannery in to the atmosphere of the surrounding area which resulted in corrosion of metal structures and equipment on the applicant's property as well as the foul odour in the form of hydrogen sulphide. It was argued that the actions of the first respondent constituted a nuisance under the common law. In addition the noxious gases had a prejudicial effect on the health and well being of those on its premises as well as the inhabitants of

²⁵³ Ibid, s 28(8).

²⁵⁴ Ibid, s 32 (1).

²⁵⁵ Constitution, s 38. In *Ferreira and Levin NO* 1996 (1) SA 984 (CC) para 165, President Chaskalson held that, for constitutional issues, that a broader approach to standing must be adopted. He held that this would be consistent with the mandate to uphold the Constitution and would serve to ensure that constitutional rights enjoy full measure of protection to which they are entitled.

²⁵⁶ 2004 (2) SA 393 (E).

PE.²⁵⁷ The applicant mainly relied on, however, s 28 of NEMA. In considering the application, the court had to consider what was ‘significant’ in that any person who caused significant pollution or degradation of the environment is caught under the net case by s 28(1) of NEMA.²⁵⁸ The court held that the assessment of significant involves a considerable amount of subjectivity. The court was satisfied that that the first respondent had breached the duty imposed upon it by s 28(1) and thus the applicant was entitled to an order, in terms of s 28(12) directing the Director-General (second respondent) or the provincial head of the department of environmental affairs (fourth respondent) to investigate, evaluate and assess the impact of the specific activities.²⁵⁹ The court also held that the causes and consequences of pollution are scientific matters. Therefore, when one is intending to take a decision of whether on whether to cease operations of the application – such a decision must be informed by scientific evidence, which was not provided for in the application.²⁶⁰

Section 33 of NEMA allows for private prosecution. Any person in the public interest or in the interest of protecting the environment may conduct a prosecution in respect of any breach, or threat thereof, of duty as recognised by NEMA. Such prosecution must be done in terms on the Criminal Procedure Act.²⁶¹

Schedule 3 of NEMA lists provisions of various environmental legislation that would constitute a criminal offence should any of such provisions be breached. Any person convicted of any offence as listed in schedule 3 may be ordered by a court to pay the costs incurred by the organ of state who rehabilitated the environment damaged by the accused person.²⁶² Section 35(5) – (9) of NEMA is of particular importance to the accountability of MNCs for pollution and environmental degradation as it applies to managers and employees or does or does not do an act which he was task to do or not do on behalf of his employer which would constitute an offence in terms of the Act. In such an event that the act or omission occurred because the employer failed to take all reasonable steps to prevent the act or omission from occurring, the employer shall be guilty of such an offence. The employer shall, therefore, be liable to be convicted and sentenced in respect to the offence committed.

²⁵⁷ Jan Glazewski and Emma Witbooi ‘Environmental Law’ (2004) *Annual Survey of South African Law* 397 – 422 at 418.

²⁵⁸ *Ibid* at 419.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* at 420.

²⁶¹ Act 51 of 1977. Hereafter referred to as the CPA.

²⁶² NEMA, s 34(1).

Section 35(7) and (8) provide for liability of a director of a firm²⁶³, shall be guilty of an offence listed in schedule 3 if that offence resulted from the failure of the director to take all reasonable measures that were necessary under the circumstances to prevent the commission of such offence.

Corporations, especially those who are in the mining sector, are urged by NEMA to develop an environmental impact assessment and an environmental management plan after consultation with local communities.²⁶⁴

4.2. Minerals and Petroleum Resources Development Act

The activities undertaken by mining corporations have potential to severely degrade the environment and therefore it is important that the Legislation regulating the mining industry address this. The MPRDA encourages mining companies to develop social and labour plans (in consultation with local communities) and to submit reports on their progress the Departments of Minerals and Energy.²⁶⁵ An important objective of this Act is to ‘give effect to s 24 of the Constitution by ensuring that the country’s mineral and petroleum resources are developed into an orderly and ecologically sustainable while promoting justifiable social and economic development’.²⁶⁶ In terms of s 37(1) of the MPRDA, the principles set in s 2 of NEMA applies to all mining operations and serve as guidelines for interpretation, administration and implementation of the environmental requirements of the MPRDA.

5. CONCLUSION

South African presents a potentially robust legal framework that may be used to prohibit MNCs from committing human rights violations in the country. The Constitution applies to the private actor as explained above and creates rights and corresponding obligations for and on everyone in South Africa – not just South African citizens unless where specifically stated. Therefore, it may apply to MNCs operating in South Africa as well. Among other things, the Constitution recognises a

²⁶³ “Firm” shall mean a body incorporated by or in terms of any law as well as a partnership’, s 35(9)(a) of NEMA.

²⁶⁴ Kamga and Ajoku op cit note 54 at 477.

²⁶⁵ MPRDA, s 21.

²⁶⁶ Ibid.

wide range of rights, including the right of children to protection from economic exploitation and the right of all South Africans to a healthy environment.

The Constitution also provides that when interpreting provisions of the Bill of Rights, the courts must consider international law. Furthermore, it states that the customary international law is binding on the country unless it is inconsistent with the Constitution.²⁶⁷ Therefore, the country is bound by all the customary international law as discussed in the previous chapter.

This chapter has also discussed the possibility of invoking criminal corporate liability to hold MNCs which have committed human rights violations accountable. Criminal sanctions could act as a strong deterrent against corporate human rights violations.

The mechanisms of holding MNCs accountable seem to be strong in South African Law. Criminal sanctions may be used where MNCs have employed children in Contravention of the Children's Act and the BCEA, or for violating certain provisions listed in schedule 3 of NEMA. Whether these mechanisms are used in practice or have made a difference is something the next chapter will consider.

²⁶⁷ Constitution, s 232.

Chapter four

Human Rights Violations in the Extractive Industry in South Africa and the Adequacy of State Responses

1. INTRODUCTION

The objective of this chapter is to examine how South Africa has addressed the issue of MNCs committing human rights violations and how the country has taken steps to prevent such violations in practice. This chapter will pay particular attention to human rights violations in the extractive/ mining industry in South Africa. The mining industry is a distinctively large industry in South Africa due to the country's vast number of mineral resources. South Africa is recognised as one of the world's largest producers of gold, platinum and chromium and is the fourth largest producer of diamonds.²⁶⁸ The mining industry is vital contributor to the country's GDP. These resources have attracted a great number of corporations with the goal of extracting resources for the sake of profit making. In the undertaking of their activities they, intentionally or unintentionally, created the potential for human rights abuses in the various South African communities in which they operate.

