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Indigenous Peoples in Africa and Transnational Corporations: Human Rights and Environmental Aspects

A Thesis Submitted to the Faculty of Law and Administration, University of Silesia in Katowice, for the Degree of Doctor of Philosophy (PhD)

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Summary

This thesis aims to analyse various instruments on the protection of the rights of Indigenous Peoples in Africa in relation to transnational corporations (TNCs) activities. The idea is to point to the human rights system in Africa as having the potential to effectively protect the rights of Indigenous Peoples in Africa if properly strengthened using the African Approaches to International Law (AAIL) as an interpretative tool. The central hypothesis, therefore, is that universal international law has not been effective in protecting the rights of Indigenous Peoples in Africa from the activities of TNCs, thereby creating a need to complement it with the innovative legal norms and developments under the African human rights, environmental, and investment law regimes for more effective protection of Africa's Indigenous Peoples. One of the reasons for the ineffectiveness of international law in protecting the rights of Indigenous Peoples in Africa is the deliberate exclusion of the peculiarities of Africa and some norms emanating from Africa from forming part of the general international law discourse. Based on an extensive analysis of Africa's human rights, environmental, and investment law regimes, this thesis appreciates those norms capable of effectively protecting Indigenous Peoples in Africa from violations committed by TNCs. To achieve this, seven principal lines of inquiry are pursued in this thesis: (1) are there Indigenous Peoples in Africa, and how should they be identified (2) what is the nature and underlying principles that underpin the operation of TNCs operating in Africa (3) do Indigenous Peoples have rights under international law (4) what are the sources of State obligations towards African Indigenous Peoples and are those obligations effective in the protection of the rights of Indigenous Peoples in Africa (5) what are the responsibilities of TNCs and is the universal human rights system capable of forcing TNCs to meet the need to protect Indigenous Peoples in Africa (6) what are Africa's developments in the protection of the rights of Indigenous Peoples in Africa are they able to protect Indigenous Peoples in the continent effectively (7) what interpretative role can AAIL play in the interpretation of the rights of Indigenous Peoples, and how can it be improved as an effective tool for protecting Indigenous Peoples' rights. Furthermore, this thesis utilises AAIL as a theoretical framework and primarily library-based research to arrive at its conclusion, which serves as its contribution. The various methods employed in this thesis reveal the different areas of public international law that cut across the thesis – international human rights, international investment law, and international environmental law with references to climate change law. Comparatively, the same areas of public international law are examined in the context of the African Union (AU) legal framework with the aim of finding out how the various regimes in Africa could complement the existing universal international law in the protection of the rights of Indigenous Peoples in Africa. References are equally made to the human rights system, including the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, especially regarding those rights Indigenous Peoples are entitled to. Each part addresses the different lines of inquiry of the thesis. Part One is dedicated to conceptualising Indigenous Peoples and TNCs. Part Two examines some Indigenous Peoples' rights together with the obligation of States to protect these rights and corporate responsibilities in business and human rights. Finally, Part Three analyses the various human rights, environmental, and investment law regimes. The thesis is concluded with final remarks and recommendations.

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PART TWO

INDIGENOUS PEOPLES RIGHTS AND STATE AND TRANSNATIONAL CORPORATIONS OBLIGATIONS

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Abbreviations

AAA	Africa Arbitration Academy
AAIL	African Approaches to International Law
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACJHPR	African Court of Justice on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AfCFTA	African Continental Free Trade Area
AfCHPR	African Court on Human and Peoples' Rights
AMDC	African Minerals Development Centre
AMV	Africa Mining Vision
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ATS	Alien Tort Statute
AU	African Union
BBNJ	Biodiversity Beyond National Jurisdiction Treaty
BITs	Bilateral Investment Treaties
CBD	Convention on Biodiversity
CCIA	COMESA Common Investment
CCPR	Centre for Civil and Political Rights
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIL	Customary International Law
CJAU	Court of Justice of the African Union
COMESA	Common Market for Eastern and Southern Africa
COP	Conference of the Parties
CSDD	Corporate Sustainability Due Diligence
CSP	Conference of State Parties
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
EAC	East African Community
ECOWAS	Economic Community of West African States
ECOWIC	ECOWAS Common Investment Code
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EU	European Union
FDI	Foreign Direct Investment
FDL	Foreign Direct Liability
FPIC	Free, Prior and Informed Consent
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESER	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILO	International Labour Organisation
ISDS	Investor-State Dispute Settlement
IWGIA	International Work Group for Indigenous Affairs
MFN	Most Favoured Nation
MNCs	Multinational Corporations
NAFTA	North American Free Trade Agreement
NCPs	National Contact Points
NDCs	Nationally Determined Contributions
NGBITs	New Generation of Bilateral Investment Treaties
NGOs	Non-Governmental Organisations
NIEO	New International Economic Order
NLSC	Not Lowering of Standards Clause
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-ended Intergovernmental Working Group
OHCHR	Office of the High Commissioner for Human Rights
PAIC	Pan African Investment Code
PCIJ	Permanent Court of International Justice
PPRTR	Protocol on Pollutant Release and Transfer Registers
PRTRs	Pollutant Release and Transfer Registers
RBC	Responsible Business Conduct
RECs	Regional Economic Communities
SADC	Southern African Development Community
SAIFAC	South African Institute for Advanced Constitutional, Public, Human Rights and International Law
SAMDC	Statute of the African Minerals and Development Centre
SDGs	Sustainable Development Goals
TNCs	Transnational Corporations
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series

WCIP	World Council of Indigenous Peoples
WG-ECOSOC	Working Group on Economic, Social and Cultural Rights
WGEI	Working Group on Extractive Industries, Environment and Human Rights Violations
WTO	World Trade Organisation

Introduction

Africa has had a long history of relationships with other continents, from the slave trade and colonialism to trade partnerships, mutual migrations from Africa, Europe, and North America for studies and jobs, etc. In trade relationships, Africa is the destination point for many European and Chinese transnational corporations (TNCs) for foreign direct investment for many reasons: (1) Africa has abundant natural resources.[1] It has been described as a "resource-rich" continent[2] as it is home to some 30% of the earth's mineral reserves, 10% of the world's crude oil, and 8% of the world's natural gas reserves.[3] (2) There is an affordable labour force in Africa[4] due to the high population growth rate, leading to increased consumer market growth.[5] (3) Many TNCs that invest in Africa are also subjected to fewer regulatory restrictions or are given certain concessions to attract them.[6] The implication of this is that high exploration and mining of natural resources occur in Africa, and of course, with its attendant environmental pollution and degradation and human rights abuses of the Indigenous Peoples on whose territories these natural resources are located. Worse still, the continued mining and indiscriminate use of natural resources worldwide contribute to global climate change and increasing climate risks to local communities.[7]

Closely related to this is the definitional understanding of who Indigenous Peoples are in the context of Africa. Africa is home to several groups of communities that identify themselves as Indigenous Peoples, although going by the Western understanding of who the Indigenous

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[1] Amon Bunyong, "Africa Tomorrow: Decades of Natural Resource Exploitation and Underdevelopment" (2022) 4(7) *Journal of Social Science and Humanities* 45 – 46; Christopher Oyier, "Multinational Corporations and Natural Resources Exploitation in Africa: Challenges and Prospects" (2017) 1(2) *Journal of Conflict Management and Sustainable Development* 69, 73.

[2] Charlotte J Lundgren, Alun H Thomas, and Robert C York, "Boom, Bust, or Prosperity? Managing Sub-Saharan Africa's Natural Resource Wealth" (2013 *International Monetary Fund*) 4 <https://www.imf.org/external/pubs/ft/dp/2013/dp1302.pdf> accessed 24 February 2021.

[3] Michael Appiah, "Foreign Investment and Growth: A Case of Selected African Economies" (2019) 5(3) *International Entrepreneurship Review* 7, 13; Oyier (n 1) 18.

[4] Dianna Games, "Ethiopia Gambles on Cheap Labour" (*African Business* 12 July 2019) <https://african.business/2019/07/economy/ethiopia-gambles-on-cheap-labour/> accessed 22 February 2021.

[5] Jean Pierre Mujyambere, "The Status of Access to Effective Remedies by Victims of Human Rights Violations Committed by Multinational Corporations in the African Union Member States" (2017) 5(2) *Groningen Journal of International Law* 255, 257.

[6] ibid. According to Sucker, while analysing digital trade in Africa, expresses the fear that "some countries might lower their standards to attract foreign direct investment." See Franziska Sucker, "Digital Trade Protocol for Africa: Why it matters, what's in it and what's still Missing" (*The Conversation*, 31 March 2024) <https://theconversation.com/digital-trade-protocol-for-africa-why-it-matters-whats-in-it-and-whats-still-missing-225908> accessed 11 May 2024.

[7] Hilary Bambrick, "Resource Extractivism, Health and Climate Change in Small Islands" (2018) 10(2) *International Journal of Climate Change Strategies and Management* 272.

Peoples are, there is a controversy about whether Indigenous Peoples exist in Africa.[8] Like elsewhere,[9] most of Africa's natural resources are in the Indigenous Peoples' territories. The result is that these Indigenous Peoples in Africa suffer the most from the effects of violations of international environmental and human rights laws by TNCs while exploring the natural resources within their territories. Ordinarily, international human rights and environmental law should offer adequate protection to Africa's Indigenous Peoples as rights holders. However, on the contrary, they are said to be "Eurocentric," and according to Ikejiaku, these laws serve only the interests of Westerners and their transnational businesses.[10] This is why, notwithstanding the existence of some international legal instruments, TNCs in Africa still engage in the violations of environmental law and human rights within Indigenous Peoples' territories. This is partly because of the absence of direct corporate human rights and environmental obligations. In other words, in Africa, a gap exists between Indigenous Peoples' realities and those rights that international law sets to protect. As discussed later, another reason for the continued violation of the rights of Indigenous Peoples by TNCs is as a result of failed attempts at holding them accountable because of their status as non-subjects of international law.

An analysis of these instruments and the realities on the ground show this gap. Because of the definitional conflict of Indigenous Peoples, most of the African communities that recognise themselves as Indigenous Peoples may not benefit from the positives of some of the international law instruments that protect and safeguard Indigenous Peoples' rights, especially the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[11] the Indigenous and Tribal Peoples Convention (ILO Convention 169),[12] International Covenant on Civil and

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[8] Jérémie Gilbert, "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights" (2011) 60(1) *International and Comparative Law Quarterly* 245, 248 – 249.

[9] The Secretariat of the United Nations Permanent Forum on Indigenous Issues, "Indigenous Peoples, Land, and Natural Resources: An Overview" in Diane Andrews Henningfeld (ed) *Indigenous Peoples* (Greenhaven Press, 2009) 116, 120, here, according to Ms Tauli-Corpuz, Chairperson of the UN Permanent Forum on Indigenous Issues, the majority of the world's remaining natural resources – minerals, freshwater, potential energy sources and more - are found within indigenous peoples' territories. See also Carter Squires, Kelsey Landau, and Robin J Lewis, "Uncommon ground: The impact of natural resource corruption on indigenous peoples" (*Brookings Blog* 7 August 2020) <https://www.brookings.edu/blog/up-front/2020/08/07/uncommon-ground-the-impact-of-natural-resource-corruption-on-indigenous-peoples/> accessed 29 April 2021.

[10] Brian-Vincent Ikejiaku, "International Law is Western Made Global Law: The Perception of Third-World Category" (2015) 6 *African Journal of Legal Studies* 337, 341. See Karin Mickelson, "South, North International Environmental Law, and International Environmental Lawyers", (2000) 11 *Yearbook of International Environmental Law* 52, where the author recognises the fact that in the scheme of things, the global South, especially Africa, is portrayed as "as a grudging participant in environmental regimes rather than as an active partner in an ongoing discussion regarding what the fundamental nature of environmental". See page 60.

[11] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

[12] International Labour Organisation (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989, C169.

Political Rights (ICCPR),[13] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[14] This, as examined in Chapter One, is because of the "overly Western" definition of Indigenous Peoples.[15]

This thesis will also look at human rights in the context of TNCs' business activities. In other words, it will inquire into the non-observance of business and human rights treaties pertaining to African Indigenous Peoples. In Chapter Two, various instances of human and environmental violations by TNCs will be examined to evaluate how the current international human rights regime has not been effective. For instance, Syngenta, a Swiss corporation, has been accused of selling pesticides that contain toxic substances to Africa, even though the pesticide had already been banned for use in the European Union and Switzerland, and exposure to it can cause Parkinson's disease and kidney problems.[16] The smelting of copper from Chelopech in Bulgaria, which has high arsenic trioxide, was first banned in Bulgaria and subsequently by the EU[17] because it is hazardous to human health. Some Swiss and Canadian TNCs import ore from Chelopech in Bulgaria to Namibia for smelting and then export the finished products back to Western countries. This practice, which has been described as "[e]xporting toxic pollution from Europe to Namibia",[18] not only affects the Indigenous People of San in Namibia but exposes the gap in the effectiveness of the present international law in protecting the rights of the Indigenous Peoples in Africa. Again, in Nigeria, Royal Dutch Shell Plc did not just cause pollution to the lands of the Indigenous Peoples of Ogoni; the company procured the Nigerian military to kill protesters. This was with the approval of the Nigerian government.[19] The oil spillage is so massive that it has been compared to "seven Olympic swimming pools of oil."[20]

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[13] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol 999, p 171,

[14] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, res 2200A (XXI) of 16 December 1966, (entered into force on 3 January 1976) 993 UNTS 3.

[15] Gilbert (n 8) 250.

[16] Fiona Harvey, "Toxic Pesticides Banned for EU use Exported from UK" (*The UK Guardian*, 10 September 2020) <https://www.theguardian.com/environment/2020/sep/10/toxic-pesticides-banned-for-eu-use-exported-from-uk> accessed 24 February 2021; Kristin Schafer, "Switzerland to stop Exporting Banned Pesticides" *PAN*, 15 October 2020 <https://www.panna.org/blog/switzerland-stop-exporting-banned-pesticides#:~:text=This%20week's%20decision%20affects%20five,be%20exported%20from%20the%20country> accessed 24 February 2021.

[17] Genady Kondarev, "Exporting toxic pollution from Europe to Namibia" (*Bankwatch Newtwork*, 19 November 2015) <https://bankwatch.org/blog/exporting-toxic-pollution-from-europe-to-namibia> accessed 02 February 2024.

[18] Ibid.

[19] Bronwen Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch, 1999) 170.

[20] Amnesty International, "The Niger Delta is One of the Most Polluted Places on Earth" (*Amnesty International*, March 2018) <https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spills-decoders/> accessed 08 April 2021.

Vedanta Resources Plc, KCM, registered in the UK, through its business activities in Chingola, Zambia, has turned the only source of water for the Indigenous Peoples into "rivers of acid",[21] and once you are in the villages, "you can smell and taste the pollution".[22]

The above instances violate international human rights and environmental protection instruments regarding the rights of Indigenous Peoples in Africa and elsewhere. These rights, which are already enshrined under international law instruments, include the right to life, the right to own lands and natural resources, the right to a healthy environment,[23] the right to cultural and natural heritage,[24] the right not to be discriminated against,[25] right to public participation in decision-making that would affect their environment,[26] etc. Even though some of these rights are fundamental and protected under hard international law instruments, like the ICCPR and ICESCR,[27] they are not observed by States and TNCs while doing business in Africa. This is because of a fundamental issue underlying public international law – the exclusion of Africa's peculiarity in negotiating international law instruments.

The existence of rights entails the existence of an obligation to protect those rights. International human rights instruments like the ICCPR, ICESCR, the ILO Convention, and so on impose certain obligations on States as the primary addressees of human rights protection as part of a State exercise of its sovereign power. As examined in Chapter Four, these obligations are grouped into the obligation to respect, fulfil, and protect individuals and groups against human rights abuses. Although these obligations are elaborate, a gap exists in business and human rights. Some of the obligations in this area are contained in legally non-binding instruments and do not create a binding obligation to respect and protect human rights generally and the rights of Indigenous Peoples. Some of them include the UN Guiding Principles on Business and Human Rights (UN Guiding Principles),[28] the OECD Guidelines for

[21] BBC, "'Rivers of Acid' in Zambian Villages" (*BBC News*, 8 September 2015) <https://www.bbc.com/news/world-africa-34173746> accessed 9 April 2021.
[22] John Vidal, "'I Drank the Water and Ate the Fish. We All Did. The Acid Has Damaged me Permanently'" (*The Guardian*, 1 August 2015) <https://www.theguardian.com/global-development/2015/aug/01/zambia-vedanta-pollution-village-copper-mine> accessed 9 April 2021.
[23] United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters* (the Aarhus Convention) of 28 June 1998 (entered into force 30 October 2001) 2161 UNTS 447, the Preamble.
[24] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295 [art 31 (1)].
[25] ibid, art 25.
[26] Aarhus Convention (n 23) art 6.
[27] These two covenants were built on the rights in the Universal Declaration of Human Rights. See UN General Assembly, *Universal Declaration of Human Rights* (UDHR)10 December 1948, 217 A (III).
[28] The United Nations Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie Guiding*

Multinational Enterprises,[29] the Tripartite Declaration of the International Labour Organisation on Multinational Enterprises (ILO Tripartite Declaration),[30] and the United Nations Global Compact.[31]

Similarly, international investment law regimes, represented in various bilateral investment treaties and multilateral investment treaties, will be examined in Chapters Four and Five. The examination is to discover if gaps exist in international investment law that often result in the failure to hold TNCs accountable for human rights and environmental violations. On the preliminary, TNCs and investors are not ordinarily obligated to respect, protect, and fulfil human rights. There is a link between the absence of a corporate obligation to protect human rights and their involvement in human rights and environmental violations. Although contained in legally non-binding instruments, existing investment law instruments create an indirect obligation to human rights on TNCs. The ongoing attempt at creating a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (Legally Binding Instrument)[32] is an attempt to bridge this gap. Yet, the 2023 draft copy of the document does not include direct obligations for TNCs.

For Indigenous Peoples, the issue of environmental protection is equally important due to their special relationship with their natural environment. The increasing reports of environmental pollution and degradation on the territories of Indigenous Peoples directly impinge on their human rights. Therefore, there is a connection between environmental violation and breach of human rights, especially when examined in the context of business activities by TNCs. So, this thesis will look at these issues and gaps in international law and how new norms from Africa

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Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011).

[29] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023 edn) <https://mneguidelines.oecd.org/mneguidelines/ > accessed 02 January 2024.

[30] International Labour Office, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions. The MNE has gone through series of amendments, the last been on 17 March 2017 <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_547615/lang--en/index.htm> accessed 28 April 2021.

[31] United Nations, *The UN Global Compact* < https://www.unglobalcompact.org/what-is-gc/mission/principles > accessed 28 April 2021.

[32] Intergovernmental Working Group, *Updated draft legally binding instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* (Legally Binding Instrument), July 2023 <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf> accessed 02 December 2023.

can be used to bridge this gap and complement international law in the protection of Indigenous Peoples. These new norms, as examined in Chapters Six and Seven, include the right to a healthy environment, the right to development, and the protection of other collective rights under the African Charter. For investment law, the attempt to introduce direct corporate human rights obligations for investors will be examined in relation to innovative environmental law norms.

2. Hypothesis and Scope

The main hypothesis formulated for this thesis is that universal international law has not been effective in protecting the rights of Indigenous Peoples in Africa from the activities of TNCs, thereby creating a need to complement it with the innovative legal norms and developments under the African human rights, environmental, and investment law regimes for more effective protection of Africa's Indigenous Peoples.

Furthermore, each chapter addresses the following **sub-hypotheses**:

1. Indigenous Peoples in Africa are not fully covered by international definitions of Indigenous Peoples, which leads to their invisibility.
2. TNCs and some States in Africa are more interested in pursuing economic benefits than they are in respecting the rights of Indigenous Peoples.
3. The identification and recognition of a group as an Indigenous group lead to the enjoyment of rights that are most important to Indigenous Peoples, even though some of these rights have been violated by TNCs.
4. Although African States are obligated to fulfil, protect, and respect human rights, these obligations towards human rights within business activities are mostly contained in non-binding instruments.
5. The international community's reluctance to have a binding instrument on the responsibility of TNCs to respect human rights is directly linked to increased reports of human rights and environmental law violations by TNCs in collaboration with States.
6. Some new developments in Africa address these gaps in the protection of the rights of Indigenous Peoples and the responsibilities of TNCs.

7. The African approach to international law embodies these new developments. However, there are challenges to the AAIL as an interpretative tool, especially when the contributions of Africa to human rights discourse have always been questioned.

Arguments and analysis of issues are used to prove the main hypothesis and sub-hypotheses, and this also guides the delineation of the scope of this thesis. For instance, while references may be made to Indigenous Peoples' situation on other continents, this thesis is based on advancing Indigenous Peoples' rights in Africa and how their human rights can be protected in a business context. These standards refer to those established in international human rights law, international environment law, climate law, and international investment law. It excludes international private law and other fields of public international law like international criminal law, international security law, international humanitarian law, diplomatic law, and others.

3. Research Questions

To achieve the main hypothesis and sub-hypotheses, the following research questions are addressed in each chapter of the thesis:

1. Who are the Indigenous Peoples in Africa? What are their specific characteristics and methods of identifying them?
2. What is the nature of TNCs operating in Africa, and what underlying principles underpin their operation in Africa?
3. Which rights are most important for African Indigenous Peoples, and are these rights adequately protected?
4. What are the sources of State obligations towards African Indigenous Peoples, and are those obligations effective in the protection of the rights of Indigenous Peoples in Africa?
5. What are the responsibilities of TNCs and the measures of redress for violations by TNCs? Is the universal human rights system, environmental treaties, and international investment law capable of forcing TNCs to meet the need to protect Indigenous Peoples in Africa?
6. What are Africa's developments in the protection of the rights of Indigenous Peoples? Put differently, can the current African law effectively protect Indigenous Peoples in the continent and fill the gaps in international law?

7. What interpretative role can the AAIL play in the interpretation of the rights of Indigenous Peoples, and how can it be improved as an effective tool for protecting Indigenous Peoples' rights?

4. Methods

This thesis primarily adopts legal-dogmatic or doctrinal research. Legal-dogmatic or doctrinal research is "seen as a study of existing law (*lex lata*) – and nothing else" and "is concerned with the analysis of the legal doctrine and how it was developed and applied."[33] Using this method, both primary and secondary research resources were utilised to make a legal analysis of the present international law regimes and offer reform methods, especially regarding Indigenous Peoples in Africa and protecting their human rights from TNCs' activities. The primary resources include conventions and international, regional, and domestic cases. Primary resources like reports from the AU agencies and reports from UN expert bodies like the Human Rights Committee (HRC) and Committee on Economic, Social and Cultural Rights (CESCR) would equally be relied on.

The literature on the subject will be examined based on human rights, investment law, and environmental law. By extension, AU instruments on human rights, investment, and environmental law will be analysed to point out their contribution to international human rights discourse. To better illustrate the contents of these instruments, jurisprudence from judicial and quasi-judicial human rights bodies will also be examined. Equally, the jurisprudence from the AU human rights organs will be extensively relied upon while referencing other regional bodies like the European Court of Human Rights and the Inter-American Court of Human Rights for comparison.

Adopting the doctrinal approach, apart from looking at binding international human rights and environmental laws that protect Indigenous Peoples' rights, will also look at soft rules developed to hold TNCs accountable for violating human rights and environmental standards. These soft rules, described by Kanalan as codes of conduct,[34] include the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration, and the United Nations Global Compact.

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[33] Salim Ibrahim Ali and others, "Legal Research of Doctrinal and Non-Doctrinal" (2017) 4(1) *International Journal of Trend in Research and Development* 493.

[34] Ibrahim Kanalan, "Horizontal Effect of Human Rights in the Era of Transnational Constellations: On the Accountability of Private Actors for Human Rights Violations" in Marc Bungenberg and others (eds) *European Yearbook of International Economic Law* (Springer International Publishing, 2016) 423, 429.

Other methods employed in this research include the historical, sociological, and comparative methods. The historical method is important in understanding the historical perspective of Indigenous Peoples and how colonialism and decolonisation resulted in the perceived marginalisation of Africa from mainstream international law. On the other hand, the sociological method will be employed to evaluate the relationship between Indigenous Peoples and the other members of society and the government, their cultural way of life, and their attachment to land. It is also employed in the characterisation of Indigenous Peoples based on the socio-psychological approach. Finally, comparative analysis is central to this thesis as it will be employed to compare judgements from other jurisdictions on the rights of Indigenous Peoples.

This thesis identifies three main stakeholders: Indigenous Peoples in Africa, TNCs, and African States. The research resources are based on sources from these three stakeholders as literature relating to TNCs' activities in Africa, the Indigenous Peoples' rights, and the State obligations to protect Indigenous Peoples' rights and regulate investment in their territories will form the fulcrum of this work. The result would be the refocusing of international law (human rights, environmental law, and investment law regimes) to capture the peculiarities of Indigenous Peoples in Africa, primarily as it affects the regulation of TNCs' activities in the territories of Indigenous Peoples in Africa.

5. Thesis Structure

This thesis progresses from the introduction, principal discussions, final remarks, and recommendations. The contents and arguments are grouped into three parts of seven chapters.

Part One – Main Stakeholders of Competing Interests and Rights of Indigenous Peoples: This part is dedicated to the stakeholders identified by this thesis – Indigenous Peoples, TNCs, and States. It aims to establish the relationship that exists among them. While Indigenous Peoples are interested in asserting their rights over their lands and natural resources, TNCs work towards the continued use of these resources. Some African States, on the other, deny the existence of Indigenous Peoples in their countries, and even where they are recognised, the States do not allow them to enjoy an essential right of Indigenous Peoples – the right to self-determination. Divided into two chapters, **Chapter One** starts with the various definitions of Indigenous Peoples under international law and how Africa has instead adopted the socio-psychological approach to solving the definitional problem so as to accommodate the various groups that identify as indigenous in Africa. It finally examines the situation of some of these

Indigenous Peoples, selected on the basis of their situation and the legal impact they have made to advance the rights of Indigenous Peoples in Africa. **Chapter Two** looks at the various ways of viewing TNCs, their activities in Africa, and their status in international law. It finally looks at African States, their attitudes towards the recognition of Indigenous Peoples, and their complicities in the various human rights abuses towards indigenous groups in Africa.

Part Two – Indigenous Peoples Rights and State and Transnational Corporations Obligations: Moving from Part One, this part aims to explore the rights of Indigenous Peoples and the various obligations and commitments States and TNCs, respectively, owe to Indigenous Peoples. This part is divided into three chapters to achieve this. **Chapter Three** delves into the various human rights of Indigenous Peoples. The aim is to point out that even though these rights exist, they have been consistently violated in Africa by TNCs. These rights were selected based on their importance to Indigenous Peoples and the level of their violations. **Chapter Four** traces the various sources of State obligations to Indigenous Peoples. These obligations arise from international human rights, environmental law, climate change and international investment law. Although some of these commitments, especially the business and human rights commitments, are contained in legally non-binding instruments, there is an ongoing attempt to develop a binding instrument called the Legally Binding Instrument.[35] In addition, this chapter emphasises that States should be able to legitimately exercise their police powers under international investment law to expropriate investments that violate human rights and environmental law. Similarly, **Chapter Five** examines TNCs' human rights and environmental responsibilities. An argument is made that notwithstanding the fact that States are currently the only addressees of human rights obligations, the new trend, as typified in the new generation of bilateral investment treaties, is to create responsibilities for TNCs. Fortunately, BITs are binding. Also, the Legally Binding Instrument aims to create indirect human commitments on TNCs, which, if adopted, will serve as a binding instrument in this regard.

Part Three – Africa's Model Laws and their Specifics: This last part analyses the AAIL and the likely impediments to its actualisation. Divided into two chapters, **Chapter Six** discusses the conceptualisation of AAIL, its development, and the different angles from which it is looked at. It moves further by studying the uniqueness of the various human rights instruments in Africa and their effectiveness. This uniqueness is appreciated even more when considering

[35] Legally Binding Instrument (n 32).

how Africa has always been at the forefront of introducing new concepts that could change international law. On the other hand, **Chapter Seven** examines some environmental treaties in Africa and Africa's international investment law regimes. It points to their unique features and how the African Court and African Commission have interpreted these documents as legal frameworks for the protection of the rights of Indigenous Peoples.

6. Contributions to General Body of Knowledge

Despite the existence of a significant volume of literature in international law encompassing, among others, international environmental law,[36] international human rights,[37] international investment law,[38] and the rights of Indigenous Peoples,[39] a noticeable gap exists in the scholarship relating to the rights and protection of Indigenous Peoples in Africa, particularly as it pertains to the business activities of TNCs in Africa. Available literature in this area mainly focuses on the need to protect the environment and human rights in the context of business activities. Presently, no literature examines Indigenous Peoples in Africa *vis-à-vis* environmental protection and investment law in Africa through the lens of AAIL. Also, examining how TNCs carry out business activities in Africa within Indigenous Peoples' territories indicates a gap in international law between the reality of Indigenous Peoples and what international law truly sets to achieve.[40] Therefore, this thesis would provide a bridge in this area by serving as a roadmap towards developing guidance and benchmarks on making

[36] Zoltán Szira, "Legal Tools in International Environmental Law" (2021) 10(2) *EU Agrarian Law* 13 – 20; Clara Brandi, Dominique Blümer, and Jean-Frédéric Morin, "When Do International Treaties Matter for Domestic Environmental Legislation?" (2019) 19(4) *Global Environmental Politics* 14 – 44; Ben Campbell and others, "Latent Influence Networks in Global Environmental Politics" (2019) 14(3) *PLoS ONE* 1 – 17.

[37] Biljana Karovska-Andonovska, "Human Rights Law and Humanitarian Law: Between Complementarity and Contradiction" (2021) 17 *Balkan Social Science Review* 25 – 40; Siobhán Mcinerney-Lankford, "Rewarding in International Human Rights Law?" (2021) 115 *AJIL Unbound* 232–236; Samantha Besson, "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?" (2016) 61(1) *The American Journal of Jurisprudence* 69-107.

[38] Barnali Choudhury, "Investor Obligations for Human Rights" (2020) 35(1-2) *ICSID Review - Foreign Investment Law Journal* 82–104; Agata Ferreira, "Intertwined Paths of Globalization and International Investment Law" (2020) 19(2) *Journal of International Trade Law and Policy* 85-99; Stephan W Schill, "Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law" in Samantha Besson and Jean d'Aspremont (eds) *The Oxford Handbook of the Sources of International Law*, (Oxford University Press, 2018) 1095–1116.

[39] Karolina Sikora, "The Right to Cultural Heritage in International Law, with Special Reference to Indigenous Peoples' Rights" (2021) 2(7) *Santander Art and Culture Law Review* 149-172; Karolina Prażmowska-Marcinowska, "Repatriation of Indigenous Peoples' Cultural Property: Could Alternative Dispute Resolution Be a Solution? Lessons Learned from the G'psgolox Totem Pole and the Maaso Kova Case" (2022) 2(8) *Santander Art and Culture Law Review* 135 – 158; Britney Villhauer, "Indigenous Autonomy and Self-Determination in International Forest Financing Strategy: A Case Study from the Indigenous Bribri People of Costa Rica" in Sylvanus Gbendazhi Barnabas (ed) *Indigenous and Minority Populations - Perspectives From Scholars and Writers across the World* (IntechOpen, 2023) 1 – 12.

[40] The central role of international law is to promote global peace and security by establishing institutions that smooth over opposing interests. See Philippe Cullet, Lovleen Bhullar, and Sujith Koonan, "Water Security and International Law" (2021) 17 *Annual Review of Law and Social Science* 261, 267.

international law effective in protecting Indigenous Peoples in Africa. Regarding the existing body of knowledge, two theses have recently been submitted in Poland that deal either with the rights of Indigenous Peoples or the responsibility of TNCs in international law, but they are silent on the legal protection of Indigenous Peoples in Africa.[41]

The ultimate contribution made by this thesis is the expansion of AAIL. While AAIL scholars identify three approaches to understanding it – the contributionist approach, the critical traditionalist approach, and the intermediary approach, this thesis makes an addition by establishing AAIL as an interpretative tool. What this means is that whenever a court or a tribunal in Africa is to interpret an Indigenous Peoples' right or, more broadly, a human right or when applying an international norm, it should understand the historical context of the right/norm and the normative nature of the right/norm, that is, whether the right/norm is of Western or African origin. Historically, if the right/norm arose as a result of colonialism or as an attempt to emasculate Africa further economically, such a right/norm should be suppressed. On the other hand, if the right/norm arose from Africa as a response to the perceived inadequacy of international law or as a result of Africa trying to assert itself as equally capable of creating rights/norms, the court or tribunal should as far as possible, give meaning to the right/norm.

[41] See for instance, Karolina Prażmowska-Marcinowska, "Arctic Indigenous Peoples' Cultural Rights and Climate Change" (PhD Thesis, University of Silesia in Katowice, Poland, 2023) <https://bip.us.edu.pl/sites/default/files/2024-03/Rozprawa_doktorska_mgr_K._Pra%C5%BCmowska-Marcinowska.pdf> accessed 24 May 2024. As the title suggests, the work is limited to the Arctic Indigenous Peoples, although references are made to some of the international legal instruments referred to in this present thesis. So, there is a need to bring in the African perspective and expand it to areas like investment law. See also, Kamil Boczek, "Responsibility of Transnational Corporations in International Law" (PhD Thesis, University of Warsaw, 2023) <https://repozytorium.uw.edu.pl/entities/publication/6e2a4542-a13b-4d0f-ad94-aba1feb36c20> accessed 24 May 2025. This work does extensive work in the area of responsibility of TNCs but does not relate it to Indigenous Peoples or the obligations of States in international law. Although the work refers to the jurisprudence in Africa, it does not go further as "it is too soon to assess the functioning of the ACHR or even State that a human rights protection framework already exists in Africa" (pg. 99). So, this present thesis aims to fill these gaps in this thesis.

PART ONE

MAIN STAKEHOLDERS OF COMPETING INTERESTS AND RIGHTS OF INDIGENOUS PEOPLES

Chapter ONE: Conceptualising Indigenous Peoples in Africa

Chapter TWO: Transnational Corporations and Their Relationship with African States

Chapter ONE

Conceptualising Indigenous Peoples in Africa

1.1.Introductory Remarks

In this Chapter, this thesis examines one of the three main stakeholders involved in this research – Indigenous Peoples. The Chapter shows the interdisciplinary nature of this research, which cuts across law, sociology and anthropology, and investment law. While this Chapter defines Indigenous Peoples broadly to cover all the possibilities of Indigenous Peoples in Africa, only four groups of Indigenous Peoples – the Ogoni people of Nigeria, the Endorois people and Ogiek of Kenya, the Pygmy peoples, and the San People of Southern Africa – would be examined. This is because of their special status and the particular legal issues they have created and to represent the various regions of Africa.

Instead of starting with the general concept of Indigenous Peoples, the thesis begins with the indigeneity of African peoples *vis-à-vis* the definitional problem of Indigenous Peoples in Africa. Also, the vulnerability of Africa's Indigenous Peoples would be analysed as proof of Africa's Indigenous Peoples suffering most of the effects of the activities of TNCs' business activities in Africa. But at the onset, it is essential to point out that Indigenous Peoples in Africa have unique attributes that distinguish them from other Indigenous Peoples in other continents. While Indigenous Peoples in Africa face similar historical and contemporary challenges to Indigenous Peoples in other continents, including issues related to land rights, cultural preservation, and political representation, it is not easy to identify which group is indigenous in Africa. This is because in Australia and New Zealand, for instance, the Indigenous Peoples either cohabit with European settlers or are in direct conflict with them regarding the dispossession of their lands. In Africa, it is either those who identify as Indigenous Peoples cohabit with other Africans or are nomadic pastoralists and hunter-gatherers, moving from one place to another. Recognising another trend of challenge for indigenous in Africa, Juanena pointed out what she describes as the "nationalist policies of integration and assimilation," which is a "form of domination brought about by developing the global pattern of capitalist

power."[42] As identified by Werner, the "continent's complicated history makes identifying as Indigenous in Africa a complex exercise."[43]

1.2. The Indigeneity of African Peoples: Definitional Problem of Indigenous Peoples In Africa's Context

Are there Indigenous Peoples in Africa? This question underscores the complexity of identifying indigenous groups in Africa and the ongoing debate on whether Indigenous Peoples exist in Africa. In his seminal work, Pelican describes this as the "complexities of indigeneity and autochthony" in Africa.[44] This debate stems from the use of 'pre-invasion' and 'pre-colonial' in the definition of Indigenous Peoples by the United Nations Special Rapporteur Cobo, who defines the term as:

> [i]ndigenous communities, peoples and nations are those which, having a historical continuity with *pre-invasion* and *pre-colonial*[45] societies that developed on their territories consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.[46]

Analysing this definition, many scholars have rejected what they call an "overly Western" definition.[47] In the African context, the use of 'pre-invasion' and 'pre-colonial' may present some difficulties, as argued by Jérémie Gilbert, since prominence is on the fact that certain groups would be more 'aboriginal' or 'native' to Africa than others.[48] He argues that while such a criterion of identification may be helpful in nations with extensive colonial occupations, practically all groups in most African countries are 'pre-colonial' in the context of being 'original' to the continent. This element of the 'original inhabitant' concept has been questioned, and it has been described as an overly Western approach to ethnicity, comparable to neo-colonisation.[49] Adopting this approach to the definition of Indigenous Peoples is tantamount to excluding groups in Africa that identify as such. Another limitation to the definition offered by Cobo is the failure to feature any African country in the knowledge gathered from various Indigenous Peoples. This definitely informed the nature of the definition

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[42] Coro J A Juanena, "A Decolonial Approach of Indigenous Identity in Africa" in Sylvanus Gbendazhi Barnabas (ed) *Indigenous and Minority Populations - Perspectives From Scholars and Writers across the World* (IntechOpen, 2023) 11.
[43] Karolina Werner, "Who is Indigenous in Africa? The Concept of Indigeneity, its Impacts, and Progression" (2023) 51(2) *Journal of International Studies* 379, 398.
[44] Michaela Pelican, "Complexities of Indigeneity and Autochthony: An African Example" (2009) 36(1) *American Ethnologist* 52.
[45] Emphasis added.
[46] José R Martinez Cobo, "Study of the Problem of Discrimination Against Indigenous Populations", UN Doc E/CN.4/Sub.2/1983/21/add.8 (1983).
[47] Gilbert (n 8) 250.
[48] Ibid.
[49] Ibid.

he offered, even though he acknowledged the existence of indigenous groups in Africa and that they needed to be studied to identify their unique circumstances.[50]

In 1982, an attempt was made to come up with a definition that would be comprehensive to include the possibility of recognising a group as Indigenous People even though they were never colonised. This attempt is contained in the Preliminary Report on the Problem of Discrimination against Indigenous Populations by the UN Economic and Social Council Commission on Human Rights.[51] The approach was that even though a strict definition of Indigenous Peoples may be adopted, those who "have not suffered conquest or colonisation, isolated or marginal groups existing in the country" should be regarded as Indigenous groups if they additionally satisfy the following reasons:

> a) they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there;
>
> b) precisely because of their isolation from other segments of the country's population, they have preserved almost intact the customs and traditions of their ancestors, which are similar to those characterised as indigenous;
>
> c) they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.[52]

Unfortunately, as pointed out by Coates, although this definition possesses evident merits and encompasses a wide range of aspects, it did not gain acceptance from other UN agencies and has not served as the foundation for the work of the most significant UN initiative in this field, the UNDRIP.[53] So, the understanding of Indigenous Peoples as groups with a history of pre-colonialism or pre-invasion still pervades international instruments with the consequence of excluding those who "have not suffered conquest or colonisation."

For Coates, recognition in international or national legislation is necessary for a group to assume the status of Indigenous People. According to him, Indigenous Peoples are "those groups specially protected in international or national legislation as having a set of specific

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[50] Werner (n 43) 385.
[51] UN Economic and Social Council Commission on Human Rights, *Preliminary Report on the Problem of Discrimination against Indigenous Populations* UN document E/CN.4/sub.2/L.566, chapter 11, cited in Olivier Barrière and Mohamed Behnassi, "Socio-ecological Viability and Legal Regulation: Pluralism and Endogeneity – For an Anthropological Dimension of Environmental Law" in Olivier Barrière and others (eds) *Coviability of Social and Ecological Systems: Reconnecting Mankind to the Biosphere in an Era of Global Change* (vol 1, Springer, 2019).
[52] Barrière and Behnassi (n 51) 181.
[53] Ken S Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (Palgrave Macmillan, 2004) 8 cited in African Development Bank Group, "Development and Indigenous Peoples in Africa" (2016) 2(2) *Safeguards and Sustainability Series* 7.

rights based on their historical ties to a particular territory, and their cultural or historical distinctiveness from other populations."[54] The above definition is problematic as it stresses international protection and national recognition before a group can qualify as indigenous.[55] This is particularly so in countries where the governments are reluctant to recognise a group as indigenous or to ratify international instruments on the protection of the rights of Indigenous Peoples.

The legal definitions offered by the International Labour Organisation Convention 169 (ILO 169) are important, as they elaborate on what the term means but still include the ideas of colonialism and conquest. Article 1 provides thus:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of *conquest or colonisation* or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[56]

Going further, Indigenous Peoples have tried to define who they are. The now-defunct World Council of Indigenous Peoples (WCIP) gave an important description of the term without any reference to colonialism:

> Indigenous Peoples are such population groups who from ancient times have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others.[57]

As observed in the next subchapter, it is essential to note that this description of Indigenous Peoples has a semblance with and probably influenced the approach adopted in Africa by the AU because it does not make reference to colonialism and conquest. The WCIP, which was

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[54] Ibid.
[55] African Development Bank Group (n 53).
[56] ILO Convention 169 (n 12) art 1.
[57] Darrell Addison Posey, "Indigenous Peoples and Traditional Resource Rights: Rights: Rights: A Basis for Equitable Relationships?" being a paper presented for a Workshop on *Indigenous Peoples and Traditional Rights* at the Green College Centre for Environmental Policy and Understanding, University of Oxford, 28 June 1995 <https://www.iccaconsortium.org/wp-content/uploads/2015/08/example-ip-and-traditional-resource-rights-addison-posey-1995-en.pdf> accessed 28 November 2021.

made up of indigenous groups across the globe, had observer status in the UN, and its lobbying towards the UN led to a sequence of developments that imposed additional legal restrictions on States and their relationship with Indigenous Peoples in their territories. Although its description of Indigenous Peoples was not accepted globally, its contribution to the imposition of legal restrictions on States resulted in the formation of instruments and policies like the UN Working Group on Indigenous Populations in 1982, the adoption of the ILO 169 in 1989, the creation of the UN Permanent Forum on Indigenous Issues in 2000 and the passing of the UNDRIP in 2007.[58]

Furthermore, the etymology of Indigenous Peoples is essential in this discourse. In the English version of the UNDRIP, the term used is "*Indigenous Peoples.*" In contrast, "*peuples autochtones*" is used in the French version. Again, while "indigenous" is from the Latin word "*indigenae,*" "autochtones" has its root from the Greek word "*autokhthon*"; the two terms basically encompass "the idea of priority in time".[59] So, limiting the definition in the context of Africa to groups living where there is an extensive colonial occupation or linking it with colonialism is problematic. The implication is that should such a people achieve decolonisation, as is the case in Africa, that group will lose its indigenous legal status.[60] In other words, regarding the cultural definition of Indigenous Peoples, colonial status is unimportant.[61] In conclusion, Indigenous Peoples now mean "culturally distinct non-Western Societies."[62] It now includes a group of people that falls under anthropologist Ronald Niezen's description: "Their territories are imposed upon by extractive industries; their beliefs and rituals imposed upon by those who would convert them, and their independence is imposed upon by States striving for social and political control. They are those people whose position in the modern world is least tenable."[63]

[58] See generally Aslak-Antti Oksanen, "The Rise of Indigenous (Pluri-)Nationalism: The Case of the Sámi People" (2020) 54(6) *Sociology* 1141, 1148.
[59] Pelican (n 44) 54; Erica Daes, "1996 Working Paper on the Concept of Indigenous Peoples" UN Doc E/CN 4/Sub 2/AC 4/1996/2.
[60] Gretchen Kaapcke, "Indigenous Identity Transition in Russia: An international legal perspective" (1994) *Cultural Survival Quarterly Magazine,* 62 – 68.
[61] Ibid.
[62] Jim Igoe, "Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics" (2006) 105(420) *African Affairs,* 399, 402.
[63] Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003) 5.

1.3.The Conceptualisation of Indigenous Peoples Within the African Union Framework

In Africa, the socio-psychological approach is adopted in the conceptualisation of Indigenous Peoples. The socio-psychological approach is "the study of how an individual's thoughts, feelings, and actions are affected by the actual, imagined, or symbolically represented presence of other people."[64] In its pure form, it involves the interplay between oneself and one "social self" because a man is a product of how he perceives himself and the image of him in the mind of society.[65] The theory has led to the study of a group's cultural bases of difference, cultural attitudes and racial identity.[66] So, socio-psychology is basically "a scientific exploration of who we are, who we think we are, and how those perceptions shape our experiences as individuals and as a society."[67] Regarding the conceptualisation of Indigenous Peoples, the socio-psychological approach, therefore, is the characterisation of Indigenous Peoples based on who they are and who they think they are, that is, self-identification and self-identity, and how these perceptions influence their experiences and general attitudes toward society.

The Report of the African Commission's Working Group of Experts on Indigenous Populations (Report by Experts Working Group on Indigenous Populations),[68] even though did not define what is socio-psychological, nonetheless agreed that "the Working Group then resolved to settle for a *socio-psychological* description of indigenous people, setting out broad criteria and affirming, as in the United Nations system, the principle of *self-definition* and recognition of *self-identity* of peoples."[69] These broad criteria involve the characterisation of Indigenous Peoples instead of a strict definition. The Report by Experts Working Group noted that the communities who identified as Indigenous Peoples have the following characteristics in common, as summarised by Jérémie Gilbert:

a) their culture and way of life differ considerably from the dominant society to the extent that their culture is under threat of extinction;

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[64] Cathy Faye, "Social Psychology" in Robert J Sternberg and Wade E Pickren (eds) *The Cambridge Handbook of the Intellectual History of Psychology* (Cambridge University Press, 2019) 318.
[65] Ibid, 319.
[66] Ibid, 329.
[67] Maryville University Online, "What Is Social Psychology? Theories, Examples, and Definition" (*Maryville Online*, 17 October 2023) <https://online.maryville.edu/online-bachelors-degrees/psychology/resources/what-is-social-psychology/> accessed 08 January 2024.
[68] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities submitted in accordance with 'Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (Transaction Publishers 2005) <https://www.iwgia.org/images/publications/African_Commission_book.pdf> accessed 23 November 2023.
[69] Ibid, 12.

b) the survival of their unique way of life depends on access to lands and natural resources;
c) they suffer from discrimination as they are regarded as less developed and less advanced than other, more dominant sectors of society;
d) they often live in inaccessible regions and are often geographically isolated;
e) they are subject to domination and exploitation within national political and economic structures.[70]

It is pertinent to point out that apart from the Report by the Experts Working Group, the African Court and the African Commission's jurisprudence regarding the definition of Indigenous Peoples is based on two other documents. These are (1) the African Commission's Advisory Opinion on the UNDRIP (Advisory Opinion)[71] and (2) the African Commission on Human and Peoples' Rights' joint work with the International Work Group for Indigenous Affairs (Report by the ACHPR & IWGIA).[72] The Report by the Experts and the Report by the ACHPR & IWGIA pointed out that it was not necessary to give a strict definition of Indigenous Peoples within the African context, but it would be "more relevant and constructive to try to outline the major characteristics that can help identify who the Indigenous Peoples and communities in Africa are."[73] Similarly, Indigenous Peoples in Africa are identified based on the uniqueness of their culture as distinct from the dominant society. This unique attribute includes their special attachment to the land and access to natural resources, and they are at risk of extinction because of the encroachment on their lands.[74] The Report by the Experts was particularly interested in using the socio-psychological method of description to define Indigenous Peoples in Africa, which incorporates "the principle of self-definition and recognition of self-identity of peoples."[75]

The Advisory Opinion was issued after the adoption of the UNDRIP to encourage African States to observe the provisions of the document. It clarified the concept of Indigenous Peoples as a guide for African States, especially as the UNDRIP was silent on the definition. The Advisory Opinion reiterated that giving a one-fit-all definition of the term was unnecessary

[70] Ibid, 89 – 90; Gilbert (n 8) 251.
[71] African Commission, "Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples", 41st Ordinary Session, Accra, Ghana, May 2007 <https://www.iwgia.org/images/publications/Advisory_Opinion_ENG.pdf> accessed 22 November 2023.
[72] African Commission and International Work Group for Indigenous Affairs, "Indigenous Peoples in Africa: The Forgotten Peoples? – The African Commission's work on indigenous peoples in Africa" (25 May 2006) <https://achpr.au.int/index.php/en/special-mechanisms-reports/indigenous-peoples-africa-forgotten-peoples> accessed 23 November 2023.
[73] Ibid, 9; Report by the Experts (n 68) p 87
[74] Ibid, 10.
[75] Report by the Experts (n 68) p 13.

since there was no universally accepted definition. However, it insisted that it was pertinent to give "characteristics allowing the identification of the indigenous populations and communities in Africa."[76] These constitutive elements or characteristics include:

a) Self-identification;
b) A special attachment to and use of their traditional land whereby their ancestral land and territory have fundamental importance for their collective physical and cultural survival as peoples;
c) A State of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have cultures, ways of life, or modes of production different from the national hegemonic and dominant model.

However, the Advisory Opinion rejected the idea of incorporating elements like "first nation," "pre-invasion," and "pre-conquest."[77] This is because of the distinctive nature of the continent and the "peculiarity [of] Africa from the other Continents where native communities have been almost annihilated by non-native populations."[78] According to Jérémie Gilbert, this is a crucial Statement emphasising that the preoccupation with whether or not one is "first" in Africa should not be the primary concern and serves as an opposition to the "overly Western approach" to the definition.[79] In other words, while Indigenous Peoples in other continents may be in conflict with foreign Europeans who have now settled in their territory, all Africans can claim to be autochthonous.[80] This may not exactly be the true situation regarding all "peoples" in Africa as there are instances where people of Arabic origin migrated and displaced groups that now identify as Indigenous Peoples and are now occupying the Indigenous Peoples' land.