Common problems associated with the extractive industry include depletion of non-renewable resources and environmental impacts as result of air emissions, discharges of liquid effluents and generation of large volumes of solid waste.²⁶⁹ Extraction activities have a visual impact on the environment and lead to degradation and disturbance of natural habitats, and sometimes resulting in the loss of biodiversity.²⁷⁰ In certain mining industries effluents may contain a large amount of toxic substances, such as cyanides and heavy metals, which can pose significant human health problems and ecological risks.²⁷¹ These problems presented themselves in the incidences of the tailing dams' failures at the Baia Mare goldmine in Romania and at the Aznalcollar zinc, lead and copper mine in Spain.²⁷² Once the mine and production

²⁶⁸ Kamga and Ajoku op cit note 54 at 459.

²⁶⁹ Adisa Azapagic, 'Developing a framework for sustainable development indicators for the mining and minerals industry' (2004) 12 *Journal of Cleaner Production* 639 – 662 at 645.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

thereon has come to an end, a further risk of water contamination due to acid mine drainage, loss of biodiversity loss of land and visual impact is likely.²⁷³

Mining corporations do not only pose environmental risks but they also pose social risks. These issues relate to the employees of the corporations as well as to society at large.²⁷⁴ The mining industry poses above-average accident risks to employees and underground mines have highest incidences of fatalities, with the gold mining industry suffering the highest average fatality ratio.²⁷⁵ Some mining activities can also pose health and safety risks to local communities. Health risks can occur as result of air pollution caused by the mining, as well as accidental release of toxic substances into the atmosphere.²⁷⁶ Mining corporations have often being accused of violating human rights, in actions taken either independently or in collusion with the government. A few of these violations include paying unfairly low wages, denying employees the right to organise in trade unions, the use of child labour, abuse of women, forced labour and so on.²⁷⁷ All these matters are serious issues within the industry across the globe and thus have garnered significant attention from national and international communities as has been shown in the previous two chapters.

As mentioned in the previous chapters the international and regional instruments, whilst binding on state parties, lack direct enforcement mechanisms on that of MNCs. Consequently, the countries in which the MNCs operate bear the duty of protecting human rights and ensuring that MNCs operating under its jurisdiction comply with the states human rights laws. This chapter will examine the extent to which South Africa ensures that MNCs respect and promote human rights. In doing so, this chapter will provide an overview of human rights violations that MNCs commonly commit and have the potential of committing in the country. Thereafter, the manner in which South Africa has addressed such violations as well as how they have attempted to deter further violations will be discussed and critiqued.

2. HUMAN RIGHTS VIOLATIONS IN THE EXTRACTIVE INDUSTRIES IN SOUTH AFRICA

²⁷³ Ibid.

²⁷⁴ Ibid at 646.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid at 647.

In order to fully explain the human rights violations committed by the mining/extractive industry in South Africa it is useful to first explain the structure of the industry.

The mining industry can be divided into two phases: the first is the exploration phase and the second is the development or extraction phase.²⁷⁸ Extraction can be done either on the surface through an open pit or cast or underground. The method used for extraction is dependent on the size, shape and depth of the ore body because ‘all operations involve the basic steps of ore breaking, loading and hauling to a mill for treatment’.²⁷⁹ At the end of this exploitation process, decommissioning and closing of the mines occurs. The main stakeholders in extractive industries are corporations, government agencies, civil society organisations and the local communities.²⁸⁰

It is not infrequent that mining companies in South Africa disregard human rights. In the exploration and development phases, the local communities living on prospective mining sites are, more often than not, not provided the opportunity to participate meaningfully in decisions affecting their lives.²⁸¹ Communities are often forced to relocate due to mining activities and therefore it is important that a consultation process with stakeholders is organised in a meaningful and sufficient manner.²⁸² In a study undertaken by Eugene Cairncross and Sophia Kisting on Platinum Gold Mining in South Africa, participants therein stated that they were victims of forced last minute mining relocations to barren sites and facilities by Mining.²⁸³ In addition it was stated that the mine (Lonmin Mines – to be discussed in more detail in the next section), provides inferior housing, inadequate plumbing and no electricity as well as poor sewage systems and no refuse removal.²⁸⁴ However, it is argued that this public participation of local communities process is often deficient in that companies, government officials and legal advisors are secretive and do not

²⁷⁸ Claudine Sigam and Leonardo Garcia *Extractive Industries: Optimising Value Retention in the Extractive Industries* (2012) United Nations: New York and Geneva at 8.

²⁷⁹ *Ibid* at 5.

²⁸⁰ Kanga and Ajoku *op cit* note 54 at 462.

²⁸¹ *Ibid* at 464.

²⁸² *Ibid*.

²⁸³ Eugene Cairncross and Sophia Kisting, ‘Platinum Gold Mining in South Africa: The Context of the Marikana Massacre’ (2016) 25 *Journal of Environmental and Occupational Health Policy* 513 – 534 at 525.

²⁸⁴ *Ibid*.

disclose relevant information to the affected people.²⁸⁵ In addition, the extraction phase of mining also harms the environment. The extraction of the mineral destroys or modifies the landscape as a result of erosion during the extraction.²⁸⁶

In a study of the Lonmin mines, it has been reported that the mining company has been discharging colourless gas sulphur dioxide at a level that exceeded the acceptable limit.²⁸⁷ In addition, Lonmin mines have been denying the local communities their human right to water. This has occurred because mining is a water-intensive activity – and Lonmin mines have been using the water resources extensively as Lonmin has identified their inability to acquire an adequate supply of water for their operations and the loss of sustainable water for their operations and communities as one of its major challenges.²⁸⁸ The local community is living in poverty due to the mining operations. The safety of the families including children is put at risk. The mining company has taken over their land and subjected them to various risks all in the name of maximising profits.

3. SOUTH AFRICA'S EFFORTS TO ADDRESS HUMAN RIGHTS VIOLATIONS

This section will now demonstrate how South Africa has been able to prevent the potential violations of human rights and environmental degradation in practice. In doing so, this section will analyse the manner in which Coal for Africa (Pty) Ltd, an Australian registered company, has had its mining undertakings halted for fear of harming the environment. Thereafter, a South African Human Rights Commission investigation into the Anglo Platinum mining corporation's relocation of a local community in the Limpopo province will be discussed. In addition, two criminal law cases will be examined in relation to environmental protection and how they will act as a deterrent for MNCs in the country.

²⁸⁵ W Olaleya, 'Corporate Governance Practices of South African Mining Companies with Operations in South Africa' in Southern African Resource Watch *South African Mining Companies in Southern Africa: Corporate Governance and Social Responsibilities* (2010) Southern Africa Resource Watch: Johannesburg 19 – 46 at 37; Cairncross and Kisting op cit note 283 at 525.

²⁸⁶ Kamga and Ajoku op cit note 54 at 464.

²⁸⁷ Bench Mark Foundation, 'Coping with Unsustainability' (2013), available at http://www.benchmarks.org.za/press/lonmin_report_print.pdf, accessed on 18 August 2016 at 31.

²⁸⁸ Ibid at 36.

3.1. Administrative Justice Mechanisms

In 2009, a mining project located near Musina in Limpopo, has caused an outcry among surrounding landowner and local community as they felt the project to be undertaken by an Australian registered corporation, Coal of Africa Ltd will detrimentally affect the area.²⁸⁹ This was particularly worrying since the mine would be near to the Mapungubwe World Heritage Site and a number of game farms catering for tourists.²⁹⁰ These concerns emerged at a public participation meeting held in April 2009 before the completion of the environmental impact assessment (EIA) and environmental management plan (EMP), needed as part of the application process for a mining licence from the Department of Mining as well as the other relevant governmental department Water and Environmental Affairs.²⁹¹ Jacana Environmentals managed these particular EIA and EMP processes, in partnership with Naledi Development Restructured.²⁹² Coal For Africa was granted an amended environmental authorisation in terms of s 24G NEMA in 2011. In 2015 Coal for Africa was granted amended environmental authorisation. This authorisation was challenged by way of appeal to the Minister of Environment. The appeal however failed on grounds that the amendment would not pose any additional impacts to those considered originally in 2011.²⁹³

In 2014 the Northern Gauteng High Court granted an interim interdict to local farmers, community and the Vhembe Mineral Resources Forum against in order to halt Coal for Africa's mining at Makhado, Limpopo.²⁹⁴ In an application to have this interdict set aside in December 2015, the judgment had been reserved and the matter

²⁸⁹ Christy van der Merwe, Coal of Africa submits final EIA for Controversial Colliery, 29th May 2009 *Creamer's Media's Mining Weekly*, available at http://www.miningweekly.com/article/coal-of-africa-submits-final-eia-for-controversial-colliery-2009-05-29/rep_id:3650, accessed on 30 August 2016.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Mining Review Africa, 'Minister Dismisses Environmental Appeal against Coal of Africa Vele Colliery' 19 November 2015 in *Mining Review Africa*, available at <https://www.miningreview.com/news/minister-dismisses-environmental-appeal-against-coal-of-africa-vele-colliery/>, accessed on 30 August 2016.

²⁹⁴ Charlotte Mathews, 'Court grants interdict to stop some work on CoAL mine' 12 December 2014, available at <http://www.bdlive.co.za/business/mining/2014/12/12/court-grants-interdict-to-stop-some-work-on-coal-mine>, accessed on 30 August 2016.

postponed to consider the various arguments made.²⁹⁵ In 2016, the same mining company was granted an integrated water use licence for the Makhado coking and thermal coal project by the Department of Water and Sanitation.²⁹⁶ This decision was successfully challenged by farmers, the concerned local community and the Vhembe Mineral Resource Project to the same Department on grounds that the activities of the mine will permanently damage the environment their surrounding area which resulted in the Coal For Africa's water use license being suspended.²⁹⁷ The company was due to start mining in the second half of 2016 and was intended to produce about 5.5 million tonnes of coal per year for domestic and export markets.²⁹⁸ In terms of 148(2)(b) of the South African National Water Act²⁹⁹ the appeal automatically suspends the integrated water use license. The decision the governmental department was commended by civil society as a good start in the step towards protection the environment.³⁰⁰ This successful appeal showcases the power that the local community can exert on mining corporations especially where the actions of such corporations may threaten the environment of the area. The mining project has the potential of causing irreversible damage to the area that includes the Mapungubwe Cultural Landscape, a World Heritage Site.³⁰¹

This success, albeit temporary as the Australian mining corporation is in process of challenging the decision of the appeal, demonstrates that civil society together with the local community may utilise options provided to them in terms of South African Legislation, such as the National Water Act, in order to protect their environment and livelihoods from potentially destructive mining.

In recent years in South Africa, there has been stricter enforcement of the nation's environmental laws, which are likely to see company directors place a greater emphasis on the company's environmental management systems and result in improved environmental monitoring and compliance.

²⁹⁵ Mining Review Africa, 'Interdict Against Coal of Africa Makhado Project Postponed' 9 December 2015, available <https://www.miningreview.com/news/interdict-against-the-coal-of-africa-makhado-project-postponed/>, accessed on 30 August 2016.

²⁹⁶ Charlotte Matthews, 'Coal of Africa's Makhado Water License Suspended' 11 April 2016 *Business Day Live*, available at <http://www.bdlive.co.za/business/mining/2016/04/11/coal-of-africas-makhado-water-licence-suspended>, accessed on 30 August 2016.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Act 36 of 1998.

³⁰⁰ Adiel Ismail, 'Coal of Africa Suffers Water Blow' 12 April 2016, *Fin24*, available at <http://www.fin24.com/Companies/Mining/coal-of-africa-suffers-blow-over-halt-of-makhado-water-licence-20160412>, accessed on 30 August 2016.

³⁰¹ Ibid.