A case in point is the *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan*,[81] where the allegation was the attack carried out by the Sudanese forces and its Arab militia (the Janjaweed) on "thousands of Black indigenous tribes" who lived in Darfur.[82] Furthermore, while recognising the "Black indigenous tribes" as a "people" within the meaning of Article 22 of the African Charter (rights of peoples to their economic, social,

[76] Advisory Opinion (n 71) para 10.
[77] "First Nations" and "Aboriginal" are used to describe the indigenous peoples mainly in Canada and Australia, respectively.
[78] Advisory Opinion (n 71) para 13.
[79] Gilbert (n 8) 251.
[80] Ibid; Advisory Opinion (n 71) para 13.
[81] *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* (African Commission) 279/03-296/05, May 2009.
[82] Ibid, para 110. See Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights* (African Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981.

and cultural development), the African Commission insisted that the "people of black African origin" deserved "not to be dominated by a people of another race in the same State."[83] Although it is correct that all Indigenous Peoples in Africa are "indigenes," it would be overarching to conclude that all "persons" in Africa are autochthonous.

This position adopted in the Advisory Opinion has influenced some of the decisions by the African Commission, leading to an expansive interpretation of Indigenous Peoples. In *Kevin Mgwanga Guuneme et al. v Cameroon*,[84] the complainant urged the African Commission to recognise Southern Cameroonians as a "separate and distinct people" under Article 20 of the African Charter (right of all peoples to existence) because the British Empire colonised them while the rest of Cameroon was colonised by France. Also, they pointed to their linguistic differences because Southern Cameroon mostly speaks English while the rest of the country is French-speaking. The African Commission agreed with them because "they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly, they identify themselves as a people with a separate and distinct identity."[85]

In the *Endorois Peoples* case, the African Commission was once again presented with another opportunity to expand the jurisprudence on the meaning of Indigenous Peoples in Africa. One of the questions for the African Commission was whether the Endorois people were entitled to the collective right to dispose of natural resources as a distinct indigenous people. This was followed by the argument by the Kenyan government that the Endorois people should not be treated as separate Indigenous People different from the larger society.[86] In rejecting this argument, the African Commission relied on the characterisation of Indigenous Peoples as enunciated in the Report of the Experts, the Advisory Opinion, and the Report by the ACHPR & IWGIA to hold that the Endorois people met all the criterion – "the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination."[87]

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[83] Ibid, paras 219 and 223.
[84] *Kevin Mgwanga Guuneme et al v Cameroon* (African Commission) Communication No. 266/2003, 26th Activity Report 2009, Annex IV.
[85] Ibid, para 179.
[86] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, (Endorois case) 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, para 142.
[87] Ibid, para 150.

Apart from self-identification as a criterion for "indigenousness," the African Commission particularly viewed cultural and spiritual attachment to land or a specific territory as a pointer to which group qualifies as Indigenous Peoples. On this, the African Commission held that "what is clear is that all attempts to define the concept of Indigenous Peoples recognise the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people."[88]

1.4. Indigenous Peoples and Tribal People: Looking at the Definition from another Dimension

Although self-identification as an indigenous group is key to understanding who qualifies for indigenous legal status, an argument could be made regarding the status of Indigenous Peoples as tribal people. In the *Case of the Saramaka People v Suriname*, the Inter-American Court of Human Rights qualified the Saramaka people both as Indigenous and Tribal people in so far as "they have traditionally been in occupation of the land."[89] The ILO169 also recognises that self-identification as indigenous or tribal shall be used as a criterion in determining which group qualifies for protection under the Convention.[90] Self-identification requires that groups or communities identify themselves as indigenous or tribal and uniquely different from other communities within the State.[91] To this extent, it is contradictory for ILO 169 to have introduced the concept of colonialism into the definition of the term when "self-identification" as an indigenous or tribal is a criterion for being protected.

Most of Africa's Indigenous Peoples are nomadic or semi-nomadic pastoralists and hunter-gatherers. Many confront obstacles, such as the loss of their lands, territories, and resources, forced assimilation into the dominant groups' way of life, and marginalisation.[92] Even though there are common denominators that connect all Indigenous Peoples in the world, as examined above, Africa's Indigenous Peoples could be contrasted with others. The Saramaka people in the Republic of Suriname have not always been in occupation of the territory they are found

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[88] Ibid, para 151; Gilbert (n 8) 253.
[89] Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname*, Series C No 172 (28 November 2007); Sascha Dov Bachmann and Ikechukwu P Ugwu, "Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?" (2021) 6(4) *Oil and Gas, Natural Resources, and Energy Journal*, 547, 571.
[90] ILO Convention 169 (n 12) art 1(2).
[91] African Commission on Human and Peoples' Rights (ACHPR), "Indigenous Peoples in Africa: The Forgotten Peoples?" (2006) *The African Commission's work on indigenous peoples in Africa,* 11.
[92] The UN Department of Public Information, "Indigenous Peoples in the African Region" Twelfth Session of the UN Permanent Forum on Indigenous Issues 23 May 2013 <https://www.un.org/esa/socdev/unpfii/documents/2013/Media/Fact%20Sheet_Africa_%20UNPFII-12.pdf> accessed 23 November 2022.

now. In the seminal case of *Saramaka People v Suriname*, the Saramaka people argued that, as a group that has been in the traditional occupation of the land in issue, their property right was protected under Article 21 of the American Convention on Human Rights. The article provides that "everyone has the right to the use and enjoyment of his property". One of the arguments by the Surinamese government was that even though the Saramaka people had been in occupation of the land for some years, they could not enjoy the right to property as an indigenous group. The Inter-American Court of Human Rights concluded that even though the Saramaka people were not indigenous to the region, once there is proof that a group of people have been in traditional occupation of territory for a long time, they enjoy the same rights as Indigenous Peoples.[93] So, while Africa's Indigenous Peoples qualify to enjoy Indigenous Peoples' rights by their indigeneity in Africa, the Saramaka people enjoy those rights through their long and traditional occupation of their region.

Similarly, African Indigenous Peoples may not trace their indigeneity to colonialism or colonisation. The Aboriginal and Torres Strait Islander people of Australia enjoy the status of Indigenous Peoples through their experience with colonisation and the concept of *terra nullius*.[94] The case of *Mabo v Queensland (No 2)*[95] abolished the concept of *terra nullius* in Australia by recognising native title to land enjoyed by Indigenous Peoples before colonial experience. Following this judgement, the Australian government enacted the Native Title Act (1993),[96] which allows a group of people to apply for a native title over land as Indigenous People. So, while the Aboriginal and Torres Strait Islander people of Australia enjoy the status of Indigenous Peoples by reclaiming lands initially acquired from them, Africa's Indigenous Peoples assert their Indigenous Peoples' status by resisting present encroachment on their lands by States and TNCs.

One could argue that apart from the characteristics set out in the documents of the AU, proof of undisturbed long occupation of a particular territory as a tribal people qualifies a group as indigenous in Africa. This would make it possible to protect those groups that have wandered from other parts of the continent, like the hunter-gatherer communities, and are now settled in a particular territory, undisturbed and for a long time.

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[93] See Hayley Garscia, "Saramaka People v. Suriname" (2014) 36 *Loyola of Los Angeles International and Comparative Law Review* 2305 – 2326.
[94] Bill Ashcroft, "Africa and Australia: The Post-Colonial Connection" (1994) 25(3) *Research in African Literatures* 161, 166.
[95] *Eddie Mabo v Queensland* (No 2) [1992] HCA 23 or (1992) 175 CLR 1 (Australia).
[96] Native Title Act 1993, No 110, 1993, Compilation No 44 <https://www.legislation.gov.au/C2004A04665/2017-06-22/text> accessed 02 June 2024.

1.5.Examples of Self-identified Indigenous Groups in Africa

The Pygmies of the Great Lakes Region, the San of Southern Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer, and Yakuu of Kenya are examples of hunter-gatherer communities that identify as Indigenous Peoples. Also, pastoralist communities such as the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Maasai of Kenya and Tanzania, the Samburu, Turkana, Rendille, Endorois and Borana of Kenya, the Karamojong of Uganda, the Himba of Namibia and the Tuareg, Fulani and Toubou of Mali, Burkina Faso and Niger are examples of pastoralists who identify as Indigenous Peoples. Additionally, the Amazigh of North Africa[97] and the Ogoni people of Nigeria also identify as Indigenous Peoples. Regarding self-determination, the Igbo people of Nigeria and Ambazonia people in Cameroon identify as Indigenous Peoples. Though different in cultural and religious practices, these groups nonetheless share a lot in common. They enjoy the status of being the original inhabitants of a particular region or territory, with deep historical, cultural, and often unique spiritual ties to the land. Equally, they have inhabited specific regions for generations, predating external colonisation and often maintaining distinct cultural practices and identities. Five groups of Indigenous Peoples in four African countries will be examined below. These groups have received some international attention and share similar experiences – denial of their territories, environmental degradation, and general neglect by the government.

1.5.1. The Ogoni People of Nigeria

The Ogoni people are thought to be one of the first to live in the east of the Niger Delta in Nigeria[98] because archaeological evidence indicates that they have lived there for over 500 years.[99] Surrounded by waters, they engage in fishing, palm oil, plantain, cassava, and yam cultivation.[100] The stretching of River Niger, and the presence of green trees and fauna, present an overview of a beautiful ecosystem in addition to being home to Africa's biggest freshwater

[97] African Commission on Human and Peoples' Rights (ACHPR) (n 91) 10.
[98] Mary Basil Nwoke, "Impact of Cultural Value System on the Personality Development of Ogoni Adolescents" (2012) 8 *Asian Social Science* 100, 101; Sonpie Kpone Tonwe, *The Historical Tradition of Ogoni, Nigeria* (ProQuest LLC 2017) 97.
[99] Refugee Review Tribunal, "RRT Research Response" 15 November 2007 <https://www.refworld.org/pdfid/4b6fe2b5d.pdf> accessed 28 January 2022; Sonpie Kpone Tonwe (n 93) 97; Sonpie Kpone Tonwe, 'Property Reckoning and Methods of Accumulating Wealth among the Ogoni of the Eastern Niger Delta' (1997) 67 Africa: *Journal of the International African Institute* 130, 130; Kay Williamson, 'Languages of the Niger Delta' (1968) *Africa Magazines* 97, 124.
[100] Nwoke (n 98) 101.

and mangrove swamp vegetation.[101] As an indigenous group, the Ogoni people are so attached to their land that they regard the planting season as a cultural and social event and as a religious and spiritual occasion.[102] The land mass is approximately 1000km^2 with about 850,000 Indigenous People, according to the 2006 Nigerian census,[103] but there is a projection that the total population is now 1,176,200.[104] They have indeed faced significant challenges related to environmental degradation, health issues, socio-political conflicts, and the preservation of their cultural heritage. The petroleum resources in their community have been perceived as a curse, leading to deteriorating health conditions and environmental pollution.[105]

As the land tenure system in Nigeria is principally based on customary land tenure rights,[106] at least until the Land Use Act[107] was enacted, the Ogoni people enjoyed all their lands and the natural resources on them, as the common law principles expressed in the Latin maxims, *quicquid plantatur solo, solo cedit,*[108] and *cuius est solum, eius est usque ad coelum et ad inferos*[109] enjoined them to do so. The first principle is to the effect that he who owns the land owns anything that is fixed or attached to the land. However, there have been arguments about whether this principle is part of Nigerian customary land law,[110] and its applicability is no

[101] Olof Linden and Jonas Palsson, "Oil Contamination in Ogoniland, Niger Delta" (2013) 42 *AMBIO* 685, 686; Tom O'Neil, 'The Curse of the Black Gold: Hope and Betrayal in the Niger Delta' (2007) 211 *National Geographic* 88, 90.

[102] Richard Boele, *Report of the UNPO Mission to Investigate of the Ogoni of Nigeria, 17 – 26 February 1995* (Unrepresented Nations and Peoples Organisation Mission) Hague, 1 May 1995, 7.

[103] Unrepresented Nations and Peoples Organisation, "Ogoni" (*UNPO.org* 11 September 2017) <https://unpo.org/members/7901> accessed 28 January 2022.

[104] City Population, "Rivers State in Nigeria" (*City Population* 21 March 2016) <https://www.citypopulation.de/php/nigeria-admin.php?adm1id=NGA033> accessed 28 January 2022.

[105] Porbari Monbari Badom and Barieeba Gbogbara, "Environmental Conflict and United Nations Environment Programme (UNEP) Report: An Appraisal of the Clean-Up in Ogoni" (2022) 94(1) *International Journal of Research Publications* 232, 233.

[106] Chris Wigwe and Igonibo F George, 'Customary Land and Real EState Ownership in Nigeria: An Appraisal' (2018) 7 *Port Harcourt Law Journal* 442; Ehi P Oshio, 'Indigenous Land Tenure and Nationalisation of Land in Nigeria' (1990) 5 *Journal of Land Use and Environmental Law* 685, 686; Isaac B Oluwatayo, Omowunmi Timothy and Ayodeji O Ojo, 'Land Acquisition and Use in Nigeria: Implications for Sustainable Food and Livelihood Security' in Luís Carlos Loures (ed), *Land Use - Assessing the Past, Envisioning the Future* (IntechOpen, 2019) 93.

[107] The Land Use Act, Cap L5 *Laws of the Federation of Nigeria* 2004 <https://www.lawglobalhub.com/land-use-act/#Download_Land_Use_Act_PDF> accessed 02 June 2024.

[108] Peter Luther, 'Fixtures and Chattels: A Question of More or Less...' (2004) 24 Oxford Journal of Legal Studies, 597, 598; Hossein Esmaeili, 'Property Law and Trusts in Iran' in Nadirsyah Hosen (ed) *Research Handbook on Islamic Law and Society* (Edward Elgar Publishing, 2018) 188.

[109] Adamu Kyuka Usman, *Nigerian Oil and Gas Industry Laws: Policies, and Institutions* (Malthouse Press Limited, 2017) 199.

[110] These arguments stemmed from an article written by Ezejiofor and another by Chianu, both professors of Land law, where they disagreed on the applicability of this doctrine to the customary land tenure system in Nigeria. see Gaius Ezejiofor, 'Is the Maxim Quicquid Plantatur Solo, Solo Cedit a Rule of Customary Law?' (1989) 4 *Nigerian Juridical Review* 92 – 100; Emeka Chianu, 'Right to Improvements on Land in Nigeria' (1989) 4 *Nigerian Juridical Review* 70 – 91.

longer absolute in Nigeria as statutes have limited it.[111] The second maxim means that "whoever owns the soil, it is theirs all the way to Heaven and all the way to Hell."[112] In other words, landowners own the air above their land and the ground below.[113] These rights were enjoyed and exercised by the Ogoni people until the discovery of oil.[114]

Shell Oil Company discovered oil in Bomu in Ogoniland in 1957, which launched a phase that significantly impacted the Ogoni people and Nigeria as a whole.[115] This became the second oil discovery in the Niger Delta region of Nigeria after an earlier oil discovery in Oloibiri, in present-day Bayelsa State.[116] The discovery heralded as good news was later to become the greatest nightmare of the Ogoni community.[117] Subsequently, the Nigerian government enacted the Land Use Act that vests ownership of all lands on State governor[118] and any land with oil and gas deposits on the federal government.[119] The implication of section 1 on the community-based rights of ownership that existed in Nigeria, according to Agbosu,[120] is that "it divests irrevocably such artificial legal persons of the customary law of their allodial ownership rights," thereby abolishing the indigenous community concept of land ownership in Nigeria.[121]

The cultural and religious aspects of the Ogoni people's life have been impacted mainly due to their cultural activities tied to rivers and lands that have been polluted. The fertile terrain and rivers of the region not only serve as a source of food for the Ogoni people but are also considered sacred objects. The land is revered as a deity and is worshipped as a god.[122] For instance, they practise the *kpoagbaa* ritual, where the Ogoni women bathe in the rivers and

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[111] Usman (n 109) 203.
[112] ibid, 199; Samantha J Hepburn, 'Ownership Models for Geological Sequestration: A Comparison of the Emergent Regulatory Models in Australia and the United States' (2014) 44 *Environmental Law Reporter* 10310, 10313; *Jackson Municipal Airport Authority v Evans* 191 So 2d 126, 128 (Miss 1966).
[113] Hepburn (n 112) 10313.
[114] See generally Ikechukwu P. Ugwu, "The Doctrine of Discovery and Rule of Capture: Re-Examining the Ownership and Management of Oil Rights of Nigeria's Indigenous Peoples" (2023) 32(3) *Studia Iuridica Lublinensia*, 260 – 261.
[115] Saatah Nubari, 'The Impact of Oil Exploration on Ogoniland' (*The Medium* 6 March 2017) <https://medium.com/@Saatah/the-impact-of-oil-exploration-on-ogoniland-2d5cbe8d90ea> accessed 18 June 2019 and re-accessed 28 January 2022.
[116] ibid.
[117] Ken Saro-Wiwa, 'Nigeria in Crisis: Nigeria, Oil and the Ogoni' (1995) 22 *Review of African Political Economy* 244, 245.
[118] The Land Use Act [section 1].
[119] Ibid, section 49.
[120] Agbosu LK, 'The Land Use Act and the State of Nigerian Land Law' (1988) 32 *Journal of African Law* 1 – 43.
[121] ibid, 5.
[122] Olu A Oyinlade and Jeffery M Vincent, "The Ogoni of Nigeria" in Robert Hitchcock and Alan Osborn (eds) *Endangered Peoples of Africa and the Middle East: Struggles to Survive and Thrive* (Greenwood Press, 2002) 135.

creeks annually as a way to purify oneself from bad omen and curses of the previous year.[123] These acts are intrinsically tied to their belief in *Bari* (Obari-Eleme), the creator of Heaven and Earth. Due to polluted rivers, the *kpoagbaa* ritual has been suspended by some families.

1.5.2. The Endorois People of Kenya

The Endorois people of Kenya are semi-nomadic pastoralists who were displaced from their traditional lands near Lake Bogoria in Kenya's Rift Valley in the 1970s to make way for the establishment of a national park.[124] Lake Bogoria has deep spiritual and cultural significance for the Endorois people and serves as a source of a multi-million dollar global biotech industry since it contains an extraordinary variety of bacteria and microorganisms from which enzymes for use in antibiotics and cleaning products have been isolated.[125] Since time immemorial, the Endorois Community has lived in the area surrounding Lake Bogoria and regarded Mochongoi Forest and Lake Bogoria as sacred grounds due to their use for significant cultural and religious activities.[126] As a deep religious object, Bogoria Lake is surrounded by "the Community's historical prayer sites, the places for circumcision rituals, and other cultural ceremonies."[127] They number approximately 60,000 people but have never been recognised by the Kenyan government as a distinct ethnic community.[128] Just like the Ogoni people, the Endorois people do not live in communities with European settlers, which distinguishes them from other Indigenous Peoples on most other continents.

In 1973, the Kenyan government forcibly displaced the tribe to establish the Lake Bogoria National Reserve without consulting the community, jeopardising their customary rights. Additionally, the community was not compensated for the harm they suffered or for losing their land.[129] Equally, community members were detained for allegedly trespassing on the

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[123] Badom and Gbogbara (n 105) 240.
[124] Minority Rights Group International, "Kenya: Protecting the Endorois' right to land" *Minority Rights Group International* 13 November 2016 <https://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case/> accessed 28 January 2022.
[125] United Nations Environment Programme, "How Kenya's Lake Bogoria is Feeding the Global Biotech Industry" (*United Nations Environment Programme*) 14 November 2017 <https://www.unep.org/news-and-stories/story/how-kenyas-lake-bogoria-feeding-global-biotech-industry> accessed 28 January 2022.
[126] Pascalia Jelagat Sergon, Steve Ouma Akoth and Jonas Yawovi Dzinekou, "The Role of Indigenous Knowledge: Practices and Values in Promoting Socio-economic well-being and Equity among Endorois Community of Kenya" (2022)18(1) AlterNative 37, 38; Endorois Welfare Council, *Endorois Peoples' Biocultural Protocol* August 2019, 9 <http://archive.abs-biotrade.info/fileadmin/media/Knowledge_Center/Pulications/BCPs/Endorois-Peoples-Biocultural-Protocol.pdf> accessed 28 January 2022.
[127] African Commission on Human and People's Rights, *CEMIRIDE (on behalf of the Endorois Community) v Republic of Kenya*, Submission of the Merits, Communication 276/2003, para 3.
[128] Endorois Welfare Council (n 126).
[129] Ibid.

reserve while visiting for cultural and religious functions, threatening their spiritual and cultural survival tied to their ancestral territory.[130] The situation of the Endorois gave rise to the case of *Endorois v Kenya*,[131] where the African Commission interpreted the African Charter concerning the rights of Indigenous Peoples in Africa, and it ruled that the Kenyan government violated the Endorois people's rights as an Indigenous People to property, culture, health, natural resources and religion. It was also of the view that the Endorois culture, religion, and traditional way of life are deeply interconnected with their ancestral lands, specifically Lake Bogoria and its surrounding vicinity. The argument by the Kenyan government that the eviction of the Endorois from their ancestral land for the establishment of a game reserve for public good was rejected by the African Commission as not being proportionate to the eviction as it threatened their cultural survival. The reason was that the Endorois people were the ancestral guardians of the land and were in the best position to maintain its delicate ecosystem.[132] While commenting on the judgement in relation to conservation, Claridge and Kobei pointed out that the judgement is evidence of the increasing recognition of the role of Indigenous Peoples in conservation.[133]

1.5.3. Pygmy People of Central Africa

The indigenous Pygmy people are semi-nomadic hunters and gatherers living in the Great Lakes region of central Africa's high mountain forests.[134] Culturally, the pygmy people are diverse and of different groups. They are a diverse group of mobile hunter-gatherers found within the tropical moist forests in the Congo Basin in Africa and are considered the largest group of mobile hunter-gatherers in Africa. According to Funk and others, the name "Pygmy" refers to a broad category of sub-Saharan peoples with various cultural backgrounds; it includes several unique ethnic groups living in Central Africa's tropical forests.[135] This informs why they could be referred to, in the plural, as the pygmies, and so go by different names depending on the country they are found. In Rwanda, Burundi, Uganda and the eastern region of the

[130] Ibid.
[131] *Endorois Peoples case* (n 86).
[132] Ibid, para 235.
[133] Lucy Claridge and Daniel Kobei, "Protected areas, Indigenous rights and land restitution: The Ogiek judgment of the African Court of Human and Peoples' Rights and community land protection in Kenya" (2023) 57(3) *Oryx*, 313, 315.
[134] Foyer de Développement pour l'Autopromotion des Pygmées et Indigènes Défavorisés and others, "Indigenous Peoples in the DRC: The Injustice of Multiple Forms of Discrimination" being an *NGO report on Indigenous Pygmy Peoples*, September 2013 <https://globalforestcoalition.org/wp-content/uploads/2014/04/RAPPORT-ALTERNATIF-UPR-ONG-PEUPLES-AUTOCHTONES-RDC-_ANGLAIS.pdf> accessed 25 November 2022.
[135] Stephan M Funk and others, "Divergent Trajectories of BMI over Age for Adult Baka Pygmy People and their Sympatric Non-Pygmy Populations" (2020) 48 *Human Ecology* 143.

Democratic Republic of Congo (DRC), they are called *Batwa*. The Pygmies residing in the Ituri Forest of the Democratic Republic of the Congo are known as Bambuti. At the same time, those in the Labaye Forest of the Central African Republic (CAR) and the Minvoul Forest of Gabon are referred to as Baka. In the North-West Congo basin, these groups identify themselves as Yaka and Babendjelle, while in Cameroon, they go by the names Baka and Bagyeli.

The preference for these other names by these Indigenous Peoples is their way of opposing the term "pygmy," which is considered derogatory. The use of this term is considered derogatory due to its colonial and pejorative connotations, as well as its association with stereotypes and misconceptions about these people regarding their small body sizes. Etymologically, the term "pygmy" refers to dwarf in Greek with mythological reference.[136] According to Venkataraman and others, the stature of the pygmies is one of their adaptative features in the tropical rainforest. They argued that the pygmy phenotype is essential regarding locomotor performance as a means of navigating through the challenges in the rainforest, like "high levels of heat and humidity, high pathogen load, low food availability, and dense forest structure." For them, the pygmies shed light on the role of environmental factors in driving the evolution of specific physical traits in human populations.[137]

Just like other Indigenous Peoples, the Pygmy people maintain a strong link with forests and natural entities on which they rely for their survival. In addition, they maintain their belief in animism, which posits that every element of nature possesses both a spiritual essence and a physical form, with each object governed by its own spirit. Due to their belief in the afterlife and the omnipresence of ancestral spirits, they hide their deceased within tree barks or caves. In Cameroon, the rainforest, which serves as their natural habitat, is steadily encroached upon due to timber production and the exploration of natural resources.[138] Unfortunately, the Cameroonian government designated some forests as national parks and has barred the pygmies from entering the forest, notwithstanding the fact that integration efforts by the government have raised concerns about the displacement of an Indigenous group.

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[136] Ahmet Emin Donmez and Alex Sinhan Bogmis, "Africa's Pygmies not giving up on their ancient lifestyle" (*AA*, 4 August 2021) <https://www.aa.com.tr/en/africa/africas-pygmies-not-giving-up-on-their-ancient-lifestyle/2323802> accessed 24 November 2023.