3.2. South African Human Rights Commission

Anglo Platinum is another huge Mining Corporation operating in South Africa. In March 2008 a NGO, ActionAid called on the South African Human Rights Commission³⁰² to conduct a full investigation into a series of human rights violations made against the relocation process undertaken by the mining company at its mine near Mokopane in the province of Limpopo.³⁰³ ActionAid's report alleged that there were insufficient community representation mechanisms in the relocation process, inadequate clean water and sanitation services, environmental impacts and pollution caused by the Mogalakwena mine operated by Anglo Platinum.³⁰⁴ The SAHRC launched the report of their seven-month investigation. While the report did not find that Anglo Platinum had violated human rights, it did conclude that the local community was adversely affected by the relocation process conducted by Anglo Platinum and as result the report included a long-list of recommendations that could improve the relocation process as well as improve corporate social responsibility in general.³⁰⁵ Recommendations from the SAHRC include recommendations relating to the provisions of clean water and sanitation, environmental protection, provision of electricity, grave removals, and agricultural land and food security, compensation for any damage and/or loss and transportation of children to school.³⁰⁶ The SAHRC encouraged engagement between Anglo Platinum and the Mogalakwena Municipality in order to ensure these improvements. In addition, the SAHRC encouraged Anglo Platinum to develop its public participation mechanisms and to keep the affected people abreast on all stages of the development process.³⁰⁷ It was also recommended that Anglo Platinum should constantly monitor the environmental impacts of their

³⁰² The South African Human Rights Commission (hereafter SAHRC) was established under chapter 9 of the 1996 Constitution of the Republic of South Africa. The Mandate of the SAHRC is to protect, respect and promote human rights.

³⁰³ SAHRC, 'Mining-Related Observations and Recommendations: Anglo-Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo' (2008), available at http://www.sahrc.org.za/home/21/files/Reports/Anglo%20Report%20Final%202008_Chp%201%20to%203.pdf,

³⁰⁴ Mark Curtis *Precious Metal: The Impact of Anglo Platinum on poor communities in Limpopo, South Africa* (2008) Published By ActionAid, available at https://www.actionaid.org.uk/sites/default/files/doc_lib/angloplats_miningreport_aa.pdf, accessed on 20 September 2016.

³⁰⁵ SAHRC op cit note 303.

³⁰⁶ Ibid at x.

³⁰⁷ Ibid.

mining activities on surrounding communities and where their activities have negatively impacted of the mine, it must be addressed promptly.³⁰⁸ Anglo Platinum's initial response to the report of the SAHRC investigation was defensive and critical. It was suggested that the SAHRC expected to high of a responsibility of the company for provisions that ought to be provided by the government.³⁰⁹ Anglo Platinum, however, later changed their tone and appeared to take a conciliatory stance on the report.³¹⁰ ActionAid, while not being vindicated on their allegations that Anglo Platinum violated the human rights of the community within the Mogalakwena area, was satisfied with the results of the report.³¹¹ While the SAHRC is a good option for NGOs and other interested parties to submit a compliant of human rights violations and to bring awareness of human rights violations where they occur, the decisions made by the SAHRC are not directly binding on private or public actors. The SAHRC would not be able to institute enforcement mechanisms against Anglo Platinum should they not comply with its recommendations.

3.3.Criminal Sanctions

There have also been occasions where the criminal justice system has been used to tighten the noose when it comes to ensuring that MNCs comply with human rights norms in South Africa. In the criminal case of *S v Frylinck*,³¹² for example, an environmental assessment practitioner (hereafter EAP) was held criminally liable for providing incorrect and misleading information in a basic impact assessment report to the Department of Environmental Affairs (hereafter DEA). Frylinck was employed by Mpopu Environmental Solutions CC and was employed by the Department of Public works to conduct an impact assessment report for development of the Pan African Parliament Buildings. The EIA regulations³¹³ stipulate that any EAP must be independent, and declare such independence under oath, and further provide that the furnishing of any incorrect or misleading information in the EIA is a criminal

³⁰⁸ Ibid.

³⁰⁹ USB, 'A Clash of Cultures (and Lawyers): A case study of Anglo Platinum and its Mogalakwena Mine in Limpopo, South Africa' (2009) *Corporate Governance in Africa Case Study Series: No 1* 1 – 26 at 13.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² North Gauteng Regional Court Case Number: 14/1740/2010 (Date of judgment: 6 April 2011).

³¹³ The relevant EIA Regulations at the time of the offence were those contained in GNR 386 of 21 April 2006. These Regulations have since been repealed and replaced with GNR543 on 18 June 2010.

offence.³¹⁴ In his basic assessment report, Frylinck indicated that there was no wetland within a 500m radius of the proposed development site and therefore informed the relevant party within the DEA that a wetland delineation study was not necessary. However, once construction commenced, concerns were raised by governmental departments regarding the existence of a wetland.³¹⁵ This presence was confirmed after an investigation was undertaken. Frylinck was, thereafter, charged with fraud and contravention of regulation 81 of the 2006 EIA Regulations under NEMA. He was convicted on the charge of contravening reg 81.³¹⁶ The court held that Frylinck conduct proved to be wilful disregard of the required standard by an EAP and that the EAP was negligent.³¹⁷ The EAP had provided incorrect or misleading information to the DEA. He was sentenced to two years imprisonment or a fine of R80000 and his firm was sentenced to a fine of R80000 with half the fines being suspended for five years.³¹⁸ While this judgment doesn't relate directly to mining MNCs, it is relevant here because MNCs, particularly mining corporation, require EIAs and therefore the appointment of EAPs in order to be granted relevant environmental authority and licences in order to undergo their various activities. This judgment highlights the importance of the role of EAPs in the EIA process and the need to ensure that accurate information is presented to the appropriate person. This judgment will go some way in reducing instances of corruption in order to gain licence in that this judgment will act as a strong deterrent for EAPs.

Following the conviction of Frylinck the National Prosecuting Authority (hereafter NPA) went a step further and focused on attempting to hold company directors personally and criminally liable for environmental degradation that was caused on their watch. In 2012, the Ermelo Regional Court was the first court to invoke the criminal provisions of NEMA, the National Water Act and the environmental provisions in the MPRDA, against the managing director of a mining company and to convict him of contravening the relevant provisions of these Legislations. The charges arose from certain mining activities that impacted negatively on water resources in the area, including diversion of water resources, mining within a flood line, the failure to have pollution management on site, the

³¹⁴ Regulation 17 of GNR 543.

³¹⁵ Supra note 312.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

dumping of waste rock materials into a water resource and mining within a wetland.³¹⁹ The mining company was ordered to rehabilitate the damaged environment and the managing director was handed a five year prison sentence without the option of fine.³²⁰

More recently the Lenyenye Regional magistrate's court in Limpopo in a landmark judgment, *S v Blue Platinum ventures (Pty) Ltd and Matome Samuel Maponya*³²¹, reflected the direction that South African courts will take when it comes to ensuring compliance with environmental law. The facts of the case are as follows: Blue Platinum Ventures had undertaken clay-mining activities outside the village of Batlhabine in Limpopo since 2007, which resulted in serious environmental damage. This resulted in numerous complaints by the local community to the Department of Mineral Resources, which never resulted in any action taken against the mining company. The activities continued unchallenged until the community laid criminal charges against the company and its managing director Matome Maponya, in terms of NEMA.³²² Maponya was convicted and sentenced to five years imprisonment, which was suspended on condition that the affected areas were rehabilitated within three months of the date of judgment.³²³ When the matter was brought to the North Gauteng High Court on automatic review, it was questioned as to why the magistrate had not convicted Blue Platinum Ventures on their plea of guilty – the issue was reverted back to the Magistrates Court so the magistrate could make an order on the issue.³²⁴ The hope is that this judgment will result in MNCs and their directors paying considerably more attention to the conduct of their employees and the risk of harm to the environment caused by their activities.³²⁵ It is likely also to result in company directors placing more emphasis on having environmental management systems in place and ensuring that these systems are strictly monitored and enforced.³²⁶ This case sets a significant precedent for future prosecutions and may empower affected

³¹⁹ Justin Truter, 'Environmental Law Compliance – The Noose of Tightening' (2014), available at <http://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/>, accessed on 30 August 2016.

³²⁰ Ibid.

³²¹ Case Number: RN126/13, in the Magistrate Court for the Regional Division of Limpopo Province held at Lenyenye.

³²² Ibid.

³²³ Ibid.

³²⁴ *S v Blue Platinum Ventures (Pty) Limited and Another* (A588/15) [2015] ZAGPPHC 980 (25 August 2015)

³²⁵ Truter op cit note 320.

³²⁶ Ibid.

communities to lay criminal charges against offending mining corporations and their directors for environmental damage and other human rights abuses. While the judgment in this case is positive, the NPA did target a relatively small corporation in the mining industry in comparison to the more major MNCs that are operating in the country. The hope is that the NPA will act against bigger corporations guilty of similar actions with the same amount of effort and vigour.³²⁷

While these judgments presents the lengths that the South African judiciary and prosecuting authority is willing to go to ensure environmental compliance as well as the protecting of human rights from mining corporations – South African courts and their staff have significant capacity constraints as well as lack of experience and training in the prosecution amongst prosecutors and magistrates in the area of environmental law specifically.³²⁸

4. CONCLUSION

This chapter has presented the manner in which mining corporations have the potential and are committing human rights violations especially when it comes to environmental degradation. The activities of mining corporations frequently damages and destroys landscapes, causes noise, air and water pollution and negatively affects the local community in which the mines operates. For these reasons, mining MNCs require various licences in terms of South African environmental and mining law and in applying for these licences all affected parties have the right to be heard and voice their concerns regarding mining in there community.

This chapter has further shown that where MNCs have been granted various permissions to disturb the environment, the local community has the right to appeal the granting of such permissions thus placing a moratorium on mining activities. The local community as well as civil society with an interest in protecting the environment have proven to be an effective weapon in curbing the damage that MNCs cause to the environment.

Furthermore, this chapter has shown that where company directors and company show willful disregard of how their actions are harming the environment

³²⁷ Centre for Environmental Rights, ‘Case Note: S V Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya’, available at http://cer.org.za/wp-content/uploads/2014/04/Case-note_-_S-v-Blue-Platinum-Ventures.docx, accessed on 30 August 2016.

³²⁸ Truter op cit note 320.

that it may be held criminally liable for the actions and face prison time. Furthermore, a recent judgment which held an EAP criminally liable when he provided incorrect and misleading information to the relevant officer regarding the results in the required EIA in terms of NEMA thus likely to result in a decrease in corruption amongst EAPS and MNCs.

However, the lack of experience and knowledge of prosecutors and magistrates in the area of environmental law can pose an obstacle in further and more complicated cases. Training therefore would be encouraged in this regard.

In addition, the NPA has so far, primarily only targeted 'small' mining corporations for prosecution of human rights violations. It may be unlikely that the large MNCs will be prosecuted with the same amount of effort.

Chapter Five

Conclusions and Recommendations

1. INTRODUCTION

The previous chapters have attempted to show where international, regional and South African National law has failed and succeeded in holding MNCs accountable for human rights violations. This chapter will attempt to provide solutions to fill the gap left by the laws as discussed the previous chapters.

While South Africa, the country at the focus of this thesis, has various measures available to prevent MNCs from violating the human rights of its citizens and there are enforcement mechanisms available in various areas of South African law to hold them accountable, there is room for further improvement of South African law on the issue.

Recommendations as so far South African law is concerned will be discussed, specifically with regard to the development of the applicability of the Constitution on corporations as well as the notion of state responsibility.

2. DEVELOPMENT OF SOUTH AFRICAN NATIONAL LAW

South African law provides various options to protect its citizens from the activities of MNCs operating in the country. This section will recommend solutions that may assist in further accountability of MNCs where they have violated human rights as well as ensuring the state takes stricter measures in order to prevent such violations from occurring in the first place.

2.1. Notion of State Responsibility

Chapter 2 discussed the notion of state responsibility and the duty to protect in international and African regional law. This duty has been recognised to some extent

in South African law, but has not been used in relation to prevention of human rights violations by MNCs.