[137] Vivek V Venkataraman and others, "Locomotor constraints favour the evolution of the human pygmy phenotype in tropical rainforests" (2018) 285 *Proceedings of the Royal Society B* 1 – 7, 5.

[138] Donmez and Bogmis (n 136).

In Congo, TNCs have continuously logged timbers within the territories of Pygmy, which has led to the expulsion of the people from their ancestral lands. In 2020, the Congolese government entered into a carbon-trading agreement with some TNCs where they agreed to pay a certain amount for their carbon-emitting activities, like cutting trees. As part of the carbon credit schemes, Norsudtimber, a Portuguese TNC, has been accused of illegally converting its timber concessions into conservation concessions, which, in turn, would be used to invest in the European carbon credit schemes.[139] These concessions were made without the consent of the Indigenous Peoples that would be affected in disregard of the Congolese law that requires 'the free, prior and informed consent of communities.'[140] These exploitations of forest resources threaten the human rights of the Pygmy peoples and the environment generally. As a result, Indigenous People find it more difficult and challenging to acquire the essential forest resources necessary to their culture and way of life.[141] Additionally, native Pygmy lands have been acquired to carry out mining activities. This is often in breach of Congolese national regulations on consultation and international law on Indigenous Peoples' rights to free, prior, and informed consent.[142]

1.5.4. The San People of Southern Africa

San is one of the African Indigenous Peoples found mostly in south-eastern Angola, Namibia, Botswana, and South Africa. Pejoratively, they are called the *Bushmen*, which is the English version of the Dutch name for them, *boesman*.[143] Traditionally, they are hunter-gatherers with a deep spiritual connection to the land and its resources, as the Bantu speakers initially revered them as "autochthons with privileged access to the spirits of the land."[144] Considered one of

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[139] Gloria Pallares, "Revealed: Timber Giant Quietly Converts Congo Logging Sites to Carbon Schemes" (*Mongabay*, 3 March 2022) <https://news.mongabay.com/2022/03/revealed-timber-giant-quietly-converts-congo-logging-sites-to-carbon-schemes/ > accessed 26 November 2022.

[140] See section 16(5) of Decree No 011/27 of 20 May 2011, *Laying Down Specific Rules for the Allocation of Conservation Forest Concessions* (Congo) <https://www.leganet.cd/Legislation/Droit%20economique/Code%20Forestier/D.011.27.50.05.2011.htm> accessed 26 November 2022.

[141] Jerome Lewis and John Nelson, "Logging in the Congo Basin. What hope for Indigenous Peoples' Resources, and their Environments?" <https://www.iwgia.org/images/publications/IA_4-06_Congo.pdf> accessed 26 November 2022.

[142] Foyer de Développement pour l'Autopromotion des Pygmées et Indigènes Défavorisés and others (110) par 12. The indigenous peoples' right to free, prior and informed consent is examined in detail in Chapter Three.

[143] Elizabeth Prine Pauls, "San" (*Encyclopaedia Britannica*, 12 September 2023) <https://www.britannica.com/topic/San> accessed 17 November 2023.

[144] Sam Challis and Brent Sinclair-Thomson, "The Impact of Contact and Colonization on Indigenous Worldviews, Rock Art, and the History of Southern Africa: "The Disconnect"" (2022) 63(25) *Current Anthropology* 91, 115.

the earliest humans and carriers of the most divergent human DNA,[145] the San people have always been the subject of various scientific experiments. Most of these experiments were carried out without their consent, resulting in a growing scepticism by the San people about any interactions with academic researchers. For instance, in 2010, San leaders expressed shock at a genomics study on the DNA of four San people, the result of which they considered to be "private, pejorative, discriminatory and inappropriate."[146] This led to the drafting and subsequent adoption in 2017 of the San Code of Research Ethics by the South African San community, which requires researchers to observe four cardinal values, namely fairness, respect, care and honesty, whenever they intend to research the San communities. While recognising the need for experiments that advance the course of humanity, the code requires that researchers seek and obtain the approval of the San people prior to embarking on an experiment.[147]

As with other Indigenous Peoples, the San people have been victims of forceful removal or constant conflict over ancestral land. In Botswana, for instance, during the early period of colonisation, many San people lost their lives as a result of genocide and murder in what is referred to as "Bushman hunting," where commandos hunted and displaced them all around Southern Africa.[148] Anaya made a report on the situation of Indigenous Peoples in Botswana, including the San people, where he recognised that even after Botswana's independence, the San people did not reclaim access to their lost ancestral lands, were denied access to natural resources, and government policies were geared towards favouring the settlers over the San people.[149] Worst still, the government, to open up Botswana for tourism, removed the San people from lands considered conservation areas and national parks.[150] While the government justified the relocation based on public use, the subsequent plan to grant a licence to Gem Diamonds/Gope Exploration Company (Pty) Ltd to conduct mining within the reserves

[145] Brenna M Henn and others, "Hunter-gatherer Genomic Diversity suggests a Southern African Origin for Modern Humans" (2011) 108(13) *Proceedings of the National Academy of Sciences of the United States of America*, 5154–5162.
[146] Doris Schroeder, *Equitable Research Partnerships: A Global Code of Conduct to Counter Ethics Dumping* (Springer, 2019) 73.
[147] Ibid, 74.
[148] Robert K Hitchcock and Wayne A Babchuk, "Genocide of Khoekhoe and San Peoples of Southern Africa" in Robert Hitchcock (ed) *Genocide of Indigenous Peoples: A Critical Bibliographic Review* (Routledge, 2017) 143.
[149] United Nations Human Rights Council, "*Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya* (Addendum) (2 June 2010) A/HRC/15/37/Add.2 [page 2].
[150] Ibid, para 44.

contradicted their earlier position. According to the company, the operation would take several decades, with the possibility of an influx of 500–1,200 people to the site.[151]

The loss of access to their ancestral lands has some negative impact on the San people and animal species. For instance, due to the relocation, San people now moved to villages "where 18,000 elephants share territory with 16,000 people," and as expected, they are in constant conflict with the elephants, leading to the vulnerability of the elephants.[152] The government abruptly terminated the supply of potable water and health care services to facilitate their removal from their reserves.[153] This particular action by the government was the subject of a court case in *Sesana and Others v Attorney-General*,[154] where a San rights activist, Roy Sesana, took the government to court for the displacement of the San people and the sudden termination of the water supply to them. The court pointed out that the forcible eviction of the San people was illegal and that the termination of services to the community was a direct act to obtain their consent, which did not satisfy the requirements of informed consent. Anaya pointed out that the government's continued "restrictions on hunting and livestock possession and its denial of services to those currently living in the reserve do not appear to be in keeping with the spirit and underlying logic of the decision, nor with the relevant international human rights standards."[155]

Finally, on the implication of loss of access to their ancestral land, the Court of Appeal of Botswana in December 2022 denied a San family the right to bury their elder, Pitseng Gaoberekwe, on his ancestral land in the Kalahari Desert, where the family had been evicted to make way for the Central Kalahari Game Reserve. Despite Gaoberekwe's passing in December 2021, his burial has been delayed as the Botswana government denied the family access to the land, known for its diamond-rich resources.[156] So, from the time of colonialism

[151] Ibid, para 73.
[152] Lauren Redmore and others, "The Village, the Elephant, and the State: Land Access and Vulnerability in Rural Botswana" (2023) 51 *Human Ecology* 237.
[153] Gilbert Motsaathebe, "Diversity and Multiculturalism Accommodation: The Cultural and (In)Humane Existence of the Indigenous San (Basarwa) Community in Botswana" (2023) 5(2) *International Journal of Critical Diversity Studies* 4.
[154] *Roy Sesana and Others v The Attorney General*, High Court of Botswana, Misca. No. 52 of 2002, judgement of 13 December 2006.
[155] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya (n 149).
[156] Cyril Zenda, "The Forced Eviction of Botswana's Indigenous People" (*Fair Plant*, 11 January 2023) <https://www.fairplanet.org/story/the-forced-eviction-of-botswanas-indigenous-people/> accessed 18 November 2023.

to the present day, the San people have remained victims of land appropriation and subjects of constant scientific research.

1.5.5. The Ogiek People of Kenya

The Ogiek people of Kenya are an indigenous community with a rich cultural heritage and a deep connection to their ancestral lands, just like any other group that identifies as an Indigenous People in Africa. With a population of around 52,000, the Ogiek people are considered one of the last remaining forest dwellers in Africa and are traditionally honey-gatherers.[157] Ancestrally, they have lived in the Mau Forest in Kenya since time immemorial and only survive on wild fruits, roots, traditional beekeeping, and game hunting. For Claridge and Kobei, the Ogiek people recognise "the Mau Forest [as] a home, school, cultural identity and way of life that gives them pride and destiny" while seeing themselves as friends to the environment they depend on for survival.[158]

The link between their cultural practices and conservation has been the subject of research. Their cultural practices are deeply intertwined with environmental conservation, as they use decrees of deities to define the relationship between them and the environment.[159] According to Tenjei and others, the Ogiek community's cultural practices, such as totemism, taboos, and the sacredness of water sources, have been identified as essential elements in fostering environmental conservation within the Mau Forest of Kenya.[160] In totemism, the Ogiek people perceive some animals like owls and dears and plants such as *mukeu* trees as having some special link with the supernatural. Equally, it is forbidden and taboo to cut down some trees or kill some animals like lions and elephants unless someone's life is in danger.[161]

Furthermore, the Ogiek people have produced a document on the proper management of the environment called the Ogiek Community Bio-Cultural Protocol (BCP).[162] The objective of the BCP is to safeguard the Ogiek people's rights as well as traditional knowledge and resources by establishing clear terms and conditions for regulating access to natural resources

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[157] Claridge and Kobei (n 133) 316.
[158] Ibid.
[159] Tenjei Eugene Tenjei, Evans Wabwire, and Norvy Paul, "Indigenous Cultural Practices and Environmental Conservation: A Case Study of Ogiek Community of Mau Forest of Kenya" (2022) 3(2) *International Journal of Culture and Religious Studies* 1-2.
[160] Ibid, 20.
[161] Ibid, 12.
[162] Ogiek Peoples' Development Program, "Ogiek Community Bio-Cultural Protocol (OC-BCP): Safeguarding Rights and Managing Resources to Improve Livehoods" (3rd ed, 2021) <https://ogiekpeoples.org/download/ogiek-community-bio-cultural-protocol/?wpdmdl=6190&refresh=655938fcb2a0e1700346108> accessed 18 November 2023.

and methods for sharing benefits derived from their development.[163] The BCP recognises the significance of the shrine and the trees in it as useful in all cultural, spiritual, and ritual matters. The trees are not allowed to be cut.[164] Based on the Constitution of Kenya and other international law instruments on the protection of the rights of Indigenous Peoples, the BCP sets out six Principles to serve as guides to the relationship between the Ogiek people and the government. These Principles include (1) access and benefit sharing agreement, (2) free prior and informed consent agreement, (3) representation, (4) agreement under the administration of justice, (5) community land administration, management and place names, and (6) traditional related knowledge, practices and innovations.[165]

The Ogiek have faced significant land rights challenges, notwithstanding the BCP's provisions. Historically, they have lived in the Mau Forest, but over the years, there have been issues of land encroachment, deforestation, and attempts to relocate the Ogiek from their ancestral lands. While the Kenyan government have systematically denied the rights of the Ogiek over the lands they have occupied for so many years, the government have allocated their lands to the political class and logging companies without any form of benefit from the commercial logging of those trees.[166] The eviction from their ancestral land has a long history, dating back to the British colonial rule in Kenya when, in 1933, the British House of Commons decided that it was pertinent to confine all native Kenyans to a native reserve. For the Ogiek, the House of Commons justified this relocation on the grounds that the Ogiek were scattered and were "more likely to progress and become useful citizens if they lived side by side with communities who have already advanced some way along the road of orderly progress."[167]

In 2017, in the seminal case of the *African Commission on Human and Peoples' Rights v. Republic of Kenya* (*Ogiek Judgement on Merits*)[168] the African Court held that the eviction of the Ogiek from the Mau Forest was a violation of the African Charter and also reiterated that they qualified as "peoples" within the provisions of the African Charter and other international law instruments on the rights of Indigenous Peoples.[169] The Court determined that the government's failure to recognise the Ogiek people's position as a distinct tribe, as other similar

[163] Ibid, p 1.
[164] Ibid, p 7.
[165] Ibid, 15 – 26.
[166] Claridge and Kobei (n 133) 316.
[167] House of Commons Parliamentary Paper, *Report of the Kenya Land Commission*, September 1933, cited in Claridge and Kobei (n 133) 317.
[168] ACtHPR, *African Commission on Human and Peoples' Rights v Republic of Kenya* (Ogiek Judgement on Merits), Application No. 006/2012 (2017).
[169] Ibid, para 208.

groups had, deprived them of the rights provided to other tribes and thus constituted discrimination.[170]

1.6.Africa's Indigenous Peoples and their Relationship with Nature

A critical look at the Indigenous Peoples examined above is the realisation that religious beliefs are attached to natural entities. This requires that religion and cultural practices play a very vital part in the struggle of Africa's Indigenous Peoples. Even though the right to religion will be examined in detail in Chapter Three, this section briefly looks at the concept here as part of the unique traits of Africa's Indigenous Peoples.

Religion, over the years, has tried to answer man's seemingly overwhelming problems, offer protection, and give hope that despite the vicissitudes of life, one gets rewarded for good deeds and punished for bad behaviour. Many religions exist, such as Christianity, Islam, Judaism, and Buddhism; traces of these religions can be found on all continents. Before the advent of Europeans in Africa, different communities worshipped differently, and there was no general name for these varied religions. Recently, scholars tended to group all these religions into what is now known as African Traditional Religion (ATR), a collection of different religions practised in Africa.

One of the core aspects that run through the ATR is animism. This has to do with the worship of tutelary deities, the worship of nature, the worship of ancestors, and the belief in the life to come.[171] Worship of nature is so pronounced with many indigenous groups in Africa that they worship natural entities like rivers, mountains, trees, forests, and animals. These communities believe these natural entities manifest God's powers[172] and are very attached to them. Unique treatments are given to these entities, and an abuse of them is frowned upon.[173] This religious practice has evolved into environmental personhood or rights of nature, where natural entities are accorded rights as though they were persons.

In simple terms, environmental personhood is a legal and philosophical concept that recognises certain non-human entities, such as rivers, forests, and mountains, as subjects of rights and duties similar to those of human beings. The idea is to extend legal protection to nature, recognise its intrinsic value and agency, and promote a more sustainable and respectful

[170] Ibid.
[171] Heinz Kimmerle, "The World of Spirits and the Respect for Nature: Towards a new Appreciation of Animism" (2006) 2(2) *The Journal for Transdisciplinary Research in Southern Africa*, 249 – 263.
[172] Eneji CVO and others, "Traditional African Religion in Natural Resources Conservation and Management in Cross River State, Nigeria" (2012) 2(4) *Environment and Natural Resources Research*, 45, 48.
[173] ibid.

relationship between humans and the natural world. Although the BCP establishes a special link between the Ogiek peoples' religious beliefs and the natural entities, it did not give these entities rights as though they were persons.

In Africa, Uganda is regarded as the first country to have incorporated rights of nature in a legal instrument after years of struggle by the Bagungu people who live on the shores of Lake Albert, where many sacred natural sites are located.[174] Therefore, in Uganda, "[n]ature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."[175] The law gives any person the right to enforce the rights of nature whenever there is an infringement.[176] This is a broad approach to locus standi, thereby giving anybody, indigenous communities, and environmental advocates interested in enforcing the rights of nature to do so. Even though the recognition of the rights of nature provided an avenue for the indigenous Bagungu communities with their local government to enact laws that protect sacred natural sites,[177] it is unfortunate that the government has continued to drill on sacred lands.[178] This is principally so because the Ugandan government prioritises national economic development over ecological concerns.[179]

TNCs' business operations in Africa have affected this belief system as most natural resources used by TNCs are hidden in mountains, rivers, and lands. So, the essence of this section is to understand how environmental degradation is not just an environmental issue but also a religious one for Africa's indigenous groups. In the *Endorois case* and *Ogiek Judgement on Merits,* the judgements pointed out that the relocation of the Indigenous Peoples out of their traditional lands and away from natural sacred entities was a violation of the right to religion,

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[174] Jack Josh, "Uganda joins the Rights-of-nature Movement but won't stop oil Drilling" (*National Geographic* 2 June 2021) <https://www.nationalgeographic.com/environment/article/uganda-joins-the-rights-of-nature-movement-but-wont-stop-oil-drilling> accessed 19 November 2023; Dennis Tabaro, "Custodians of Life: How the Bagungu People are reviving Sacred Custodianship" (*ICCA Consortium* 14 December 2021) <https://www.iccaconsortium.org/2021/12/14/bagungu-people-custodians-life-uganda/> accessed 19 November 2023.

[175] National Environment Act, 2019 (Act No 5/2019) (Uganda) s 4(1) <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/111164/138460/F-1865473437/UGD111164.pdf> accessed 19 November 2023.

[176] Ibid, s 4(2).

[177] National Association of Professional Environmentalists, "NAPE makes a Breakthrough as Buliisa District Council recognises Customary Laws of Bagungu Indigenous Communities" (NAPE) <https://www.nape.or.ug/news-events/latest-news/202-nape-makes-a-breakthrough-as-buliisa-district-council-recognizes-customary-laws-of-bagungu-indigenous-communities> accessed 15 April 2023; The Gaia Foundation, "Uganda Recognises Rights of Nature, Customary Laws, Sacred Natural Sites" (*Gaia Foundation*, 29 March 2021) <https://gaiafoundation.org/uganda-recognises-rights-of-nature-customary-laws-sacred-natural-sites/> accessed 15 April 2023.

[178] Josh (n 174).

[179] Nicola Pain and Rachel Pepper, "Can Personhood Protect the Environment? Affording Legal Rights to Nature" (2021) 45(2) *Fordham International Law Journal* 315, 326.

water, and food. So, conservation, religious beliefs, and natural entities are intertwined for Indigenous Peoples in Africa.

1.7.Concluding Remarks

Indigenous Peoples' important role in international law has contributed to the growth of the corpus of international human rights. Some of these legal instruments, which form part of the discussions in Chapters Two to Five, like the UNDRIP and ILO 169, are further evidence of Indigenous Peoples' struggle for recognition over the years. As part of a developing area of international law, some scholars have suggested that due to their struggles and contributions to international law, there are suggestions that Indigenous Peoples could have attained the status of subjects of international law.[180] Furthermore, Shrinkhal,[181] relying on the work of Barsh,[182] argues that the attainment of the status of subjects of international law by Indigenous Peoples is closely tied to their rights to self-determination and their struggles over the years for recognition under international law.[183] Whatever the position, it is essential to appreciate that "Indigenous Peoples have developed a distinct international identity as well as distinct rights in intentional law."[184]

This chapter establishes that Indigenous groups exist in Africa and equally argues against the inclusion of colonialism into the definition of Indigenous Peoples. As discussed above, an elaborate attempt was made to identify the Indigenous Peoples in Africa without the need for a strict definition but having a set of characteristics that any group that identifies as Indigenous People should satisfy. The essence of adopting a socio-psychological characterisation of Indigenous Peoples in Africa as against a rigid definition is that a strict definition might be viewed as perpetuating colonial legacies and reinforcing divisions created by external powers

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[180] Jan Klabbers, "The Subjects of International Law" in Jan Klabbers (ed) *International Law* (Cambridge University Press, 2013) 89. It is not certain to what extent indigenous peoples are regarded as subjects of international law. For instance, according to Katja Göcke, "Indigenous Peoples in International Law" in Brigitta Hauser-Schäublin (ed) *Adat and Indigeneity in Indonesia: Culture and Entitlements between Heteronomy and Self-Ascription* (Göttingen University Press, 2013) 17-29, the author argues that "[f]or centuries, indigenous peoples had been regarded as subjects of international law and holders of sovereignty" (see page 23) but recently [] their status as subjects of international law has been disregarded" (see page 25).

[181] Rashwet Shrinkhal, ""Indigenous Sovereignty" and Right to Self-determination in International Law: A Critical Appraisal" (2021) 17(1) *AlterNative* 71–82.

[182] Russel Lawrence Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law" (1994) 7 *Harvard Human Rights Journal* 33-86. Other writers hold similar view. See Valentina Vadi, "Spatio-Temporal Dimensions of Indigenous Sovereignty in International law" in Antonietta Di Blasé and Valentina Vadi (eds) *The Inherent Rights of Indigenous Peoples in International Law* (Roma Tre Press, 2020) 91 – 120. The author describes indigenous peoples as "subjects of rights under international law" (page 109).

[183] Rashwet Shrinkhal (n 181) 76.

[184] Shea Elizabeth Esterling, "Legitimacy, Participation and International Law- Making: 'Fixing' the Restitution of Cultural Property to Indigenous Peoples" in Karen N Scott and others (eds) *Changing Actors in International Law* (Brill, 2020) 158, 160 – 161.

and could inadvertently exclude groups that, while not fitting into a strict definition, still face similar challenges related to marginalisation, discrimination, and loss of land and resources. From the analysis of some Indigenous groups in Africa, the African Union human rights system gives an expansive interpretation of "peoples" to accommodate groups that identify as Indigenous based on the socio-psychological characterisation of Indigenous Peoples in Africa. This approach underscores the reality in Africa, where many groups that identify as Indigenous groups may not have experienced conquest or colonisation like the situation in New Zealand, Australia, and many parts of America. The following chapter examines the remaining two stakeholders – TNCs and African States – in the context of their relationship with Indigenous Peoples.

Chapter TWO

Transnational Corporations and Their Relationship with African States

2.1.Introductory Remarks

TNCs have played vital roles in shaping the economy of the world, especially developing economies with rich natural resources. Because of their economic importance, African States are particularly interested in making the continent attractive for investment, which consequently establishes a special relationship between TNCs and African States. However, the growing corporate presence in Africa has the consequences of causing various reports of human rights abuses and environmental issues that adversely impact Indigenous Peoples in the continent. Therefore, this chapter attempts to conceptualise TNC, trace its history and examine the theories that underpin TNC and the TNC-State relations in Africa. It also explores power dynamics in the protection of Indigenous Peoples' rights. While examining the potential adverse impacts of the activities of TNCs on the rights of Indigenous Peoples and the environment, this Chapter underscores the role African States play in these violations. Therefore, this chapter is dedicated to an analysis of TNCs and an examination of instances of African States' collusion with TNCs to engage in various human rights abuse and environmental pollution.

2.2.Conceptualising Transnational Corporations

At the onset, it is pertinent to highlight the different names used to identify business entities. The difference in names underscores the various forms and functions of business entities and the nature of their business operation. For instance, as identified by Jankowiak, the following terms can be used interchangeably to refer companies that operate across national borders and engage in international business activities: multinational corporations (MNCs), transnational corporations (TNCs), and multinational enterprises (MNEs).[185] Less frequently, such business entities are described as international corporations, international business organisations, or Stateless corporations. In this work, the term TNC is used, and the pieces of literature referred to in this work have been brought to conformity with TNC, notwithstanding the terms used in the literature. So, in any literature where other terms are used, this thesis refers to them as

[185] Anna H Jankowiak, "Transnational Corporations and Business Networks in ASEAN: Building Partnership in the Asia– Pacific Region" (2018) 11(1) *International Business Research* 230, 231. See also Rita Castro and António Carrizo Moreira, "Mapping Internal Knowledge Transfers in Multinational Corporations" (2023) 13(16) *Administrative Sciences* 1, 2.

TNCs. The reason for the adoption of TNC is that most legal instrument definitions use the term TNC, as seen below. Furthermore, in chapters Four and Five, which examine the sources of States' obligations and TNCs' responsibility, the terms "investor" and "investment" are used to reflect the unique names used in international investment law for TNCs.

Kogut and Reuben define TNC as a type of commercial organisation with operations in more than two countries, and it is the organisational structure that characterises foreign direct investment. It is a vehicle for knowledge transfer from one country to another while preserving cash flow and the possibility of control rights.[186] Some writers have tried to conceptualise it based on the percentage of assets owned by a foreign firm in another firm abroad. In this regard, according to Milberg, a TNC is "a firm that owns more than 10 per cent of assets in a foreign firm or operation, a level of investment presumably large enough to indicate control."[187] However, strictly limiting it to a certain percentage of asset ownership in a foreign firm has the problem of excluding the possibility of a firm owning a lesser percentage of assets but effectively participating in another foreign firm.