The *SERAC* case discussed in chapter 2 above held the Nigerian state accountable for failing in its duty to protect its citizens from human rights violations committed by an MNC operating within the country. This duty to protect is recognised in South Africa³²⁹, there has, however, been no extension of this duty to protect specifically where state have failed to prevent MNCs from violating human rights as well as holding MNCs accountable where they have done so. The *SERAC* case was determined in terms of the African Charter. South Africa has signed and ratified the Charter. However, s 231(4) of the Constitution states that an international agreement becomes law in South Africa only becomes law in the country when it is enacted into law by legislation. Section 39(2) of the Constitution does, however, state that when a court is interpreting a provision of the Bill of Rights international law must be considered. The *SERAC* matter will, therefore, hold some weight where a court has to decide on whether the South African state has the legal duty to protect its citizens from MNC activities and where they have failed in their duty (through the failure to regulate MNC activities, for example) they may be held liable.

The Constitutional Court has an obligation to develop the common law.³³⁰ When the court decides whether or not to develop the common law, it must hold a two-stage inquiry. The first stage requires the court to consider whether the existing common law (having regard to s 39(2)) necessitates development in terms of the section.³³¹ If this question is answered in the affirmative, the second stage is to determine how such development is to take place.³³² Furthermore, the court stated that its power to develop the common law in such manner is not discretionary – but rather

³²⁹ In the Constitutional Court case of *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) held that the state (police officers and prosecutors) had acted negligently where they failed in their legal duty to protect the appellant from a sexual assault by a perpetrator who had previously been arrested and convicted, on more than one occasion, of similar offences. The court held that where the state failed to protect a woman from a particular man, who they knew had a violent nature, who they recommended be released from police custody on warning, while out on bail, the accused assaulted the appellant. This failure could amount in negligence thus giving a rise to a claim in delict.

³³⁰ Section 39(2) of the Constitution provides as follows:

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

³³¹ *Carmichele* supra note 329 at [40].

³³² *Ibid.*

an obligation.³³³ The law as regards this legal duty to protect of the state should be developed to include protection from human rights violations at the hand of MNCs.

Where an MNC is consistently violating human rights in South Africa and the appropriate South African authority has not done anything to stop such violations through their failure to hold such MNCs accountable, through failure to regulate MNC activities or through complicity or enabling of MNC human rights violations the state should be held liable in a similar nature to that of the Nigerian government in the *SERAC* case.

2.2. Constitutional Applicability of MNCs

Chapter 3 discussed the applicability of the South African Constitution to MNCs, stating that the direct horizontal application will only be possible in certain circumstances.³³⁴ The Constitutional Court case of *Mankayi*, discussed above briefly in chapter 3, highlighted an issue with the court's hesitation to directly horizontally apply the Constitution to MNCs who have violated human rights of South African citizens – but holding that the appellant had a delictual claim against the company. The appellant, however, passed away before any such claim could be instituted, and as result thereof it did not contribute as much as it could to the development of human rights accountability of corporations.³³⁵

The debate amongst academics on the advantages of direct and indirect horizontal application is extensive, while it seems fair to conclude that the courts have preferred indirect horizontal application over direct.³³⁶ Furthermore, courts favour holding the state accountable where possible, thus moving away from horizontality and expressing preference for vertical application of the Constitution over corporation violations.³³⁷ This preference is in line with the traditional model that companies' human rights compliance should only be voluntary, while states have duty to hold companies' liable through law and regulation.³³⁸ If the appellant in the *Mankayi* matter had seen his action to the finish line, the judgment could have paved the way for the development an actions against companies in delict on a human rights basis.

³³³ Ibid.

³³⁴ Constitution, s 8(2).

³³⁵ Smit op cit note 183 at 357.

³³⁶ Ibid at 370.

³³⁷ Ibid.

³³⁸ Ibid.

While the application of the Constitution would still have been indirect, the effect would be that a litigant could claim a company has a legal duty to protect their human rights – and that they have failed to do so – thus exposing them to a delictual claim.³³⁹ The judiciary is placed to recognise the existence of such legal duty – and such the law should be developed to form the contents and limits of said duty. Examples of these contents and limitations would be: would it apply to all stakeholders, what would be the requirements for reasonableness, are there limitations to the amount of damages an infringed party could be awarded, does the duty extend to all rights, including civil and political as well as socio-economic rights. These are some of the questions that the court in *Mankayi* could have answered had the appellant not died before his delictual claim could be realised. South African courts, however, are likely to encounter matters of a similar nature involving corporations and it is recommended that the courts recognise the direct horizontal application of constitutional rights on corporations. Section 8(2) of the Constitution allows for such direct horizontal application where it is applicable, ‘taking into account the nature of the right and the nature of the duty of the right’.

3. CONCLUSION

To conclude, MNCs are in a position to cause massive violations of human rights if they are not adequately regulated either by international, regional and/or national law. The Union Carbide factory explosion in India, the BP Oil Spill in in Gulf of Mexico, and the environmental degradation caused by Shell Petroleum in Nigeria are only a few instances where MNCs have violated human and environmental rights in countries in which they are operating. It is, therefore, essential that mechanisms be put in place and, where they are in place, they should be effective in holding MNCs accountable where they have violated human rights and to prevent them from committing further violations.

South Africa has various mechanisms available to them to address MNC activities that could potentially violate human rights as well as harm the environment. They have addressed such activities through administrative law, criminal sanctions

³³⁹ Ibid at 371.

through the investigating powers of the SAHRC to name a few. However, this thesis has recommended a few manners in which MNCs could be better held accountable for human rights violations.

This chapter had recommended that the legal duty to protect or the notion of state responsibility recognised under international, African regional and South African law should be extended to that of human rights violations committed by MNCs in South Africa. This chapter has further argued that in the South African context, that the judiciary should set an important precedent regarding direct horizontal applicability of the Constitution against MNCs.

BIBLIOGRAPHY

International Law

Treaties/ Conventions

- International Labour Convention, 'Minimum Age Convention' (1973) C138
- International Labour Organisation, 'Worst Form of Labour Convention' (1999) C182
- United Nation, 'Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal' (1997)
- United Nations, Charter of the United Nations (1945) 1 UNTS XVI. Hereafter referred to as the UN Charter.
- United Nations, Statute of the International Court of Justice (1945) annexure to the UN Charter
- UN General Assembly, International Convention on Civil and Political Rights (1966) 999 UNTS 302
- UN General Assembly, 'Convention on the Rights of the Child' (1989)
- UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, (Sept. 28,1966) 660 U.N.T.S. 195, 218
- UN General Assembly, 'Rome Statute of the International Criminal Court' (17 July 1998), available at <http://www.refworld.org/docid/3ae6b3a84.html>, accessed on 30 May 2016.
- UN General Assembly, Universal Declaration of Human Rights, (10 December 1948) 217 A III.

Case Law

- Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment, ICJ Reports (2010)
- Legality of the Threat of Use of Nuclear Weapons* ICJ Reports (1996) p 226

Declarations/ Guiding Principles and Other

- Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, art. 9., U.N. Doc. A/56/10 (2001)

International Labour Organisation, 'What is Child Labour' (2015), available at <http://www.ilo.org/ipecc/facts/lang--en/index.htm>, accessed on 24 March 2016

OECD, 'Guidelines For Multinational Enterprises' (OECD) OECD Publishing, available at http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en, accessed on 29 April 2016. Hereafter referred to as the OECD Guidelines.

United Nations, 'Rio Declaration on Environment and Development' (1992), available at <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>, accessed on 29 April 2016

United Nations, 'Stockholm Declaration on the Human Environment' (1972), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503>, accessed on 29 April 2016

African Regional Law

Treaties/ Conventions

African Union, Protocol to the African Charter on Human and People's Rights on the Establishment of African Court on Human and Peoples' Rights (1998), available at <http://www.achpr.org/instruments/court-establishment/>, accessed on 1 June 2016

Organisation of African Unity, 'African Charter on People's and Human Rights' (1981)

Organisation of African Unity, 'African Charter on the Rights and Welfare of the Child

Case Law

Social and Economic Rights Actions Centre and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Foreign Law

Case Law

New York Central and Hudson Railroad Co v United States 212 US 481 (1909)

United States v Bank of New England 484 US 943 (1987)

South African Law

Legislation

Basic Conditions of Employment Act 75 of 1997

Children's Act 38 of 2005

Companies Act 71 of 2008

Constitution of the Republic of South Africa, 1996

Environment Conservation Act 73 of 1989

Labour Relations Act 66 of 1995

Mineral And Petroleum Resources Development Act 28 of 2002

National Environmental Management Act 107 of 1998

National Water Act 36 of 1998

Regulations

Regulation 17 of GNR 543

Case Law

Bester v Wright 2011 (2) SA 75 (WCC)

Carmichele v Minister of Safety and Security 2001 (10) BCLR 995 (CC)

Ex Parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie 1992 (4) SA 804 (A)

Fisheries Development Corporation v Jorgensen 1989 (4) SA 156 (W)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others 2004 (2) SA 393 (E)

Khumalo v Hlomisa 2002 (5) SA 401 (CC)

Mankayi v Anglo Gold 2011 (3) SA 237 (CC)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC)

R v Bennett Co (Pty) Ltd 1941 TPD 194

S v Blue Platinum Ventures (Pty) Limited and Another (A588/15) [2015] ZAGPPHC 980 (25 August 2015)

S v Blue Platinum ventures (Pty) Ltd and Matome Samuel Maponya Case Number: RN126/13, in the Magistrate Court for the Regional Division of Limpopo Province held at Lenyenye

S v Frylinck North Gauteng Regional Court Case Number: 14/1740/2010 (Date of judgment: 6 April 2011)

South African Fabrics v Millman 1972 (4) SA 592 (A)

The Director: Mineral Development Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA)

Books and Journal Articles

Adisa Azapagic, 'Developing a framework for sustainable development indicators for the mining and minerals industry' (2004) 12 *Journal of Cleaner Production* 639 – 662 at 645

Anniki Laine, 'Integrated Reporting: Fostering Human Rights Accountability for Multinational Corporations' (2015) 47 *The George Washington International Law Review* 639 – 667

Carlos Vázquez, 'Direct v Indirect Obligations of Corporations Under International Law' (2005) 43 *Columbia Journal of Transnational Law* 927 – 959 at 933

Carolyn Scanlon Martorana, 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human & Peoples' Rights?' (2008) 2 *George Washington International Law Review* 583

Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimising Value Retention in the Extractive Industries* (2012) United Nations: New York and Geneva at 8

David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2001) *SALJ* 484 – 501

David Kinley and Junko Tadaki, 'The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) *Sydney Centre Working Paper 4* 933 – 1021

Debosmita Nandy and Niketa Singh, 'Making Transnational Corporations Accountable for Human Rights Violations' (2009) *2 NUJS Law Review* 75 – 92

Department of Labour *Child Labour Programme of Action for South Africa* (2008 – 2012) Department of Labour: Pretoria

Dinah Shelton, 'Soft Law' in *Handbook of International Law* (2008) Routledge Press: Washington

Dominique Lapierre and Javier Moro, *Five Past Midnight in Bhopal* (2002) Simon and Schuster Ltd: London

Eugene Cairncross and Sophia Kisting, 'Platinum Gold Mining in South Africa: The Context of the Marikana Massacre' (2016) *25 Journal of Environmental and Occupational Health Policy* 513 – 534

Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996), *25 Georgia Journal of International & Comparative Law* 289 – 397

Iain Currie and Johan De Waal, *The Bill of Rights Handbook* 6th Ed (2013) Juta Co and Ltd: Cape Town

Jan Glazewski and Emma Witbooi 'Environmental Law' (2004) *Annual Survey of South African Law* 397 – 422 at 418