Legal definitions of TNC exist. The Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines),[188] although does not give a precise definition of a TNC, gives clues on how to identify one. In other words, TNCs:

> usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of other entities in a group, their degree of autonomy within the group may vary widely from one multinational enterprise to another. Ownership may be private, State, or mixed.[189]

One essential element of this definition is the identification of ownership structure. TNCs equally include the ones owned by States. The now-abandoned Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms on Responsibilities of TNCs) [190] offered another definition. Still, it used "legal form"

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[186] Bruce Kogut and Alicja Reuben, "Multinational Corporations" (2015) 2(16) *International Encyclopedia of the Social and Behavioral Sciences* 74.
[187] William S Milberg, "Globalization and its Limits" in Richard Kozul-Wright and Robert Rowthorn (eds) *Transnational Corporations and the Global Economy* (Macmillan Press Ltd, 1998) 77.
[188] OECD Guidelines (n 29).
[189] Ibid, Chapter 1, para 4.
[190] Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN 4/Sub 2/2003/12/Rev 2 (13 August 2003).

to cover private or State ownership. Put differently, the Norms on Responsibilities of TNCs provided that "…transnational corporation refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their *legal form*, whether in their home country or country of activity, and whether taken individually or collectively."[191] The ongoing attempt by the open-ended intergovernmental working group (OEIGWG) set up by the Human Rights Council to come up with a legally binding instrument on business human rights[192] has an equally elaborate definition of TNC. It starts with the definition of "business activities" as

> any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialisation, marketing and retailing of goods and services, undertaken by a natural or legal person, including State-owned enterprises, financial institutions and investment funds, transnational corporations, other business enterprises, joint ventures, and any other business relationship undertaken by a natural or legal person. This includes activities undertaken by electronic means.[193]

It then defines "Business activities of a transnational character" as

> any business activity described in Article 1.4. above, when:
> (a) It is undertaken in more than one jurisdiction or State; or
> (b) It is undertaken in one State, but a significant part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution takes place through any business relationship in another State or jurisdiction; or
> (c) It is undertaken in one State but has a significant effect in another State or jurisdiction.[194]

For the purposes of this research, the definition given by Mira Wilkins would be adopted as it does not incorporate any limitation as to the percentage of assets or some levels of control. For her, TNCs thus:

> are businesses that cross over borders, carrying with them a package of business attributes, including capital but also products, processes, marketing methods, trade names, skills, technology, and most important[ly] management. They move over borders tangible and intangible assets, while at the same time, and most crucial[ly],

[191] Ibid, para 20.
[192] Intergovernmental Working Group, *Updated Draft Legally Binding Instrument (clean version) to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* (Legally Binding Instrument), July 2023 <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>
[193] Ibid, art 1(4).
[194] Ibid, art 1(5).

> retaining connections with the home locations. They make direct investments, however small.[195]

Four essential elements can be distilled from Wilkins' definition. Firstly, the element of "across the border." Any corporation registered and operating in more than one country simultaneously qualifies as TNC. It does not matter that it is within the same regional location of Europe, Africa, Asia, and America, provided it has a presence in another country. Secondly, the nature of business does not determine which entity qualifies as TNC. In other words, a TNC could be providing services, goods, or technical advice. In this sense, TNC is considered one of the tools for technological transfer from the developed and transferring country to the developing and receiving country.[196] Thirdly, TNCs maintain a special relationship with their home countries or the main branch in the country of origin or registration from where most managerial decisions are made. The corporation's headquarters are often located in one country and maintains wholly or partially owned subsidiaries in other countries.[197] Finally, TNCs are into investment for profit maximisation, which is usually through foreign direct investment (FDI), and the size of the investment does not matter. Thus, TNC is the result of FDI, which is defined as an effective way for foreign investors to own and control operations in a country.[198]

Usually, TNCs engage in human rights or environmental violations through their subsidiaries in developing economies. Besides the advantages of facilitating business operations, subsidiaries make it possible for "violations committed in developing countries by or with the support of …its subsidiary or its commercial partner."[199] So, it is crucial to consider subsidiaries of TNCs as it relates to how they make it challenging to hold parent TNCs accountable.

One of important business characteristics of TNCs is their ability to establish subsidiaries, branches, or affiliates in different countries where they have presence. As earlier pointed out, the incorporation of subsidiaries has the advantage of allowing TNCs engage in production,

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[195] Mira Wilkins, "Multinational Corporations: An Historical Account" in Richard Kozul-Wright and Robert Rowthorn (eds) *Transnational Corporations and the Global Economy* (Macmillan Press Ltd 1998) 95.
[196] Lukas Madl and Theresa Radebne, "Technology Transfer for Social Benefit: Ten Principles to Guide the Process" (2021) 7 *Cogent Social Sciences* 1 – 19; Alana Corsi, João Luiz Kovaleski, and Regina Negri Pagani, "Technology Transfer, Anthropotechnology and Sustainable Development: How Do the Themes Relate?" (2021) 16(4) *Journal of Technology Management and Innovation* 96 – 108.
[197] The Editors of Encyclopaedia Britannica, "Multinational Corporation" (*Encyclopedia Britannica*, 28 May 2012) <https://www.britannica.com/topic/multinational-corporation> Accessed 27 January 2022.
[198] Kogut and Reuben (n 114) 74.
[199] International Federation for Human Rights, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* (July 2010) <https://www.refworld.org/pdfid/4c3d5ff62.pdf> accessed 08 January 2024.

marketing, and sales activities on a large scale internationally and to limit the possibilities of attributing to them the liabilities for the acts of their subsidiaries. As pointed out by Barnali Choudhury,[200] TNCs rely on two basic corporate principles to avoid responsibility for the debts of their subsidiaries. One is the principle of limited liability, which guarantees that parent TNCs are not responsible for the debts of their subsidiaries. Second, the principle of separate legal personality allows a parent TNC to be viewed as different from its subsidiaries. Fortunately for corporate liability advocates, recent judgements from national courts tend to suggest that once there is evidence of a parent-subsidiary relationship, the parent TNC would be liable for human rights and environmental law violations. In the *Four Nigerian Farmers and Milieudefensie v Shell*,[201] the Dutch Court of Appeal held that Royal Dutch Shell was liable for the environmental harm caused by its subsidiary in Nigeria, Shell Nigeria, for breaching its duty of care. This ruling introduces a novel approach to ensuring TNCs are held responsible by applying the common law duty of care principle. It expands the application of this principle to include both the principal firm and its subsidiary entities.[202] On the other hand, it has been criticised for not being specific on the applicable law and misapplying some legal principles.[203]

The decision is not different from the English case of *Okpabi and others v Shell,*[204] where the UK Supreme Court reiterated the routes to establish the accountability of TNCs for the acts of their subsidiaries. While approving the four Vedanta routes established in *Vedanta v Lungowe,*[205] the Court made it clear that the routes are not exclusive and that the standard for a parent TNC accountability for acts of its subsidiaries was not restrictive. These routes, as summarised by Owen, are:

> 1. A parent company takes over the management or joint management of the relevant activity of its subsidiary.
> 2. A parent company provides defective advice and/or promulgates defective group-wide safety/environmental policies that its subsidiary then implements.

[200] Barnali Choudhury, "Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough" (2023) 8 *Business and Human Rights Journal* 180, 186.
[201] *Four Nigerian Farmers and Stichting Milieudefensie v. Royal Dutch Shell Plc and another* [2021] ECLI:NL: GHDHA: 2021:132 (Oruma), ECLI:NL: GHDHA:2021:133 (Goi) and ECLI:NL: GHDHA:2021:134 (Ikot Ada Udo).
[202] Ikechukwu P. Ugwu, "The Extent of the Covid-19 Impact on Multinational Corporations' Accountability for Environmental Pollution" in Stoicheva Maria and others (eds*) Societal Transformations and Sustainable Development with Respect to Environment in the Post COVID-19 Digital Era* (St. Kliment Ohridski University Press, 2023) 96.
[203] See this criticism, see Lucas Roorda, "Broken English: A critique of the Dutch Court of Appeal decision in Four Nigerian Farmers and Milieudefensie v Shell" (2021) 12(1) *Transnational Legal Theory* 144–150.
[204] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.
[205] *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Others* [2019] UKSC 20.

> 3. A parent company promulgates group-wide safety/environmental policies and takes active steps to ensure its subsidiary's implementation of those policies.
> 4. A parent company holds out that it exercises a particular degree of supervision and control of its subsidiary.[206]

For the court, the need to show that there was "operation control" before an TNC could be held accountable for the acts of its subsidiary was not necessary, provided there is evidence of supervision or group-wide policies and guidelines. The court rejected the Court of Appeal's ruling that "the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations … of the subsidiary"[207] was necessary for parent liability. It refers to it as "inappropriately [focusing] on the issue of control."[208] For the court, mere omission to provide supervision after the parent has held itself as providing such supervision is enough. On this, the court ruled:

> The parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not, in fact, do so. In such circumstances, its very omission may constitute the abdication of responsibility which it has publicly undertaken.[209]

A parent TNC has been held liable for its global carbon emissions, including the emissions by all the entities in its chain. In *Milieudefensie v Royal Dutch Shell*,[210] a Hague District High Court ordered Royal Dutch Shell and its entire group to cut its global carbon dioxide (CO_2) emissions by 45 per cent by 2030, as compared with 2019 levels. This obligation to reduce its CO_2 emission covers all its subsidiaries in its energy portfolio. In appreciating the dimension of this decision regarding the role and responsibilities of a parent TNC within a corporate group, Macchi and van Zeben argued that the Court essentially confirmed that when a parent corporation develops and publicly communicates a comprehensive climate change policy or plan for the entire group, it assumes a duty of care for ensuring that the group's emissions are lowered in accordance with the specified outcome obligation.[211] Furthermore, as welcoming as

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[206] See Will Owen, "The Vedanta Route: Okpabi vs Royal Dutch Shell Plc", (*Global Mining Review*, 9 March 2021), <https://www.globalminingreview.com/mining/09032021/the-vedanta-route-okpabi-vs-royal-dutch-shell-plc/> accessed 18 November 2023.
[207] *Vedanta v Lungowe* (n) para 146.
[208] Ibid.
[209] Ibid, para 148.
[210] *Milieudefensie et al. v Royal Dutch Shell PLC* (26 May 2021) C/09/571932/HA ZA 19-379
[211] Chiara Macchi and Josephine van Zeben, "Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al. v Royal Dutch Shell" (2021) *Review of European, Comparative and International Environmental Law* 1, 6.

the decision is, it raises some issues regarding its enforceability. The court made the order "provisionally enforceable" because the interest of the claimants in the immediate reduction of CO_2 outweighed the interest of Royal Dutch Shell in maintaining the status quo pending the final and conclusive decision by the court of appeal. While making the order, the court was mute on any specific compliance mechanism for the company.[212]

The relationship between TNCs and their subsidiaries generally underscores economic advantages. However, apart from economic advantages, other factors are considered by TNCs before they decide to cross the border. In 1979, Dunning came up with the eclectic paradigm theory, otherwise called the ownership, location, internalisation (OLI) model, to emphasise three types of advantages that drive the internationalisation of firms: ownership-specific advantages (O), location-specific advantages (L), and internalisation advantages (I).[213] the OLI is a three-tiered template that a TNC can use to evaluate whether it will be beneficial to pursue an FDI and how they establish production in different locations. The ownership advantages encompass confidential data and different ownership rights of a TNC. These may include intellectual property rights such as branding, copyright, trademark, or patent rights, as well as the utilisation and administration of skills that are available within the organisation.

On the other hand, the location-specific advantages imply that TNCs evaluate whether there is a comparative advantage in carrying out specific tasks within a specific country. The consideration here would include the availability of natural resources, cheap labour, and market access, which are also immobile and, therefore, require that TNCs partner with other foreign firms or establish subsidiaries.[214] This is especially the case with regions with abundant natural resources, as is witnessed in Africa and in the territories of Indigenous Peoples. Addae and Addae, in addition to the abundant natural resources in Africa, equally identified emerging markets, economic growth, ease of doing business, and heightened demand from consumers as

[212] Andreas Hösli, "Milieudefensie et al. v. Shell: A Tipping Point in Climate Change Litigation against Corporations?" (2021) 11 *Climate Law* 195, 209.
[213] Ayse Merve Urfa and others, "A Bibliometric Analysis of the Eclectic Paradigm in Turkish Literature" (2023) 91 *Istanbul Management Journal* 25, 26; John H Dunning, "Explaining Changing Patterns of International Production: In Defence of the Eclectic Theory" (1979) 41(4) *Oxford Bulletin of Economics and Statistics* 269 – 295.
[214] See generally James Chen, "Eclectic Paradigm: Definition, Example, Advantages" (2020) Investopedia <https://www.investopedia.com/terms/e/eclecticparadigm.asp#:~:text=This%20paradigm%20assumes%20that%20institutions,Dunning> accessed 21 November 2023.

factors which attract TNCs in Africa using the location-specific advantages of the eclectic paradigm.[215]

Finally, the third tier, internalisation advantages, gives TNCs the opportunity to determine whether to produce a particular product internally or outsource it to a third party, especially when it is cost-effective. This may involve establishing subsidiaries, joint ventures, or licensing agreements. The eclectic paradigm suggests that TNCs will choose to internalise their activities in foreign markets when the costs of transacting with external parties are too high or when internalising the activities can better protect and exploit the firm's ownership advantages.[216] For Indigenous Peoples, the location-specific advantages of the eclectic paradigm are of particular interest to them as they explain the reason TNCs find their way into their territories to explore and exploit their natural resources.

2.3.History of Transnational Corporations

TNCs play essential roles at the international fora; they are at the centre of globalisation and have influenced many policies on governance in many countries. This section intends to give a brief history of TNCs, economic theories that serve as the basis for TNCs' business behaviour, especially in Africa, and the status of TNCs in international law. The early history of TNCs could be traced to colonial rule, where TNCs built colonial factories or port cities to ease the movement of natural resources from the colonised areas to Europe. These early TNCs played an important role in shaping international commerce and influencing overseas territories. For instance, the East India Company traded in the Indian Ocean region from 1600 to 1874. The United African Company, which was formed in 1879, was renamed the Royal Niger Company and engaged in the oil palm trade from Nigeria to Europe. In 1899, the company was sold to the British government at £46,407,250 being the amount the British government paid to buy the territory, which was to become known as Nigeria.[217] It is in this

[215] Isaac Yao Addae and Martinez Vencia Addae, "Multinational Enterprise Entry Modes in Sub-Saharan Africa: An Eclectic Paradigm Perspective" (2013) 2(1) *Journal for the Advancement of Developing Economies* 28, 31 – 32.
[216] Rajneesh Narula and others, "Applying and Advancing Internalization Theory: The Multinational Enterprise in the Twenty-first Century" (2019) 50 *Journal of International Business Studies* 1231 –1252.
[217] Baker G L "Research Notes on the Royal Niger Company—Its Predecessors and Successors" (1960) 2(1) *Journal of the Historical Society of Nigeria* 151–161; Cheta Nwanze, "Who sold Nigeria to the British for £865k in 1899?" (*Africa is a Country*, 28 April 2014) <https://africasacountry.com/2014/04/historyclass-who-sold-nigeria-to-the-british-for-865k-in-1899> accessed 27 January 2022.

sense that former British colonies, especially Nigeria, were seen as business enterprises of the British Crown.[218]

Carlos and Nicholas[219] take another approach to the history of TNCs by grouping the history into stages. For them, the trading companies of the early 16th and 17th centuries, such as the English and Dutch East India Companies, the Muscovy Company, the Hudson's Bay Company, and the Royal African Company, engaged in cross-border trade of goods and services. These companies had a vast geographical presence comparable to that of today's largest TNCs. Shortly after its establishment in 1553, the Muscovy Company inaugurated a unit in Russia known as a rope house. This establishment recruited skilled English craftsmen to produce cordage. The Dutch East India business established a saltpetre refining facility in Bengal in 1641. Ten years later, they created print works for textiles. By 1717, the business had employed more than four thousand silk spinners in Kaimbazar.[220]

On the other hand, they looked at 19th-century international firms as TNCs because they replaced merchant houses and agents with branches abroad. In this period, the advancement in communications and transportation facilitated administrative control and the frequency of transactions. For Boona and Storli, this advancement led to an increase in global trade by a factor of more than ten.[221] The 20th century, which saw the proliferation of TNCs, has often been argued to be a result of decolonisation and an attempt by the West to maintain the hegemonic power it exerted during colonialism. Because colonialism gave the colonising powers the opportunity to "consolidate knowledge production by creating cultural hegemony," a single unified market after decolonisation would still give them the power to maintain this hegemony in the form of globalisation.[222]

2.4. Main Theories that Underpin the Operation of Transnational Corporations

Principally, three theoretical concepts will be examined to buttress the relationship between TNCs and developing economies, especially countries in Africa and how these concepts influence their attitudes toward Indigenous Peoples. These are neoliberalism, transnationalism,

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[218] Benjamin Maiangwa, Muhammad Dan Suleiman, and Chigbo Arthur Anyaduba, "The Nation as Corporation: British Colonialism and the Pitfalls of Postcolonial Nationhood in Nigeria" (2018) 25(1) *Peace and Conflict Studies* 1 – 23.

[219] Ann M Carlos and Stephen Nicholas, ""Giants of an Earlier Capitalism": The Chartered Trading Companies as Modern Multinationals" (1988) 62 *Business History Review* 398.

[220] Ibid, 399.

[221] Marten Boona and Espen Storli, "Creating Global Capitalism: An Introduction to Commodity Trading Companies and the First Global Economy" (2023) 65(5) *Business History* 787, 791.

[222] Irene Lodigiani, "From Colonialism To Globalisation: How History Has Shaped Unequal Power Relations Between Post-Colonial Countries" (2020) 2 *Glocalism: Journal of Culture, Politics and Innovation* 1, 10-11.

and globalisation. Neoliberalism and transnationalism are analysed together as they are somewhat related.

2.4.1. Neoliberalism and Transnationalism

Fundamentally, TNCs favour neoliberalism and transnationalism, and the two concepts inform the behavioural pattern of TNCs. Neoliberalism is the philosophical ideal that trade and the economy should be liberalised, that is, less governmental interference to give room for more private enterprises. It is a "view that a society's political and economic institutions should be robustly liberal and capitalist but supplemented by a constitutionally limited democracy and a modest welfare State."[223] Neoliberal ideology is based on the presumption that individual freedoms are guaranteed by market freedom, primarily through free trade, privatisation, deregulation, and reduced State intervention in social provision.[224] According to neoliberalism, the best policies to be implemented by the States are those that open up the market for the unregulated forces of demand and supply to determine perfect market competition. Neoliberalists believe that when this happens, it will "maximise not only individual freedom but efficiency, growth, wealth and welfare".[225]

Again, for such an economy to be achieved, social institutions must be deregulated. The deregulation process will stop the government's meddling or unwarranted regulation and allow free markets to allocate resources according to individual actors' performances.[226] When propelled by neoliberalism, TNCs would oppose government regulation of the environment and policies on human rights protection in so far as these regulations and policies affect business operations. The core neoliberalist view is that the function of government when it pertains to business growth is limited to regulating property rights, enforcing contracts, and determining the supply of money.[227] The implication is that neoliberalism is perceived "as a process of deregulation where private markets eclipse State power and TNCs displace local market actors and challenge State authority, particularly in developing economies."[228]

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[223] Kevin Vallier, "Neoliberalism" (*Stanford Encyclopedia of Philosophy*, 9 June 2021) <https://plato.stanford.edu/entries/neoliberalism/> accessed 1 December 2021.
[224] Terry Hathaway, "Neoliberalism as Corporate Power" (2020) 24(3-4) *Competition and Change* 315, 318.
[225] Paddy Ireland, "Law and the Neoliberal Vision: Financial Property, Pension Privatization and the Ownership Society" (2011) 62(1) *Northern Ireland Legal Quarterly* 1, 32.
[226] Uchechukwu Nwoke, "Neoliberal Corporate Governance, Oil MNCs and the Niger Delta Region: The Barriers to Effective CSR" (May 2015, *PhD Thesis submitted to the Kent Law School, University of Kent*), 151.
[227] Clinton Free and Angela Hecimovic, "Global Supply Chains after COVID-19: The End of the Road for Neoliberal Globalisation?" (2021) 34(1) *Accounting, Auditing and Accountability Journal* 58, 59.
[228] Amy J Cohen and Jason Jackson, "Governing Through Markets: Multinational Firms in the Bazaar Economy" (2020) *Regulation and Governance* 1,2.

Historically, neoliberalism traces its origin to classical 18th-century liberal philosophy, influenced by political philosophers such as John Locke[229] as espousing natural liberty, natural rights, and individual rights over the monarch and church autocracy.[230] According to Locke, since God gave nature to humankind in common, any individual has the right to appropriate natural resources for their use. Locke further argued that individuals have a natural right to acquire property by exerting labour over the property. Consequently, unowned natural resources become their property by exerting their labour with them.[231] Unfortunately, this Lockean theory of property rights has been used to justify the dispossession of Indigenous Peoples from their lands by colonial powers as it was claimed that Indigenous Peoples did not cultivate the land and, therefore, were not exercising their natural right to property.[232] This dispossession continues even after colonialism.[233] This principle of "rights in the individual" ultimately led to the emergence of the "rights in property" that allows an individual who is in possession to do as they please with the property they possess.[234]

The ultimate assumption was that while pursuing an individual interest in an unstrained and enlightened world, the individual is also promoting the interest of the general society. This aspect of neoliberalism is the foundation of classical liberalism, especially as championed by Adam Smith and David Ricardo.[235] This theory of absolute advantage by Smith and Ricardo, which focuses on the ability of a country to produce goods more efficiently than another, was the foundation for the development of the theory of comparative advantage.[236] The idea is that human beings, by nature, work toward making profits. The theory of absolute advantage has been integrated into the framework of location competitiveness, and guides TNCs in their strategic decisions on choosing locations in countries most beneficial to them.

Furthermore, transnationalism is another concept that influences the behaviour of TNCs. It refers to the diffusion and expansion of social, political, and economic activities between and

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[229] Kylie Smith, Marek Tesar, and Casey Y Myers, "Edu-Capitalism and the Governing of Early Childhood Education and Care in Australia, New Zealand and the United States" (2016) 6(1) *Global Studies of Childhood* 123, 124.
[230] Nwoke[2] (n 226) 153 – 154.
[231] John Locke, "Second Treatise of Government" in Mitchell Cohen (ed) *Princeton Readings in Political Thought: Essential Texts from Plato to Populism* (Princeton University Press, 2018) 213
[232] Jan H Pranger, "Christianity, Settler Colonialism, and Resource Extraction" (2023) 62(2) *Dialog* 138 – 142; Natsu Taylor Saito, *Settler Colonialism, Race, and the Law Why Structural Racism Persists* (New York University Press, 2020) 79.
[233] Ugwu (n 114) 277.
[234] Nwoke[2] (n 226) 154.
[235] Reinhard Schumacher, "Altering the Pattern of Trade in the Wealth of Nations: Adam Smith and the Historiography of International Trade Theory" (2020) 42(1) *Journal of the History of Economic Thought* 19, 26.
[236] Ibid.

beyond the sovereign jurisdictional boundaries of nation-States.[237] Non-State actors, TNCs, and international organisations are increasingly changing international discourses and ideas. These actors often time represent the aspirations of States to achieve economic globalisation. On the side of TNCs, transnationalism is a tool for avoiding strict human rights and environmental requirements. In this sense, Bertram argues that "the transnationality of corporate structures allows businesses to shift their operations to jurisdictions with weak laws or lax enforcement to escape environmental scrutiny and accountability."[238]

The emergence of the TNC as a quasi-governmental institution has occurred amid an ongoing, profound transformation of the relationship between politics, society, and the market from the early 19th century onward.[239] While colonialism was eradicated, TNCs and strong economic-based international organisations rose. The WTO is an excellent example of how strong economies have succeeded in maintaining economic relationships with developing economies through open market access and trade liberalisation principles.[240] For instance, Article 1.1 of the General Agreement on Tariffs and Trade (GATT)[241] mandates WTO members to extend similar treatment to all goods of other members regarding export, import, tariffs, and so on. The exact requirements also apply in the trade involving services[242] or intellectual property rights.[243] One of the effects of these provisions is that goods or services produced by TNCs would enjoy the same treatment as other goods or services produced in a TNC's home State. TNCs could establish subsidiaries where raw materials are readily available without the fear of the final products suffering any export barriers. Similarly, the WTO's Agreement on Trade-Related Investment Measures[244] are rules that limit the preference of domestic companies over

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[237] Global Society Theory, "Transnationalism" <https://globalsocialtheory.org/concepts/transnationalism/> accessed 3 December 2021.

[238] Daniel Bertram, "Judicializing Environmental Governance? The Case of Transnational Corporate Accountability" (2022) 22(1) *Global Environmental Politics* 117, 118.

[239] Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press, 2009) 169.

[240] For more on the WTO and market access and trade liberalisation, see Emeka C Iloh and others, *World Trade Organization's Trade Liberalization Policy on Agriculture and Food Security in West Africa* (Intechopen, 2020); Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2005); Julia Langbein, Ildar Gazizullin, and Dmytro Naumenko, "Trade Liberalisation and Opening in Post-Soviet Limited Access Orders" (2021) 37(1) *East European Politics*, 139 - 158.

[241] World Trade Organisation, "General Agreement on Tariffs and Trade" 1994, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organisation*, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

[242] World Trade Organisation, "General Agreement on Trade in Services", 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organisation*, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994) [art 2.1].

[243] WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement) 15 April 1994, Annex 1C to the WTO Agreement, 1869 UNTS 299, [art 4].

[244] WTO, *Agreement on Trade-Related Investment Measures* (TRIMS Agreement) Annex 1A to the WTO Agreement, 15 April 1994, 1868 UNTS 186

foreign ones, making it easier for international companies to do business in foreign markets. With these, TNCs freely invest in foreign countries and produce goods and services without barriers to exportation.

These two economic theories of less governmental regulation of TNCs and open market access explain the behaviour of TNCs in Africa. This has indirectly led to less strict regulatory measures in Africa regarding the operations of TNCs. Neoliberalism and transnationalism have created shareholder value ideology where the interests of non-stakeholders, like the communities, are secondary to the interests of shareholders.[245] While neoliberalism centres on economic policies that promote free markets and limited government intervention, transnationalism focuses on the geographical scope of operations and adaptability to diverse environments. TNCs often navigate the global business landscape by incorporating elements from both transnational and neoliberal perspectives within the framework of global capitalism.