- Jennifer Bol, 'Using International Law to Fight Child Labour: A Case Study of Guatemala and the Inter-American System' (1998) 13 *American University International Law Review* 1135 – 1223
- Jonathan Burchell, 'Criminal Liability of Corporations' in Jonathan Burchell *South African Criminal Law: Volume 1 General Principles of Criminal Law 4th edition* (2011) Juta and Co Ltd: Cape Town
- Lise Smit, 'Human Rights Litigation Against Companies in South African Courts: A Response to *Mankayi v Anglo-Gold Ashanti* 2011 (3) SA 237 (CC)' *SAHRJ* 354 – 373
- Louise Jordaan, 'New Perspectives on the Criminal Liability of Corporate Bodies' in Jonathan Burchell et al *Criminal Justice in a New Society: Essays in Honour of Solly Leeman* (2003) Acta Juridica: Cape Town
- Malcolm N. Shaw *International law 5th edition* (2003) Cambridge University Press: Cambridge
- M Gwanyana, 'The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities' (2015) 18 *PER* 3012 – 3131
- Muzaffar Eroglu *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (2008) MPG Books Ltd: London
- Ratna Kapur, 'From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations' (1990) 10 *Boston College Third World Law Journal* 1 – 43
- SD Kamga and OO Ajoku, 'Reflections On How To Address The Violations Of Human Rights By Extractive Industries In Africa: A Comparative Analysis Of Nigeria And South Africa' (2014) 17 *Potchefstroom Electronic Law Journal* 453 – 612

Sheri Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 442 – 477 at 448

USB, 'A Clash of Cultures (and Lawyers): A case study of Anglo Platinum and its Mogalakwena Mine in Limpopo, South Africa' (2009) *Corporate Governance in Africa Case Study Series: No 1* 1 – 26

Vincent Obisienunwo Orlu Nmehielle *The African Human Rights System: Its Laws, Practice, and Institution* (2001) Kluwer Law International: Hague

W Olaleya, 'Corporate Governance Practices of South African Mining Companies with Operations in South Africa' in Southern African Resource Watch *South African Mining Companies in Southern Africa: Corporate Governance and Social Responsibilities* (2010) Southern Africa Resource Watch: Johannesburg 19 – 46 at 37

Theses

12376622 *The Prospects and Challenges of a Regional Human Rights Mechanism For Corporate Responsibility in Africa* (unpublished LLM Thesis University of Pretoria, 2012) 3

Deborah Wangusa, *Multinational Corporations, Human Rights and Child Labour* (unpublished LLM Thesis, University of Pretoria 2013)

Internet References

Adiel Ismail, 'Coal of Africa Suffers Water Blow' 12 April 2016, *Fin24*, available at <http://www.fin24.com/Companies/Mining/coal-of-africa-suffers-blow-over-halt-of-makhado-water-licence-20160412>, accessed on 30 August 2016

Amy Humphries and Juliette Guiot, 'Child Labour' (2012) *Human Rights Youth Forum*, available at <https://mismun2012.wikispaces.com/file/view/Child+Labour.doc>, accessed on 24 March 2016

Bench Mark Foundation, 'Coping with Unsustainability' (2013), available at http://www.bench-marks.org.za/press/lonmin_report_print.pdf, accessed on 18 August 2016 at 31

David Bilchitz, 'Can the Environmental Rights in the South African Constitution Offer Protection to the Interests of Animals' (year), available at <https://www.uj.ac.za/faculties/law/saifac/PublishingImages/Pages/default/The%20Environmental%20Rights%20and%20Animal%20Interests.pdf>, accessed on 31 July 2016

Centre for Environmental Rights, 'Case Note: S V Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya', available at http://cer.org.za/wp-content/uploads/2014/04/Case-note-_S-v-Blue-Platinum-Ventures.docx, accessed on 30 August 2016

Charlotte Mathews, 'Court grants interdict to stop some work on CoAL mine' 12 December 2014, available at <http://www.bdlive.co.za/business/mining/2014/12/12/court-grants-interdict-to-stop-some-work-on-coal-mine>, accessed on 30 August 2016

Charlotte Matthews, 'Coal of Africa's Makhado Water License Suspended' 11 April 2016 *Business Day Live*, available at <http://www.bdlive.co.za/business/mining/2016/04/11/coal-of-africas-makhado-water-licence-suspended>, accessed on 30 August 2016

Christy van der Merwe, Coal of Africa submits final EIA for Controversial Colliery, 29th May 2009 *Creamer's Media's Mining Weekly*, available at http://www.miningweekly.com/article/coal-of-africa-submits-final-eia-for-controversial-colliery-2009-05-29/rep_id:3650, accessed on 30 August 2016

Gunther Handl, 'Declaration on the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (2012) *United Nations Audiovisual Library of International Law*, available at http://legal.un.org/avl/pdf/ha/dunche/dunche_e, accessed on 30 May 2016

Justin Truter, 'Environmental Law Compliance – The Noose of Tightening' (2014), available at <http://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/>, accessed on 30 August 2016

Margaret Cronin Fisk et al, 'BP Found Grossly Negligent in 2010 Gulf of Mexico Spill' *Bloomberg Business* 5 September 2014, available at <http://www.bloomberg.com/news/articles/2014-09-04/bp-found-grossly-negligent-in-2010-gulf-of-mexico-spill>, accessed 19 March 2016

Mark Curtis *Precious Metal: The Impact of Anglo Platinum on poor communities in Limpopo, South Africa* (2008) Published By ActionAid, available at https://www.actionaid.org.uk/sites/default/files/doc_lib/angloplats_miningreport_aa.pdf, accessed on 20 September 2016.

Mining Review Africa, 'Minister Dismisses Environmental Appeal against Coal of Africa Vele Colliery' 19 November 2015 in *Mining Review Africa*, available at <https://www.miningreview.com/news/minister-dismisses-environmental-appeal-against-coal-of-africa-vele-colliery/>, accessed on 30 August 2016

Mining Review Africa, 'Interdict Against Coal of Africa Makhado Project Postponed' 9 December 2015, available <https://www.miningreview.com/news/interdict-against-the-coal-of-africa-makhado-project-postponed/>, accessed on 30 August 2016

National Wildlife Federation, 'How does the BP Spill Impact Wildlife and Habitat?' (2010), available at <http://www.nwf.org/What-We-Do/Protect-Habitat/Gulf-Restoration/Oil-Spill/Effects-on-Wildlife.aspx>, accessed on 19 March 2016

SAHRC, 'Mining-Related Observations and Recommendations: Anglo-Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo' (2008), available at http://www.sahrc.org.za/home/21/files/Reports/Anglo%20Report%20Final%202008_Chapter%201%20to%203.pdf

University of Michigan, 'Environmental Justice Case Studies', available at <http://www.umich.edu/~snre492/Jones/thorchem.htm>, accessed on 29 April 2016