Neoliberalism and transnationalism, as pointed out earlier, have impacted negatively on the rights of Indigenous Peoples. According to Gardner and Richards, this usually results when governments of developing economies are forced to adapt their human rights and environmental policies to reflect the structural adjustment reforms of the IMF and World Bank.[246] They further point out that "Indigenous Peoples have faced particular consequences – cultural, political, economic, and environmental – as a result of neoliberalism and often have mobilised in response to ensure their rights and sovereignty."[247] As earlier Stated, the concepts have contributed to the continued encroachment on the lands of Indigenous Peoples in Africa after it was used to dispossess Indigenous Peoples of their ancestral lands. Consequently, some attempts by the West to conserve some natural habitat in Africa have been interpreted as "a pretext for the exportation of "neoliberal conservation" … and Western ideals." This is because

[245] Mark R DesJardine, Muhan Zhang, and Wei Shi, "How Shareholders Impact Stakeholder Interests: A Review and Map for Future Research" (2023) 49(1) *Journal of Management* 400, 401; Uchechukwu Nwoke, Collins Chikodi Ajibo, and Timothy Okechukwu Umahi, "Neoliberal Shareholder Value and the Re-privatization of Corporations: The Disengagement of "Transformative" Corporate Social Responsibility?" (2018) 60(6) *International Journal of Law and Management* 1354, 1354. These supranational bodies are described as agents of neo-liberalism, see Gorden Moyo, *Africa in the Global Economy: Capital Flight, Enablers, and Decolonial Responses* (Springer, 2024) 41, since they coordinate large private and public TNCs which are leading players in capitalist ideologies, see Fernanda Frizzo Bragato and Alex Sandro da Silveira Filho, "The Colonial Limits of Transnational Corporations' Accountability for Human Rights Violations" (2021) 2 *TWAIL Review* 34, 48.
[246] Jeffrey A Gardner and Patricia Richards, "Indigenous Rights and Neoliberalism in Latin America" in Steven Ratuva (ed) *The Palgrave Handbook of Ethnicity* (Palgrave Macmillan, 2019) 849, 851.
[247] Ibid, 852.

the end result is always the "commodification of conservations" for profit maximisation instead of "saving it for posterity and the basic needs of its closest human population."[248]

2.4.2. Globalisation

At the heart of TNCs is globalisation. As its name suggests, globalisation is the idea of making the whole world a single and free "global village" or "global parlour".[249] The International Monetary Fund (IMF) gives an elaborate definition of globalisation thus:

> *Economic* "globalization" is a historical process, the result of human innovation and technological progress. It refers to the increasing integration of economies around the world, particularly through the movement of goods, services, and capital across borders. The term sometimes also refers to the movement of people (*labor*) and knowledge (*technology*)[250] across international borders. There are also broader cultural, political, and environmental dimensions of globalization.[251]

From the above, globalisation involves economic, migration of people, and technological considerations, which invariably have impacts on a people's cultural, political, and environmental aspects. Globalisation is a process of international integration that has grown because of increased global trade of goods, services, and other items, as well as the effect of other cultural and social factors. This process has been influenced over time by advancements in different industries, ranging from information communication technology to transportation. This enables the rising interdependence between marketing and other corporate activities such as management, logistics, and accounting.[252]

There are many advantages of globalisation, which include increased interdependence of countries for necessary goods and services, TNCs now grow and develop activities across countries quickly,[253] easy movement of money and information,[254] expansion of international trade through the elimination or reduction of barriers to trade like import tariffs,[255] and so on.

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[248] See Kenneth Toah Nsah, "Conserving Africa's Eden? Green Colonialism, Neoliberal Capitalism, and Sustainable Development in Congo Basin Literature" (2023) 12(3) *Humanities* 1, 7.
[249] Valentine Ehichioya Obinyan and Albert Osemeamhen Onobhayedo, "Globalization and Culture Modification: Reshaping the Instruments of Socialization Towards African Societal Development" (2017) XXIX (1) *IDEA – Studia nad strukturą i rozwojem pojęć filozoficznych*, 393, 396.
[250] Emphasis added.
[251] Julian Di Giovanni and others, "Globalization: A Brief Overview" (2008) 02/08 *International Monetary Fund: Issues Brief* 2.
[252] Marius-Răzvan Surugiu and Camelia Surugiu, "International Trade, Globalization and Economic Interdependence between European Countries: Implications for Businesses and Marketing Framework" (2015) 32 *Procedia Economics and Finance*, 131, 132.
[253] Ibid, 133.
[254] Meetika Srivastava, "Globalisation and Public Administration: A Study of the Term 'Globalisation', Its Nature, Meaning, Characteristics and Impact on Public Administration" (2009) *Social Science Research Network*, <https://ssrn.com/abstract=1508013 accessed on 26 January 2022.
[255] Julian Di Giovanni and others (n 90) 3.

Specifically, for developing countries, it was said that globalisation "has reduced the sense of isolation felt in much of the developing world and has given many people in the developing world access to knowledge well beyond the reach of even the wealthiest in any country a century ago".[256] To facilitate globalisation, many international instruments were agreed upon like the General Agreement on Tariffs and Trade[257] and its Agreements[258] (the GATT Agreements) and the various regional trade agreements like the North American Free Trade Agreement (NAFTA),[259] the African Continental Free Trade Area (AfCFTA)[260] and many EU agreements on the free movement of goods and people. In Africa, together with supranational institutions like the World Bank, World Trade Organisations, and the IMF, TNCs advance open market access and the globalisation of the world by employing some ideologies that justify this.

Some scholars have established a relationship between capitulation and the way in which the World Bank and IMF operate. This relationship, which was made by Fidler, underscores the hegemony of the West, where other nations have to conform and adjust to the policies, norms, and rules established by the hegemonic powers.[261] Simply defined, capitulations were a system of extraterritorial jurisdiction and power used by European and US States in non-Western territories. Baker defines capitulations elaborately thus:

> [I]t was the object of the... treaties to exempt foreigners from the civil and criminal jurisdiction of the local magistrates and tribunals, and make them subject only to the laws and authorities of their own country, thus creating a kind of extra-

[256] Joseph Stiglitz, *Globalization and Its Discontents* (WW Norton and Company, 2003) 4, cited in Julian Di Giovanni and others (n 90) 3.
[257] The United Nation General Assembly, *General Agreement on Tariffs and Trade* 30 May 1950, 814 UNTS 64, 187.
[258] Some of these Agreements include the WTO, *Agreement Establishing the World Trade Organization* (World Trade Organisation [WTO]) 15 April 1994, 1867 UNTS 154; WTO, TRIMS Agreement (n); WTO, *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, Annex 1A to the WTO Agreement, 1869 UNTS 14; WTO, *General Agreement on Trade in Services* (the GATS Agreement), 15 April 1994, Annex 1B to the WTO Agreement, 1869 UNTS 183; TRIPS Agreement (n); WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Dispute Settlement Rules) 15 April 1994, Annex 2 to the WTO Agreement, 1869 UNTS 401. These Agreements all aim to globalise and liberalise trade and services with provisions for settling disputes. See Dylan Geraets, *Accession to the World Trade Organization: A Legal Analysis* (Elgar Online, 2018) 31-32.
[259] *North American Free Trade Agreement*, 17 December 1992 ((1993) 32 ILM 289, UN Doc UNCTAD/DTCI/30 (Vol III), 73), OXIO 154.
[260] The African Union, *Agreement Establishing the African Continental Free Trade Area*, adopted on 21 March 2018, entered into force on 30 May 2019.
[261] David P Fidler, "A Kinder, Gentler System or Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization" (2000) 35 *Texas International Law Journal* 387, 389.

> territoriality for all citizens of the contracting States resident in or visiting any part of the East where the treaties obtained.[262]

Although capitulations were a result of bilateral trade negotiations, they had a religious undertone because they provided exemptions to the jurisdiction of local Islamic laws to Christian traders who carried out businesses in non-Christian countries, especially in Turkey.[263] According to Britannica, although older capitulation agreements existed, the 1536 capitulation treaty signed between Francis I of France and Süleyman I of Turkey, became the model for later treaties with other powers. In the 18th century, almost every European nation had capitulations in Turkey, and in the 19th century, newly formed countries like the United States, Belgium, and Greece did the same. The Sino-British supplementary treaty of 1843 established a British supreme court in China to entertain all matters involving British subjects.[264] As argued by Fidler, the essence of the capitulatory regime was to achieve harmonisation of rules of international business transactions since the diversity of the legal systems among nations created a form of uncertainty for investors and, as Chimni puts it, the regime was, as result of "the absence of cohesive laws and institutions considered necessary to promote commercial interests of imperial powers."[265] Unfortunately, it was an unequal attempt at harmonisation as it was only the UK and US laws and norms that were chosen for this harmonisation. Ultimately, it put pressure on non-Western countries to reform their laws to be in conformity with Western ideals.[266]

Relating this to the World Bank and IMF, Fidler pointed out that the structural adjustment programmes (SAPs) of the World Bank mirror capitulations because both principles attempt to harmonise laws and policies to conform to Western ideals. Technically, SAPs can be viewed as economic reform policies implemented by developing countries, often under the guidance of international financial institutions like the IMF and World Bank. Halton gives an elaborate description of SAPs: it

> is a set of economic reforms that a country must adhere to in order to secure a loan from the International Monetary Fund and/or the World Bank. Structural

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[262] Sherston Baker, *Halleck's International Law V1: Or Rules Regulating The Intercourse Of States In Peace And War* (3rd edn, Kegan Paul, Trench, Trübner Ltd, 1893) 387 – 388 cited in David P Fidler (n) 390.
[263] Inura Fernando, "The Necessity of Interdisciplinary Investigations for Proper Understanding of the History of International Law" (2021) 52(2) *Victoria University of Wellington Law Review* 285, 308.
[264] See generally Britannica Encyclopaedia, "Capitulation" (*Encyclopedia Britannica*, 8 May 2020, <https://www.britannica.com/topic/capitulation> accessed 22 November 2023.
[265] B S Chimni, "The International Law of Jurisdiction: A TWAIL Perspective" (2022) 35 *Leiden Journal of International Law* 29, 43.
[266] David P Fidler (n) 391.

> adjustments are often a set of economic policies, including reducing government spending, opening to free trade, and so on.[267]

Furthermore, Fidler opines that the economic model underlying SAPs is based on the principles of liberal or neoliberal theory of economic growth and development.[268] This informs the criticism of the programme by developing countries, especially Africa, because SAPs may not always take into account the unique circumstances of each country, leading to negative consequences and the possibility of "contributing to the degradation of the natural environment."[269] The SAPs entail a country making a series of policy changes, such as reducing tax and tariff rates, slashing social spending, and privatising the public sector, which is criticised as being "disastrous for most developing countries".[270] Fidler compares capitulations and the SAPs on the basis of their attempts to achieve legal harmonisation to aid global trade and investment. Rather than harmonisation based on negotiations and exchange of mutual uniqueness, both tools impose Western economic policies on developing countries.[271] This harmonisation reflects the tenets of globalisation, and to this extent, the World Bank and IMF advance unequal globalisation entirely along Western lines.

Beyond the negative impacts of globalisation identified above, globalisation equally manifests itself in forms that have been described as contemporary colonialism. This is more so because while colonialism was ending, globalisation was beginning to gain ground in 1980.[272] According to Uzoigwe, Africa was conquered in the face of globalisation by the industrialised nations of Europe.[273] While decolonisation was taking place, former colonial powers did not

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[267] Clay Halton, "What Are Structural Adjustment Programs (SAPs)?" (*Investopedia*, 2021) <https://www.investopedia.com/terms/s/structural-adjustment.asp#:~:text=A%20structural%20adjustment%20is%20a,free%20trade%2C%20and%20so%20on> accessed 22 November 2023.

[268] David P Fidler (n) 399. To this end, if neo-colonialism is defined as the imposition of capitalism, then all SAPs become neo-colonialism by default. See Sarai-Anne Ikenze, "Policy Choices in African Structural Adjustment: An Exploration of Sectoral Continuity" (Doctoral Thesis, Lund University, 2022) 39 <https://lucris.lub.lu.se/ws/portalfiles/portal/116093160/Ikenze_Sarai_Anne_Thesis.pdf > accessed 29 May 2024.

[269] Almahdi Musa Attahir Musa and Omer Abdelrahman Mohammed Mansour, "Assessment the Structural Adjustment Policies in Sudan via (VECM) Model through the period 1989-2019" (2021) 12(2) *Business and Economics Journal* 1, 3. See also Giles Mohan and Frangton Chiyemura, "Structural Adjustment" in Audrey Kobayashi (ed) *International Encyclopedia of Human Geography* (2nd edn, Elsevier, 2020) 61, 61.

[270] David Karjanen, "World Bank, the International Monetary Fund, and Neoliberalism" in John Stone and others (eds) *The Wiley Blackwell Encyclopedia of Race, Ethnicity, and Nationalism* (1st edn, John Wiley and Sons, Ltd, 2016) 1, 4.

[271] David P Fidler (n) 399 – 340.

[272] Julian Di Giovanni and others (n 90) 3.

[273] Uzoigwe G N, "European Partitioning and Conquest of Africa: An Overview", in Boahen Albert Adu (ed), *General History of Africa- VII: Africa under Colonial Domination* 1880-1935 (Heinemann Educational Book, 1985) 20.

intend to relinquish the economic and hegemonic powers that they had sustained during colonial rule, so they sought new means of maintaining similar control and dependency.[274]

Some scholars refer to globalisation as neo-colonialism, that is, new colonialism.[275] The argument is that globalisation is the carrier of predominantly Eurocentric values that are aggressively projected globally as universal values.[276] The philosophy behind neo-colonialism remains the dominance of the economy by former colonial powers through foreign actors, such as TNCs, as the exemplary manifestation of the continuity of colonialism.[277] This continuity of colonialism manifests in various forms, according to Ziai.[278] Firstly, through economic globalisation. Following the abandonment of the 1973 Bretton Woods system of fixed exchange rates, there was an increase in cross-border financial transactions. Unfortunately, Africa constitutes only about 3% of the global export. This is because, in many areas, the colonial division of labour still exists (raw material production for export in the South, technological manufacturing in the North).[279] In this sense, Africa and other countries in the global South continue to supply raw materials for the production of technologies in the North. Regarding ownership and structure of companies involved in the global economy, 72% of beneficial owners of companies in Europe and the USA come from the regions, unlike 8% from Africa, 24% from Asia, and 11% from Latin America and the Caribbean. Again, more than 80% of the 100 largest TNCs are headquartered in Europe or North America.[280]

The second way in which colonialism continues to manifest is through international institutions of the global economy. Supranational global economic institutions like the WTO, the IMF and the World Bank, that is, the International Bank for Reconstruction and Development (IBRD)

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[274] Irene Lodigiani, "From Colonialism to Globalisation: How History has Shaped Unequal Power Relations between Post-Colonial Countries" (2020) 2 *Glocalism: Journal of Culture, Politics, and Innovation*, 1, 7; Sanya Osha, "Appraising Africa: Modernity, Decolonisation and Globalisation" in Lansana Keita (ed) *Philosophy and African Development: Theory and Practice* (Council for the Development of Social Science Research in Africa, 2011) 169 – 176; Kwame Nkrumah, *Neo-Colonialism, The Last Stage of Imperialism*, (Thomas Nelson and Sons, Ltd, 1965).

[275] Louay M Safi, *Islam and the Trajectory of Globalization: Rational Idealism and the Structure of World History* (Routledge, 2021) 250 – 276; Nick Couldrya and Ulises Ali Mejias, "The decolonial turn in data and technology research: What is at stake and where is it heading?" (2023) 26(4) *Information, Communication and Society* 786, 797; Marianne Storgaard and others, "Holding On While Letting Go: Neocolonialism as Organizational Identity Work in a Multinational Corporation" (2023) 41(11) *Organization Studies*, 1469-1489.

[276] Tom Adoko, "(Neo)-Colonialism, Globalised Modernisation and Global Energy and Environment: A Review of Available Opportunities and their Threats to Globalisation" (2021) 9(3) *International Journal of Social Science and Humanities Research* 195, 197.

[277] Aram Ziai, "Neocolonialism in the Globalised Economy of the 21st Century: An Overview" (2020) 9(3) *Momentum Quarterly* 128, 129.

[278] Ibid.

[279] Ibid.

[280] ibid, 131.

and its subsidiary, the International Development Association (IDA), have been accused of continuing colonial policies in the guise of globalisation. The voting rights in the IMF and World Bank exemplify this. Voting rights are weighted based on capital shares: wealthier countries with higher capital shares have more voting rights. As a result, the executive directors from Germany, France, and the United Kingdom have more than twice as many votes (11.96%) in the IBRD as the representatives from the nearly 54 African countries put together.[281] Even though the WTO decision-making mechanism is based on "one country, one vote," European countries used threats or clever tactics on developing countries from Africa.[282]

Finally, colonialism perpetuates itself through cultural heritage and integration made possible by globalisation. At the core of globalisation is the idea of integrating cultural systems through the exchange of sociocultural values, belief systems, and ideas.[283] There is always the possibility of a culture being projected as superior to others, and Africa has remained a victim of such cultural domination.[284] Africa's Indigenous Peoples' practices, such as hospitality, communal living, and extended family system, are being replaced with European individualism and capitalism.[285]

2.5. The Status of Transnational Corporations

This section is necessary because examining the status and role of TNCs would open up the examination of their legal personality and because they play a significant role in international law, particularly in economic matters and human rights.[286] The ongoing debate on whether TNCs are subjects of international law centres around the extent to which they have rights and responsibilities under international law, particularly in areas like human rights, taxation, and the environment.

Before an entity can be regarded as a subject of a legal system, these three conditions must be fulfilled. That is, the entity must (1) possess duties as well as responsibility for violating those duties; (2) have the capacity to benefit from legal rights as a direct claimant and not as a mere beneficiary; and (3) in some capacity, be able to enter into contractual or other legal relations

[281] ibid
[282] Ziai (n 105) 132.
[283] Obinyan and Onobhayedo (n 89) 397.
[284] ibid, 399.
[285] ibid.
[286] Patricia Rinwigati, "The Legal Position of Multinational Corporation in International Law" (2019) 49(2) *Jurnal Hukum and Pembangunan* 376.

with other subjects of the system.[287] For an entity to hold rights and duties under international law, it must be qualified as a subject of international law. The terms "subject of a legal system" or "legal person" are used interchangeably.[288] Under the classical or orthodox theory of international legal personality, only States qualify as subjects of international law.[289] The emphasis is on the centrality of States as the sole subjects of international law, with international law primarily governing the relations between States and underscores the principle that international law is binding on States in their relations with each other and does not typically confer direct rights or impose duties upon individuals.[290]

But over the years, new subjects of international law have been recognised. In the case of *Reparation for Injuries*,[291] the ICJ recognised the UN as a subject of international law. In justifying this, the ICJ opined that for these organisations to function well, their agents must be protected. While holding that the legal personality of the UN was different from that of States, the ICJ nonetheless observed that as a subject of international law, the UN was "capable of possessing international rights and duties" and the "capacity to maintain its rights by bringing international claims."[292] The Court advised thus:

> It must be noted that the effective working of the Organization—the accomplishment of its task, and the independence and effectiveness of the work of its agents… it is necessary that, when an infringement occurs, the Organization should be able to call upon the responsible State to remedy its default, and, in particular, to obtain from the State reparation for the damage that the default may have caused to its agent.[293]

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[287] Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges", (2008) 6(2) *Northwestern Journal of Human Rights* 222, 233; Marko Aćić, "International Organizations as Sui Generis Subjects of International Law" (2021) 1 *Acta Politica Polonica* 51, 63; Christian N Okeke, *Controversial Subjects of Contemporary International Law* (Rotterdam University Press, 1974) 19.

[288] Okeke (ibid) 19, used these words interchangeably when he said, "[t]o be a *subject of a system of law*, or to be a *legal person* within the rules of that system…."

[289] Duruigbo (n 287) 222; Pavel Bureš, "International Legal Personality of Transnational Corporations – Any Chance for the Theoretical Shift with Respect to a Legally Binding Instrument on Human Rights and TNCs?" (2022) 22(2) *International and Comparative Law Review* 139, 143; Joycelin Chinwe Okubuiro, "Application of Hegemony to Customary International Law: An African Perspective" (2018) 7(2) *Global Journal of Comparative Law* 232, 248. For Blanco and Grear, TNCs' ideological structure gives them the "juridical privilege and power to evade jurisdictional responsibility." See Elena Blanco and Anna Grear, "Personhood, Jurisdiction and Injustice: Law, Colonialities and the Global Order" (2019) 10(1) *Journal of Human Rights and the Environment* 86, 87.

[290] Solomon E Salako, "The Individual in International Law: 'Object' versus 'Subject'" (2021) 8(1) *International Law Research* 132, 139. Other authors have expressed this sentiment too. See Aneta Stojanovska-Stefanova and Drasko Atanasoski, "State as a Subject of International Law" (2016) 13(1) *US-China Law Review* 25 – 32.

[291] The ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949 ICJ 174.

[292] Ibid, 179.

[293] Ibid, 183.

What should always be considered when the question of who a subject of international law is, is whether the entity in question has its agents working in an international setting and whether its agents could suffer harm or cause harm to a State or citizens of a State and the obligations such an entity owes. Some authors have suggested that entities like the Red Cross have become subjects of international law.[294] Arifin, Zulfa, and Saraswati point expressly to the role and obligations of the Red Cross as evidence of attaining the status of subject of international law. In this instance, they opine that the position of the Red Cross as a "subject of international law cannot be separated from its great role in providing assistance to war victims…."[295] As progressive as these opinions are on the Red Cross being a subject of international law, it is essential to understand that international law is still largely State-centric.

Regarding TNCs, scholars have yet to agree that TNCs have attained the status of subjects of international law. Klabbers argues that TNCs are subjects of international law because of their investments in other countries, which are protected by international law.[296] On the other hand, Júnior and Calazans argue that the status of TNCs as subjects of international law is predicated on TNCs as holders of rights and obligations under international law and their capacity to participate in the law-making process and international dispute resolution.[297] On the contrary, Porumbescu and Pogan are of the view that notwithstanding the role TNCs now play under international law, they are not yet subjects of international law based on the classic international law classification. However, they equally recognised the need to evolve TNCs' status under international law.[298] Unlike a State where one of the bases for recognition as a subject is the presence of a territory, for TNCs, the basis is functional,[299] underscoring the critical role and influence TNCs now possess. The controversy on the subject status of TNCs manifests in the difficulties that have been encountered in holding them accountable for various breaches of international law norms, including the violations of the rights of Indigenous Peoples. Because of this, four possibilities or challenges to the exclusion of TNCs as subjects of international law have been put forward to include:

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[294] Klabbers (n 180) 89; Ridwan Arifin, Zaeda Zulfa, and Dhanny Saraswati, "International Committee of Red Cross versus International red Crescent: The Recent Practices as Subject of International Law" (2022) 1(2) *International Law Discourse in Southeast Asia* 243-264.
[295] Ridwan Arifin, Zaeda Zulfa, and Dhanny Saraswati (n) 247.
[296] Klabbers (n 180) 69.
[297] Arno Dal Ri Júnior and Erika Louise Bastos Calazans, "Transnational Corporations Subjectivity Based on the Criteria of the Bernadotte Case and the Traditional International Law Doctrine" (2018) XVIII *Anuario Mexicano de Derecho Internacional* 155.
[298] Alexandra Porumbescu and Livia Dana Pogan, "Transnational Corporations, as Subjects of International Law in the Globalization Context" (2019) 64 *Revista de Stiinte Politice. Revue des Sciences Politiques* 65, 74.
[299] ibid, 90.

1. An outright rejection of the orthodox theory of international legal personality as a product of an old positivist ideology because it does not consider the relevant natural law principles,[300] even when the current realities support a change of approach.
2. TNCs already possess rights and duties at some international level and can enforce these rights and duties.[301]
3. TNCs as participants of international law. It has been argued for the abolition of the "subject-object" dichotomy in recognising entities that should have international legal personality.[302] According to Higgins, the notion of subjects and objects have no credible meaning and States, international organisations, and TNCs are participants of international[303] because they all participate in making international law, especially for TNCs, in the making of international investment law through investor-State adjudication[304] and laws on environmental and Indigenous Peoples rights protection.

2.6. Evaluation of Harms Caused by Transnational Corporations to Indigenous Peoples in Africa

As discussed earlier, TNCs' behaviour in Africa can be contrasted with their behaviour in their home countries. The result is that while TNCs comply with international laws guiding business operations and environmental protection in their home countries, the reverse is the case in Africa. Two instances would be helpful in examining this point. First, the sale of pesticides containing paraquat was banned in the EU in 2007,[305] but they are still produced and exported to Africa by Syngenta, a Swiss corporation and TNC registered in England.[306] Paraquat, an

[300] Duruigbo (n 287) 236.
[301] Ibid, 237; Silvia Steininger and Jochen von Bernstorff, "Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate 'Human' Rights in International Law" in Ingo Venzke and Kevin Jon Heller (eds) *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press, 2021) 281.
[302] Jose Alvarez, "Are Corporations "Subjects" of International Law?" (2011) 9 (1) *Santa Clara Journal of International Law* 1 – 35; Duruigbo (n 287) 237; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994); Upendra Baxi, "Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?" (2015) 1(1) *Business and Human Rights Journal* 21, 23.
[303] Higgins (ibid) 50.
[304] Alvarez (n 138) 9.
[305] J McGinley and others, "Impact of Historical Legacy Pesticides on Achieving Legislative Goals in Europe" (2023) 873 *Science of The Total Environment* 1 – 13. This chemical was also banned in China, Korea, and Japan. See generally Jin-Won Kim and Do-Soon Kim, "Paraquat: Toxicology and Impacts of its Ban on Human Health and Agriculture" (2020) 68(3) *Weed Science* 208-213.
[306] Laurent Gaberell and Géraldine Viret, "Banned in Europe: How the EU Exports Pesticides too Dangerous for use in Europe" (*Public Eye*, 10 September 2020) <https://www.publiceye.ch/en/topics/pesticides/banned-in-europe#:~:text=The%20deadly%20pesticide%20was%20first,even%20when%20wearing%20protective%20equipment.&text=Paraquat%20is%20a%20flagship%20product,%22Made%20in%20Europe%22%20scandal> accessed 9 April 2021.

active chemical component of the pesticide, damages the "lungs, eyes, kidneys [,] and heart through long-term exposure".[307] Even though the use of this pesticide by Indigenous Peoples in Africa has not been studied, it shows how TNCs can produce illegal goods in their home countries with the intention of exporting them to Africa. In 2021, in a study carried out by the EU Policy Department for External Relations and as requested by the Committee on Development, it was shown that banned pesticides produced by TNCs headquartered in the EU were exported to Africa and other regions in large amounts by these TNCs, despite the obvious negative effect on human health.[308]

The second example of how TNCs behave differently in Africa as compared with their attitude in their home country is the case of Dundee Precious Metals. The Indigenous People of San in Namibia are exposed to the dangerous substances released into the air when copper from Chelopech in Bulgaria is smelted in Namibia. The smelting of Chelopech ore was banned in Bulgaria because of its high arsenic content and sulphuric dioxide, which are very dangerous to the human body. Tsumeb Smelter, which belongs to Dundee Precious Metals, an TNC registered in Canada, would transport the Chelopech ore into Namibia for smelting and later export the finished materials to Bulgaria, Armenia, and Serbia to develop gold and silver.[309] This practice has been described as "[e]xporting toxic pollution from Europe to Namibia"[310] to underscore how toxic the practice is, and it also exposes the gap in the effectiveness of the present international human rights law and international environmental law in protecting the rights of the Indigenous Peoples in Africa. The effect of this toxic practice has been described in these words:

> Local people claim that some of their garden plants and crops are ailing from this pollution. And not only plants are affected. A health report tested the urine of a few hundred locals. The arsenic concentration in the urine samples was high – even for people living 60 km away from the smelter.[311]

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[307] Harvey (n 13); Ikechukwu P Ugwu, "An Examination of Multinational Corporations' Accountability in the light of Switzerland's failed Responsible Business Initiative in the Covid-19 Pandemic Era" (2021) 13 *Adam Mickiewicz University Law Review* 119, 126 – 127.

[308] Policy Department for External Relations of the EU, "The use of Pesticides in Developing Countries and their Impact on Health and the Right to Food" January 2021, page 30 <https://www.europarl.europa.eu/cmsdata/219887/Pesticides%20health%20and%20food.pdf> accessed 22 November 2023.

[309] Kondarev (n 15).

[310] ibid.

[311] ibid; Dimitar Sabev, "The Price of Gold" (*The Ecologist*, 8 January 2019) <https://theecologist.org/2019/jan/08/price-gold> accessed 9 April 2021.

The Indigenous Peoples in Africa, whose territories the resources used by these TNCs are found, are left at the mercy of TNCs because, *ab initio*, the formulation of international environmental law and international human rights did not take into consideration their peculiarities. The result is a violation of the rights of Africa's Indigenous Peoples and environmental degradation without a concrete accountability measure under international law.

The often-cited example in this regard is the case of the Ogoni people in Nigeria. As the first ethnic group believed to live in the East of the Niger Delta in Nigeria,[312] the Ogoni land is blessed with abundant crude oil. The Royal Dutch/Shell, a TNC registered in the United Kingdom and the Netherlands, discovered the first "commercially viable" Nigerian oil field in 1956 as part of a joint venture with the British government,[313] the government in charge of Nigeria as of then. The exploration resulted in much environmental damage and human rights abuses. The Ogoni people who protested the environmental degradation in the form of water, land, and air pollution were rounded up, beaten, and incarcerated in prison. Some died in 1993, and in 1998, some of their leaders were killed gruesomely. It was alleged that Royal Dutch Shell Plc, through its subsidiary in Nigeria, the Shell Petroleum Development Company, procured the Nigerian military that beat and arrested Ogoni protesters.[314] The company even accepted that they paid the military what they described as a "field allowance," which was used to mobilise the military against the Ogoni people.[315]

The damage carried out by this TNC on the lands of the Indigenous People of Ogoni has been described as one of the world's largest oil spills, especially since 2011, when the size of the spill was as big as "seven Olympic swimming pools of oil".[316] Breaches of international human rights and international environmental law in the activities of Shell in Nigeria can be identified as Shell was aided by the Nigerian State to breach these rights. First, although addressed to States in terms of obligation to protect, the right to life, which is inalienable and guaranteed under various international human rights laws,[317] was denied some of the Ogoni people killed

[312] Nwoke (n 98) 101.
[313] Steven Cayford, "The Ogoni Uprising: Oil, Human Rights, and a Democratic Alternative in Nigeria" (1996) 43 (2) *Africa Today* 183, 183.
[314] Opeoluwa Adisa Oluyemi, "The Military Dimension of Niger Delta Crisis and Its Implications on Nigeria National Security" (2020) 10(2) *Sage Open* 1, 8.
[315] ibid
[316] Amnesty International, "The Niger Delta is One of the Most Polluted Places on Earth" (*Amnesty International*, March 2018) <https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spills-decoders/> accessed 08 April 2021.
[317] See UDHR (n 27) art 3; ICCPR (n 13) art 6; African Charter (n 82) art 4; Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (entered into force in 1953) ETS No.005 [art 2].

during the protest. Second, their individual right to a healthy environment[318] and their collective right to the lands, territories, and resources which they have traditionally owned[319] were denied them because the gas flaring polluted the air, the oil spill made both underground and surface water unsafe to drink,[320] and the spill condemned a traditionally owned land.

Unfortunately, the victims of these violations are still moving from one country to another, seeking justice. For instance, they first instituted a case in the US known as *Kiobel v Royal Dutch Petroleum Co*.,[321] where the US Supreme Court refused their claims. In the United Kingdom, in the case of *Okpabi and others v Royal Dutch Shell Plc and another,*[322] the UK Supreme Court held that the English Courts have jurisdiction over what happened in Ogoniland. However, the decision was only on jurisdiction and not on the substantive issue of the case. Finally, in The Netherlands, the Hague Court of Appeal held in February 2021 that the Royal Dutch Shell owed a duty of care to the Ogoni people.[323]

In Chingola, Zambia, the story is the same as that of the Ogoni people because a mining group called Vedanta Resources Plc, KCM, registered in the UK, engages in business activities that undermine the health of the Chingola people.[324] Its mining activities have already polluted the only river that served as drinking water to the Chingola people and turned it into "rivers of acid",[325] and once you are in the villages, "you can smell and taste the pollution."[326] Recently, the UK Supreme Court held that English courts have jurisdiction to hear the Chingola people's complaints since the parent company is registered in the UK. As wonderful as the decision

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[318] Aarhus Convention (n 23) Preamble.

[319] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295 [art 26]. Although this Declaration was made in 2007, long after the first oil spill in Ogoniland, there is continuing damage as the oil spill still occurs, and the polluted lands still need to be cleaned up.

[320] Olof Linden and Jonas Palsson, "Oil Contamination in Ogoniland, Niger Delta" (2013) 42 *AMBIO* 685 – 701. Here, the author researched the extent of the damage and found "extractable oil hydrocarbons (EPHs) in surface waters up to 7420 lg L-1, potable water wells up to 42 200 lg L-1, and benzene up to 9000 lg L-1", 900 times the World Health Organisation's recommendations. See World Health Organisation, *Petroleum Products in Drinking-water: Background Document for Development of WHO Guidelines for Drinking-water Quality* (WHO/SDE/WSH/05 08/123, 2008) 7.

[321] *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

[322] *Okpabi and others v Shell* (n 204).

[323] *Milieudefensie v Royal Dutch Shell plc (1) and Shell Petroleum Development Company of Nigeria Ltd* ECLI: NL: GHDHA: 2021: 134.

[324] Caroline Lusonde and Kabwe Harnadih Mubanga, "Residents' Perceptions of the Environmental and Social Impacts of KCM's Mining Activities in Nchanga North Township, Chingola, Zambia" (2019) 8 (4) *Environmental Management and Sustainable Development* 75, 76.

[325] BBC, "'Rivers of Acid' in Zambian Villages" (*BBC News*, 8 September 2015) <https://www.bbc.com/news/world-africa-34173746> accessed 9 April 2021.

[326] John Vidal, "'I Drank the Water and Ate the Fish. We all did. The Acid has Damaged me Permanently'" (*The Guardian*, 1 August 2015) <https://www.theguardian.com/global-development/2015/aug/01/zambia-vedanta-pollution-village-copper-mine> accessed 9 April 2021.

might be, it is to be noted that it was only on the English courts' jurisdiction, and no pronouncements were made regarding monetary compensation.[327]

It is not just European-owned TNCs that abuse the environment and Indigenous Peoples' rights in Africa; China is not left out. Shinn[328] details how China plans to "relocate[] some of its highest polluting industries (such as the steel, glass, leather, and cement industries) to Africa…".[329] This they are doing as part of the Chinese government's effort to reduce pollution in China. Apart from Chinese TNCs engaging in environmental pollution in Africa, they have often been accused of human rights violations since it is not always the practice for China to consider human rights issues in its economic relations, which is even made worse by the fact that domestically, "China itself has an appalling internal human rights record."[330]

Instances of human rights violations by TNCs show the ineffectiveness of existing accountability mechanism despite the existence of some international regulations. Just like with the situation of Shell in Ogoniland in Nigeria and the activities of Vedanta Resources Plc in Zambia, the right to life is threatened, and there is a disregard for the provisions of the UN Guiding Principles[331] that require business enterprises and States to endeavour that their business activities do not cause harm to people.[332] Furthermore, the smelting of ore from Bulgaria by Dundee Precious Metals in the territory of the San peoples in Zambia and the sale of dangerous pesticides in Africa despite the two activities no longer allowed in the EU is evidence of how differently TNCs could behave regarding human rights and environmental protection. The ultimate receivers of these acts are vulnerable Indigenous Peoples.

2.7.African States' Position on Indigenous Peoples

States have obligations to protect the rights of the Indigenous Peoples and the environment. These obligations arise from international law instruments and will be examined in Chapter Four. In this section, the thesis analyses African States' position on the rights of the Indigenous Peoples in their territories. Based on this, the national legal framework on the recognition and protection of the rights of Indigenous Peoples, different from the African Union framework, would be divided into two – outright denial of protection and partial protection of rights.

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[327] *Vedanta v Lungowe* (n).
[328] David H Shinn, "The Environmental Impact of China's Investment in Africa" (2016) 49 (1) *Cornell International Law Journal* 25 – 67.
[329] ibid, 40.
[330] Adaora Osondu-Oti, "China and Africa: Human Rights Perspective" (2016) 41 (1) *Africa Development* 49, 75.
[331] UN Guiding Principles (n 28).
[332] ibid, arts 2 and 11.

In some countries, there is an outright denial of the rights of Indigenous Peoples. This entails an absence of any form of recognition and protection of the rights of Indigenous Peoples and a failure to realise that Indigenous Peoples' rights are distinct from general human rights. In Nigeria, for instance, in 1978, the government took over all lands, including indigenous lands, especially where there are crude oil or other natural resource deposits. Section 1 of the Land Use Act vests ownership of all lands in a State on the State governor for the benefit of all Nigerians, but where oil or any other mineral has been discovered on land, ownership automatically vests on the federal government.[333] The implication of section 1 on the community-based rights of ownership that existed in Nigeria, according to Agbosu,[334] is that "it divests irrevocably such artificial legal persons of the customary law of their allodial ownership rights" thereby abolishing the indigenous community concept of land ownership in Nigeria.[335] After annihilating this right, it replaced it with the mere right of occupancy, which may be customary or statutory[336] and could be revoked or automatically divested to the federal government once crude oil or other natural resources are discovered.[337] These provisions imply that the Ogoni community, which has abundant mineral oil, is at risk of continuous revocation of their right of occupancy whenever any part of their land is required for mining or laying of oil pipelines.[338]

The right to self-determination is expressly prohibited in Nigeria. The Constitution of Nigeria describes Nigeria as an "indivisible and indissoluble" entity. The government perceives any discussion on self-government as an open confrontation to the sovereignty of Nigeria and a call to the division of Nigeria. During the 2014 National Conference, the president of Nigeria then, Goodluck Jonathan, expressly banned the discussion on whether Nigeria "should be

[333] See The Land Use Act (n) s 49; Constitution of the Federal Republic of Nigeria, Cap C23 *Laws of the Federation of Nigeria* 2004, [s 44 (3)] <https://nigeriareposit.nln.gov.ng/items/399df25a-52d0-4972-9365-c618cd3ddf5f/full> accessed 02 June 2024; The Minerals and Mining Act (MMA) No 20, 2007 [s 1] <https://admin.theiguides.org/Media/Documents/Nigeruian%20Minerals%20and%20Mining%20Act,%202007.pdf> accessed 02 June 2024; The Petroleum Act, Cap P10 *Laws of the Federation of Nigeria*, 2004 [s 1] <https://lawsofnigeria.placng.org/laws/P10.pdf> accessed 02 June 2024.

[334] Agbosu LK, "The Land Use Act and the State of Nigerian Land Law" (1988) 32 *Journal of African Law* 1 – 43.

[335] Ibid, 5.

[336] Ugwu (n 114) 269; M O Kehinde and others, "Land Tenure and Property Rights, and Household Food Security among Rice Farmers in Northern Nigeria" (2021) 7 *Heliyon* 1.

[337] The Land Use Act (n) s 28 (1).

[338] On how State governors have always narrowly interpreted "overriding public interest" to include the flimsiest of reasons, see Eloamaka Carol Okonkwo, "A Closer Look at the Management, Revocation and Compensation Principles Under the Nigerian Land Use Act" (2013) 1 *The Journal of Sustainable Development Law and Policy* 21 – 36.

divided."[339] Nigeria has not taken any action towards implementing the UNDRIP and even abstained from voting during its negotiation.[340]

Cases instituted by indigenous groups in Nigeria to enforce their rights, especially regarding the right to natural resources and a clean environment, failed on many grounds. Firstly, ownership, exploration, and management of crude oil, which is the primary natural resource located in Ogoniland, is undertaken by the Nigerian National Petroleum Corporation (NNPC),[341] an agent of the federal government, and ownership claim by Indigenous Peoples or any other interested parties will not be successful in the courts.[342] Secondly, the right to a clean environment in Nigeria cannot be enforced in a law court as the right is not part of the fundamental human rights provided for in Part IV of the Constitution,[343] and the right does not create any obligation on the part of the government to protect.[344]

In some other countries, there is a partial recognition of the rights of Indigenous Peoples. Here, partial recognition and protection of Indigenous Peoples' rights entail where a certain degree of recognition is accorded to indigenous groups in a country, but there are still reports of violations or where the provisions of international law instruments on the rights of Indigenous Peoples are not observed.

Cameroon is home to hunter-gatherers, Pygmies, Baka, Bakola, Bagyeli, Bedzang, and Mbororo Indigenous Peoples, and they are recognised as Indigenous Peoples. Still, there has yet to be any progressive action by the government towards protecting their rights. The Constitution of Cameroon provides that "the State shall ensure the protection of minorities and shall preserve the rights of Indigenous populations in accordance with the law."[345] However, even though it may not be clear whom this refers to, with the development of international law,

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[339] BBC, "Nigeria's National Conference Starts in Abuja" (*BBC*, 17 March 2014) <https://www.bbc.co.uk/news/world-africa-26613962> accessed 29 January 2022.

[340] United Nations, "United Nations Declaration on the Rights of Indigenous Peoples" (*United Nations Department of Economic and Social Affairs*) <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>accessed 29 January 2022.

[341] The NNPC was established pursuant to s 1 of the Nigerian National Petroleum Corporation Act Cap N123 Laws of the Federation of Nigeria 2004. This Act was repealed by the 2021 Petroleum Industrial Act, which renamed NNPC to NNPC Ltd.

[342] *Attorney General of the Federation v Attorney General of Abia State and Others (No. 2)* [2002] 6 NWLR (Part 764) 542

[343] Ogugua VC Ikpeze, "Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development" (2015) 5 *Developing Country Studies* 48, 49;

[344] *Archbishop Anthony Okogie and Others v The Attorney General of the State of Lagos* (1981) 2 NCLR 350; *Attorney General of Ondo State v The Federation's Attorney General & 35 ors* [1983] NGSC 38; *Federal Republic of Nigeria v Aneche & 3 Ors* (2004) 1 SCM 36.

[345] Constitution of the Republic of Cameroon 1972, amended in 2008 [Preamble] <https://www.constituteproject.org/constitution/Cameroon_2008> accessed 02 June 2024.

people in Cameroon use the term "Indigenous" to talk about Pygmies, Baka, Bakola, Bagyeli, Bedzang, Mbororo and other indigenous groups in the country.[346] Cameroon participated actively and voted in favour of the UNDRIP.[347] Despite this recognition, in 2014, the Ngoyla-Mintom nature reserve was established in a forest that the Baka used to hold and live in. The Baka were then banned from the reserve or forced out of it.[348]

To this point, Kenya has yet to pass laws explicitly dealing with Indigenous Peoples. It has neither signed the UNDRIP nor ratified the ILO 169, despite agitations from the Endorois and other indigenous groups.[349] The Constitution of Kenya[350] somewhat has some provisions that could be interpreted as recognising the rights of Indigenous Peoples. Even though the constitution defines "marginalised community" to include, among other groups, "an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy,"[351] it does not recognise indigenous ownership of certain natural resources. The Constitution classifies land as public, community, and private.[352] Community land shall vest in and be held by communities identified based on ethnicity, culture or similar community of interest. Still, when such land contains minerals or mineral oils, it is classified as public land.[353]

2.8. Involvement of African States in Business Activities of Transnational Corporations

As earlier pointed out, TNCs, through their FDIs, serve as significant sources of revenue for most of the States in Africa. This, together with other factors, accounts for the unwillingness of African governments to hold TNCs accountable even where there are existing mechanisms to do so. Abe contended that the unwillingness of States to implement accountability measures against TNCs' activities is because politicians have invested interests in TNCs that are into

[346] The International Work Group for Indigenous Affairs, "The Indigenous World 2021: Cameroon" (*IWGIA*, 18 March 2021) <https://www.iwgia.org/en/cameroon/4207-iw-2021-cameroon.html> accessed 29 January 2022.
[347] United Nations (n 221).
[348] Cultural Survival, "Covenant on Economic, Social, and Cultural Rights Alternative Report Submission: Violations of Indigenous Peoples' Rights in Cameroon", being a paper *Prepared for Committee on Economic, Social, and Cultural Rights 62nd Pre-Sessional Working Group*, Geneva, 03 - 06 April 2018
[349] Cultural Survival, "The State of Indigenous Human Rights in Kenya" *Prepared for Committee on Economic, Social, and Cultural Rights (CESCR)* 57th Session 22 February- 4 March 2016.
[350] The Constitution of Kenya, No 55, 27 August 2010 <https://kenyalaw.org/kl/index.php?id=398> accessed 23 March 2024.
[351] ibid, s 260.
[352] Ibid, s 61 (2).
[353] Ibid, s 62 (1) f.

extraction.[354] There are many instances where this is the case. First, in Nigeria, Royal Dutch Shell and Shell Nigeria have become notorious for cases of human and business rights for their complicity in the environmental degradation in the territory of the Ogoni people and other communities in Nigeria. Hardly are there successful cases against Shell Nigeria in national courts of Nigeria, which has made the Ogoni people move around the world for the accountability of the Royal Dutch and its subsidiary in Nigeria. Apart from the reason that the right to a clean environment is non-justiciable in Nigeria and so unenforceable,[355] there is another reason – a Nigerian-owned company is a shareholder in Shell Nigeria.

The Nigerian National Petroleum Company Limited (NNPC Ltd) (formerly Nigerian National Petroleum Corporation until 2022 (NNPC)) is a limited liability company[356] which carries out petroleum operations on a commercial basis and is vested as the concessionaire of all production-sharing contracts on behalf of the Nigerian government.[357] The shares of NNPC Ltd are made up of initial paid-up capital by the Nigerian government, and any other shares acquired by it shall be vested in the Nigerian government.[358] It is empowered to engage in commercial activities of petroleum operations for profit and is allowed to acquire shares in other petroleum firms just like any other company.[359] As a consequence, the NNPC Ltd is in a joint venture with Shell Nigeria and other companies where the NNPC holds 55% of the shares while Shell Nigeria holds 30%. The remaining shares are held by Total E&P Nigeria Ltd (10%) and the ENI subsidiary Agip Oil Company Limited (5%). Furthermore, Shell Nigeria, the NNPC Ltd ENI, and Total Nigeria jointly own the Nigeria LNG Limited, a liquefied natural gas-producing company and a liquefied natural gas plant in Nigeria. In this company, NNPC Ltd holds 49% of the share, Shell Nigeria holds a 25.6% share, Total owes 15%, and ENI 10.4%.[360]

On this basis, the Nigerian government will always be unwilling to implement accountability mechanisms for Shell Nigeria as doing so would be directly holding itself accountable, which

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[354] Oyeniyi Abe, *Implementing Business and Human Rights Norms in Africa: Law and Policy Interventions* (Routledge, 2022) 168.
[355] Eghosa Osa Ekhator, "International Environmental Governance: A Case for Sub-regional Judiciaries in Africa" in Michael Addaney and Ademola Oluborode Jegede (eds) *Human Rights and the Environment under African Union Law* (Palgrave Macmillan, 2020) 224.
[356] Petroleum Industry Act of Nigeria (Act no 142, vol 108, 2021) [s 53(1)] <https://pia.gov.ng/petroleum-industry-act/> accessed 02 June 2024.
[357] Ibid, section 64(a–b).
[358] Ibid, section 53 (2–3).
[359] Ibid, section 53 (7).
[360] See generally Shell Plc, "Who we are" <https://www.shell.com.ng/about-us/who-we-are.html> accessed 23 November 2023.

will impact the revenue from petroleum operations. Since the NNPC Ltd has always remained one of the highest taxpayers in Nigeria,[361] it is not surprising that courts' decisions against Shell Nigeria regarding its human and business responsibilities have not been enforced. For instance, in *Gbemre v Shell Petroleum Development Company Nigeria Limited*,[362] members of some communities instituted an action against NNPC, Shell, and other TNCs for gas flaring, which they contended has negative impacts on human health and the environment. The court ordered the companies to stop the gas flaring.[363] The judgement of the court, as widely as it is celebrated, is a pyrrhic victory for the communities as the Nigerian government disregarded the order and allowed gas flaring to continue.[364]

In the Democratic Republic of Congo (DRC), the Perenco Group, a Franco-British group, is alleged to have 167 pollution incidents and huge methane emissions in DRC. The carbon footprint attributed to Perenco's flaring in 2021 was estimated to be the equivalent of 21 million Congolese.[365] Apart from its involvement in environmental pollution, Perenco is equally mired in allegations of corruption from the former dictator of DRC, Joseph Kabila, who ruled the country for almost two decades. It was recently uncovered that Perenco's Congolese subsidiaries made several transfers to firms closely linked to the former president, totalling $1.3 million between 2013 and 2015.[366] It was alleged that those transactions were part of the deals to secure licence extensions and drilling rights by Perenco and that the daughter of the former president had shares in some of Perenco's subsidiaries.[367]

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[361] In 2021, the NNPC Ltd was listed as the highest taxpayer in Nigeria. See Busola Aro, "FIRS: NNPC, MTN among Top-performing Taxpayers in 2021" (*The Cable*, 16 May 2022) <https://www.thecable.ng/firs-nnpc-mtn-among-top-performing-taxpayers-in-2021> accessed 23 November 2023.

[362] *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* [2005]) AHRLR 151 (NgHC 2005).

[363] Ibid, paras 5–7.

[364] Urenmisan Afinotan, "How serious is Nigeria about climate change mitigation through gas flaring regulation in the Niger Delta?" (2022) 24(4) *Environmental Law Review* 288, 301; Bukola Faturoti, Godswill Agbaitoro, and Obinna Onya, "Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?" (2019) 27(2) *African Journal of International and Comparative Law* 225, 235-237. For other improper acts by Shell in Nigeria and other places, see Friends of the Earth International, "These Eight Scandals Prove Shell's Long History of Contempt for People and Planet" (*FOEI*, 22 May 2018) <https://www.foei.org/eight-shell-scandals/> accessed 11 May 2024.

[365] Leïla Miñano and others, "Toxic Fumes and Leaks: Perenco's Polluting Oil Business in Democratic Republic of Congo" (*Investigate Europe*, 9 November 2022) <https://www.investigate-europe.eu/en/posts/perenco-democratic-republic-congo-pollution> accessed 24 November 2023.

[366] Leïla Miñano, Maxence Peigné and Yann Philippin, "Oil Giant Perenco's Suspicious Deals with Companies Close to Congo's Ex-president" (*Investigate Europe*, 20 July 2023) <https://www.investigate-europe.eu/posts/perenco-oil-suspicious-deals-congo-drc-ex-president-joseph-kabila> accessed 24 November 2023.

[367] Maxence Peigné, Amund Trellevik, and Leïla Miñano, "Congo: European Oil Companies' Secret Interests with Ruling Family" (*Investigate Europe*, 20 July 2023) <https://www.investigate-europe.eu/posts/congo-brazzaville-european-oil-companies-petronor-perenco-secret-interests-with-ruling-family> accessed 24 November 2023.

Just like in Nigeria, where the government is directly linked to TNCs that pollute the environment, the political ruling class in DRC are directly linked to the TNC that has caused one of the greatest environmental pollution in the country, and this shows why Perenco was allowed to pollute the environment without being held accountable. The order of the French Supreme Court in 2022 in *Sherpa and Friends of the Earth France v Perenco SA*[368] underscores the level of political patronage enjoyed by Perenco in DRC. In this case, an NGO, Sherpa and Friends of the Earth France, requested that Perenco should produce some documents which would show their level of involvement in corruption and environmental pollution in DRC. The company argued that Congolese law should be the applicable law and that the appropriate forum was DRC. While granting the order for the production of the documents, the French Supreme Court held that Article 145 of the French Code of Civil Procedure was the applicable law and that France was the appropriate forum, noting the possibility of subversion of justice due to Perenco's influence in DRC if the matter was to be taken to DRC.[369]

Furthermore, in 2022, Niger was the second-highest supplier of natural uranium to the EU after Kazakhstan and followed by Canada.[370] The uranium mining operation is carried out by Orano (formerly known as Areva S.A.), a TNC owned 80% by France accused of committing ecocide in Niger due to its radiation emission.[371] The negative effects of uranium mining in Niger are "severe environmental, social and human health impacts,"[372] including its possible effects on Indigenous Peoples in Niger.[373] Orano faced criticism for abandoning radioactive waste at the Akokan mine near Arlit, which ceased operations in 2021 after extracting 75,000 metric tonnes of uranium. Reportedly, Orano abandoned over 20 million tonnes of hazardous radioactive waste.[374] The recently ousted President of Niger, Mohamed Bazoum, was alleged to have

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[368] *Sherpa and Friends of the Earth France v Perenco SA*, Ruling of 9 March 2022, reported by the Business and Human Rights Centre on 10 March 2022, <https://www.business-humanrights.org/en/latest-news/french-high-court-rules-in-favor-of-ngos-in-perenco-environmental-case-for-alleged-harm-in-the-democratic-republic-of-congo/> accessed 24 November 2023.
[369] Ibid.
[370] France24, "Niger Coup Raises Questions About Uranium Dependence" (*France24*, 1 August 2023) <https://www.france24.com/en/live-news/20230801-niger-coup-raises-questions-about-uranium-dependence> accessed 24 November 2023.
[371] Nick Meynen, "France's Dirty Little Secret: Nuclear Pollution In Niger" (*European Environmental Bureau*, 18 October 2017) <https://meta.eeb.org/2017/10/18/french-State-owned-company-creates-ecocide-in-niger-to-fuel-its-nuclear-plants/> accessed 24 November 2023.
[372] Rasmus Kløcker Larsen and Christiane Alzouma Mamosso, "Environmental Governance of Uranium Mining in Niger – A Blind Spot for Development Cooperation?" (2013) 2 *DIIS Working Paper* 11.
[373] Randa S Ramadan and others, "Environmental and Health Impact of Current Uranium Mining Activities in Southwestern Sinai, Egypt" (2022) 81(213) *Environmental Earth Sciences* 1, 2.
[374] Fatma Esma Arslan, "Niger: Important Uranium Supplier Shaken by Military Coup" (*AA*, 1 August 2023) <https://www.aa.com.tr/en/africa/niger-important-uranium-supplier-shaken-by-military-coup/2959090> accessed 24 November 2023.

received a bribe from Orano in 2011 during the purchase of 2,500 tons of uranium by Orano,[375] and as examined in Chapters Four and Five, States and TNCs have the responsibility not to engage in bribery and corruption under various business and human rights instruments. One of the reasons given by the military juntas who ousted Mohamed Bazoum was that the former president sabotaged the economic growth of the country and, in the meantime, was suspending uranium exports to France.[376]

2.9. Concluding Remarks

This Chapter has identified and examined the remaining two stakeholders of competing interests – TNCs that operate in Africa and African States. Regarding TNCs, this chapter provided a comprehensive conceptualisation, historical evolution, international legal status, and the critical human rights and environmental implications associated with TNCs operating in the African context, especially as they affect Indigenous Peoples. Again, some ideas and theories like globalisation, neoliberalism which emphasises shareholders' value and transnationalism, were examined to explain the behaviour of TNCs in Africa. There is less focus on protecting human rights, provided the interests of shareholders are protected. The discussion on TNCs acknowledged the fact that even though public international law is still largely State-centric as regards which entities are subjects of international, it is nonetheless important that TNCs should be vested with the status of participants of international law to facilitate the accountability mechanisms of their business activities.

In the final analysis, the attitude of African States towards the protection of Indigenous Peoples was examined. While in some States, the Indigenous Peoples are not accorded any distinct rights from the rest of the society as in Nigeria, in some other States, Indigenous Peoples are recognised but with some limitations on how far they can exercise their rights. The chapter has further delved into the complex relationship between African States and TNCs that operate within their territories in the form of government agencies holding shares in some TNCs that engage in violations of human rights and environment or through receiving bribes from the TNCs. This explains the attitude of some of the States' unwillingness to prosecute these TNCs. It equally establishes the ineffectiveness of any existing international law instruments in regulating the activities of TNCs. Consequently, it calls for new ways to regulate TNCs through

[375] Samuel Furfari, "The Coup in Niger does not Threaten Uranium Supply to the EU" (*Brussels Report*, 10 August 2023) <https://www.brusselsreport.eu/2023/08/10/the-coup-in-niger-does-not-threaten-uranium-supply-to-the-eu/ > accessed 24 November 2023.
[376] Ishaan Tharoor, "The Coup in Niger puts Spotlight on Nation's Uranium" (*Washington Post*, 1 August 2023) <https://www.washingtonpost.com/world/2023/08/01/uranium-niger-france-coup/> accessed 24 November 2023.

an internationally accepted binding instrument. The subsequent chapter will analyse the various human rights of the Indigenous Peoples violated by TNCs during their business activities in Africa.

PART TWO

SOURCES OF HUMAN RIGHTS, ENVIRONMENTAL, AND CLIMATE CHANGE OBLIGATIONS

Chapter THREE: Rights of Indigenous Peoples

Chapter FOUR: Obligations of States

Chapter FIVE: Sources of Responsibilities of Transnational Corporations

Chapter THREE

Rights of Indigenous Peoples

3.1. Introductory Remarks

In the previous Chapter, some of the activities of TNCs that impinge on the rights of Africa's Indigenous Peoples were examined. The effects on their lives cut across human rights, environmental, and cultural issues. In this chapter, an attempt is made to evaluate the rights of Indigenous Peoples, protected under international law and as interpreted by various international and inter-regional courts. Although some of these rights accrue to individuals not identified as members of indigenous groups, some specific rights can only be collectively enjoyed by indigenous groups. Also, some other rights are not explicitly addressed to Indigenous Peoples, like the right to water, but due to the special status of Indigenous Peoples and their relationship with lands, these other rights become necessary.

Moving forward in this chapter, it becomes evident that the rights of Indigenous Peoples are not merely legal discourse but a living narrative of identity, autonomy, and the enduring connection between communities and their ancestral lands. Consequently, the exploration of these rights begins with an examination of the rights of Indigenous Peoples as enunciated in international instruments, treaties, and declarations that have emerged as beacons guiding the recognition and protection of indigenous rights at the international level. Therefore, this chapter aims to discover the extent of protection of these rights, especially for Africa, drawing examples from practices of regional courts and the opinions of scholars on the interpretation of these rights. However, it is pertinent to point out that these rights are interrelated, and a violation of one can lead to the violation of others. For instance, according to Barsh, the "substantive rights to practice and perpetuate distinctive languages, cultures, and religions" are guaranteed under Article 27 of the ICCPR, and for Indigenous Peoples, the recognition of cultural rights would involve the "protection of land rights, environmental quality, and local knowledge systems."[377]

3.2. Right to Self-Determination

According to Pullar, the right to self-determination can be traced to around 1000 BC, during the Israelites' exodus from Egypt.[378] The main reason for this exodus was for the Israelites to form their own nation after suffering several years of harsh slavery at the hands of the

[377] Lawrence Russell Barsh, "Indigenous Peoples" in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (University of Oxford Press, 2007) 838, 845.
[378] Andrew Pullar, "Rethinking Self-Determination" (2014) 20 *Canterbury Law Review* 91, 94.

Egyptians.[379] After several years of this exodus, this right was exercised in many European kingdoms where the people sought to replace God and the monarch as the legitimate embodiment of sovereignty "with the idea of sovereignty being vested in the people."[380] This gave rise to new republics with elected representatives and the gradual decline in the monarchical system of government. The rejection of monarchical rule in favour of republicanism influenced the American Revolution war[381] and gave rise to the United States Declaration of Independence of 1776.[382] The Declaration provides "that all men are created equal… with certain unalienable Rights" like the right to "[l]ife, [l]iberty and the pursuit of [h]appiness." At the onset, it is to be noted that the right to self-determination has two aspects – internal and external. While internal self-determination implies the political right to pursue economic, social, and cultural development, external self-determination is broader and encompasses sovereignty and secession.[383] In this section, the Indigenous Peoples' right to the internal aspect of the right is examined, while the external self-determination will be analysed in another section as an emerging Indigenous Peoples' right that is yet to crystallise as an international law norm.

This right is fundamental for the Indigenous Peoples, and many attempts have been made to protect it through several international legal instruments. After the right was recognised in the Atlantic Charter in 1941,[384] it was legally codified in the United Nations Charter (UN Charter).[385] Article 1(2) of the UN Charter provides that one of the purposes for establishing the UN is to seek the friendly development of all nations "based on respect for the principle of equal rights and self-determination of peoples." This provision influenced subsequent documents on this right. For instance, paragraph 1 of common Article 1 of the ICCPR[386] and the ICESCR[387] provide that "[a]ll peoples have the right of self-determination. By virtue of that

[379] St Joseph New Catholic Bible, Exodus 1 – 2.
[380] Stefan Salomon, "Self-determination in the Case Law of the African Commission: Lessons for Europe" (2017) 50 (3) *Law and Politics in Africa, Asia and Latin America* 217, 222.
[381] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press 1967) where one of the supporters of the Revolution was quoted to have said that "that we are bound by no laws to which we have not consented either by ourselves or our representatives is a novel position unsupported by any authoritative". See page 171.
[382] Officially called the Unanimous Declaration of the Thirteen United States of America <https://www.archives.gov/founding-docs/declaration-transcript> accessed 02 June 2024.
[383] Agnieszka Szpak, "The Right Of Indigenous Peoples To Self-Determination: International Law Perspective" (2018) 59 Athenaeum 178, 188.
[384] *Joint declaration by the President of the United States and the Prime Minister of the United Kingdom*, US- UK (Atlantic Charter) 55 Stat app 1603, 14 August 1941.
[385] UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
[386] ICCPR (n 13).
[387] ICESCR (n 14).

right, they freely determine their political status and freely pursue their economic, social and cultural development."

The CCPR, in its General Comment No 12, views this right as the foundation of some other rights because "its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[388] Also, while commenting on the interconnectedness of this right to human rights in general, Gadkowski contends that "the theoretical construct of the right to self-determination is very interesting, since on the one hand it is conceived of as a principle of international law, and on the other hand it can be seen as a crucial law in the inventory of human rights."[389] The CCPR General Comment 12 does not provide a more theoretical analysis of the import of the right to self-determination other than reiterating that under international law, States have an obligation to protect this right and calls on States to take positive actions towards the realisation of this right.[390]

Consequently, the Committee on the Elimination of Racial Discrimination (CERD), which monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[391] in its General Recommendation 21 on the right to self-determination,[392] goes further to clarify the contours of the right to self-determination. First, the right to self-determination has two aspects – internal and external self-determination. By internal self-determination, the CERD means "the rights of all peoples to pursue freely their economic, social and cultural development without outside interference." Furthermore, the CERD conceptualises the external aspect of self-determination to mean the right of peoples "to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation."[393]

Secondly, another issue clarified by the CERD's General Recommendation 21 is that the right does not ordinarily create the ground for the exercise of secession by minority groups. In other

[388] UN Human Rights Committee, *CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, 13 March 1984 [para 1].
[389] Tadeusz Gadkowski, "The Principle of Self-Determination in the Context of Human Rights" (2017) 7 *Adam Mickiewicz University Law Review* 25, 26.
[390] CCPR General Comment No. 12 (n) para 6.
[391] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, UNTS, vol 660, p 195.
[392] Committee on the Elimination of Racial Discrimination, *General Recommendation 21, The right to self-determination* (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 125 (1996).
[393] Ibid, para 4.

words, CERD commented that none of its actions should be interpreted as encouraging the dismembering or impairing, "totally or in part, the territorial integrity or political unity of sovereign and independent States." This stand is qualified on the grounds that the State in question must be one that conducts itself "in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[394]

In addition, this right has been further attributed to Indigenous Peoples as the basis of other rights. According to Saul,[395] the drive for decolonisation in the 1960s provided the background for developing the legal right to self-determination in these international law instruments.[396] And so, there is an argument about whether "peoples" or "all peoples," as used in the instruments, refer to Indigenous Peoples or only to peoples under colonialism. The provisions intend that the right can only be realised as a collective right, distinct from other rights that refer to "everyone."[397] Consequently, the right to self-determination also extends to Indigenous Peoples in so far as they exercise it as a collective right. However, this interpretation is not apparent in the ICCPR as it does not define "peoples." Nevertheless, "peoples" has been suggested to pertain to any people regardless of the international political standing of the territory they live in. This concept is relevant not only to populations that have not achieved political autonomy but also to those residing in independent and self-governing nations.[398]

However, as regards minority groups, Cassese suggests that any national or ethnic group that has been constitutionally recognised as a part of a multinational or multi-ethnic State is entitled to the right to self-determination as a people.[399] Also, the argument that constitutional recognition is necessary is dangerous, especially for Indigenous Peoples in States that can easily deny their existence due to a lack of constitutional recognition. This played out in Chad where, in its concluding observations on the fourth periodic report of Chad in 2023,[400] the CESCR noted with dismay the report by the State of Chad that no Indigenous Peoples exist

[394] Ibid, para 6.
[395] Matthew Saul, "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?" (2011) 11(4) *Human Rights Law Review* 609 – 644.
[396] Ibid, 613.
[397] Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 37.
[398] Ibid, 47.
[399] Antonio Cassese, "The Self Determination of Peoples", in Louis Henkin (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights* (Columbia University Press, 1981) 92, 94, cited in Taylor (n 397) 47.
[400] Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Chad* (30 October 2023), adopted by the Committee at its seventy-fourth session (25 September–13 October 2023) E/C.12/TCD/CO/4.

within its territory. The denial of the existence of Indigenous Peoples was in spite of the Mbororo Fulani, who identify as Indigenous Peoples and the potential threat to their enjoyment of the right to self-determination. The CESCR consequently recommends that Chad take all necessary measures to put in place legislative frameworks to recognise the Mbororo Fulani and any other group that identifies as an Indigenous group.[401] So, Cassese's suggestion that a constitutional requirement was necessary for a group to be so identified is dangerous, and even Kiss was wary of constitutional recognition as a requirement.[402]

Consequently, the expression of the right to self-determination as a collective right robs the CCPR of the competence to examine claims brought under Article 1 by individuals. This is because the First Optional Protocol to the ICCPR,[403] which empowers the CCPR to receive and consider complaints, only allows for communications from individuals who claim the violation of their ICCPR rights.[404] This was reaffirmed in *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia*,[405] where the issue was that the Rehoboth Baster Community, an indigenous Khoi and Afrikaans settlers,[406] claimed that their right as a people "to self-determination inside the republic of Namibia (so-called internal self-determination) has been violated" since they are not allowed to pursue their economic social and cultural development, nor are they allowed to dispose of their community's national wealth and resources freely.[407] Even though the CCPR found that there was a violation of Article 26 (equality before the law),[408] it, however, did not think that "the question [of] whether the community to which the authors belong is a "people" is […] an issue for the Committee to address under the Optional Protocol to the Covenant."[409] It held further that the Optional Protocol only establishes a process allowing individuals to assert that their specific rights, outlined in Part III of the Covenant (Articles 6 to 27), have been infringed upon.[410]

So, for minority groups that have not attained the status of "peoples," Article 27 of the ICCPR offers a solution. Article 27 provides that in States where minorities, ethnic or linguistic, exist,

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[401] Ibid, paras 15 – 16.
[402] Alexandre Kiss, "The Peoples' Right to Self-determination" (1986) 7 *Human Rights Law Journal* 165, cited in Taylor (n 397) 47.
[403] UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966 (entered into force on 23 March 1976) UNTS vol 999, 171.
[404] Ibid, Preamble.
[405] *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, (UN Human Rights Committee) Communication No 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000).
[406] Ibid, para 2.1.
[407] Ibid, para 3.2.
[408] Ibid, para 11.
[409] Ibid, para 10.3.
[410] Ibid.

they "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." The CCPR has consistently held on to this to insist that instead of claiming under Article 1 (right to self-determination), such claims are better protected under Article 27 (rights of minority groups).[411]

Summers offers two possible ways by which individuals, especially Indigenous or tribal communities, can author communications to the CCPR under Article 1. The first is that since the right to self-determination is a collective right, such communications should be "on behalf of" a "group of individuals." For Summers, such representative claims should be made with the consent of the members of the group, and for Indigenous Peoples, such relevant consent can be expressed by the leaders of the Indigenous Peoples.[412] The second approach, according to Summers, is to establish a nexus between the right to self-determination and other individual rights such that a violation of those individuals' rights could ground an action for breach of the right to self-determination.[413] This part was partly addressed by the CCPR in the *Diergaardt v Namibia* case, where it observed that "the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular Articles 25, 26 and 27."[414]

Since the adoption of the UNDRIP, the Indigenous Peoples' right to self-determination has become part of the increasing rights of Indigenous Peoples. The UNDRIP sets out various Indigenous Peoples' rights, including the right to self-determination. Article 3 of the UNDRIP, while departing from the previous instruments' use of "peoples," specifically provides that "*[i]ndigenous peoples* have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[415] Some other political rights derive from the right to self-determination, and these other rights cannot be enjoyed without first realising the right to self-determination. For instance, "Indigenous Peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[416] Similarly, Indigenous Peoples

[411] See generally Paweł von Chamier Cieminski, "A Look at the Evolution of the Right to Self-Determination in International Law" (2020) 25(3) *Białostockie Studia Prawnicze* 117, 123 – 124; James Summers, "The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right" (2019) 31(2) *New England Journal of Public Policy* 1 – 9.
[412] Summers (n) 4.
[413] Ibid.
[414] *Diergaardt v Namibia* (n) para 10.3.
[415] Ibid, article 3.
[416] Ibid, article 4.

see sustainable development and the right to self-determination as complementary because the full implementation of human rights is necessary for sustainable development.[417]

International and regional courts have also interpreted this right. The International Court of Justice (ICJ) identified the right to self-determination as "one of the essential principles of contemporary international law" in the case of *East Timor*.[418] The ICJ also recognised the right to have an *erga omnes* character,[419] meaning that all States have a legal obligation to protect the right.[420] Based on this judgement, Agnieszka Szpak argues that even though the UNDRIP is a soft law without any binding obligation, the *erga omnes* character of the right to self-determination, as recognised by the ICJ, implies that the provision of the UNDRIP on this right imposes an obligation to protect on States[421] since it is a "core principle of customary international law."[422] The ICJ also recognised this status in *Western Sahara,*[423] where the court reaffirmed the right to self-determination, although in the context of non-self-governing territories.[424] The ICJ reached the same decision in *The Separation of the Chagos Archipelago* case,[425] where the court observed that "the right to self-determination is an obligation *erga omnes*," and consequently, "all States have a legal interest in protecting that right."[426]

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[417] See Rio+20, *Declaration of the Indigenous Peoples gathered at the Indigenous Peoples International Conference on Sustainable Development and Self Determination* from June 17th – 19th 2012 at the Museu da República in Rio de Janeiro, Brazil [par 2] <https://www.forestpeoples.org/sites/default/files/publication/2012/06/final-political-declaration-adopted-rio20-international-conference-indigenous-peoples-self-determina.pdf > accessed 28 November 2022

[418] International Court of Justice, *Case Concerning East Timor (Portugal v Australia)* Merits, Judgment, ICJ Reports 1995 4 at 102, para 29.

[419] Ibid. See *Case Concerning Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)* Judgment of 5 February 1970 - Second Phase - Judgments [1970] ICJ 1; In *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice* (ICJ), 9 July 2004 the ICJ found that "[t]he obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination" (para 155).

[420] Oddný Mjöll Arnardóttir, "Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights" (2017) 28(3) *The European Journal of International Law* 819, 821.

[421] Szpak (n 383) 187.

[422] Maribeth Hunsinger, "Self-determination in Western Sahara: A Case of Competing Sovereignties?" (2017) *Berkeley Journal of International Law* <https://www.berkeleyjournalofinternationallaw.com/post/self-determination-in-western-sahara-a-case-of-competing-sovereignties> accessed 30 November 2022.

[423] *Western Sahara*, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12.

[424] The ICJ based its decision on many documents of the UN, especially on the UN General Assembly's Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples (UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV). Recognising some of the doubts by scholars on whether the right qualifies "as a norm of contemporary international law", opined that "the present Opinion is forthright in proclaiming the existence of the "right [to self-determination]" in so far as the present proceedings are concerned". See the Separate Opinion of Judge Dillard.

[425] International Court of Justice, *Legal Consequences of The Separation of the Chagos Archipelago from Mauritius in 1965* (ICJ Advisory Opinion, 25 February 2019, General List No 169).

[426] Ibid, para 180.

At the regional levels, the Organization of American States (OAS) and the AU have developed some legal regimes to protect the right to self-determination. Article III of the American Declaration on the Rights of Indigenous Peoples[427] has similar provisions to the UNDRIP on this right. It provides that "Indigenous Peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development." It goes further to recognise that this right is limited only to internal self-determination by providing that "Indigenous Peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to *their internal and local affairs*, as well as ways and means for financing their autonomous functions."[428] While interpreting Article 21 of the American Convention on the right to land and resources in the case of *Saramaka People*, the Inter-American Commission on Human Rights noted that the right is intrinsically tied to the right to self-determination. It noted that common Article 1 to the ICCPR and the ICESCR guarantees the right to self-determination for the Indigenous Peoples.

In the African context, the scope of interpretation of the right to self-determination is very narrow and conforms to the internal aspect of self-determination. Again, if an indigenous group brings a complaint within a Member State, the Commission is less likely to find a violation if the demand is for secession.[429] Article 20(1) of the African Charter provides that "[a]ll peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen." In *Mgwanga v Cameroon*,[430] the African Commission, despite recognising that the Complainants were a "separate and distinct people" like Indigenous Peoples, nonetheless refused to recognise that they can exercise the right to self-determination. The Commission observed:

> As a consequence, the Commission cannot envisage, condone or encourage secession as a form of self-determination…. The Commission has, however, accepted that autonomy within a sovereign State, in the context of self-government, confederacy, or federation, while preserving the territorial integrity of a State party, can be exercised under the Charter.[431]

[427]Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, AG/RES.2888 (XLVI-O/16) (15 June 2016).
[428] Ibid, art XXI (1).
[429] Olufemi Amao, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge, 2019) 145.
[430] *Mgwanga Gunme v Cameroon* (n 84).
[431] Ibid, paras 190 – 191.

There have been other instances where the African Commission was unwilling to recognise the right to self-determination, mainly by insisting that such rights would impede the territorial integrity of Member States,[432] yet the African Commission has created exceptions when Indigenous Peoples can enjoy this right. These exceptions, which include grave threats to human rights, would be examined in greater detail as part of the AAIL in Chapter Six.

As earlier indicated and contended by Gadkowski, the right to self-determination is an inventory of human rights[433] and has other principles and rights flowing from it. Two of these rights will be discussed below:

1. Political participation

This right, just like most other rights of the Indigenous Peoples, flows from the right to self-determination, and it simply means the involvement of Indigenous Peoples in their national and local affairs. The HRC has observed that realising the right to self-determination as protected under Common Article 1 also involves the enjoyment of the right to participate in State institutions[434] and decision-making processes that will affect the enjoyment of their traditional lands and natural resources.[435] While it is said that no human rights protection instrument "recognises a common and comprehensive right to political participation per se,"[436] some international instruments are explicit that this right might arise where persons belong to some particular groups. For example, the ILO 169[437] provides that tribal and indigenous persons shall enjoy this right. Article 6 (1)(b) of the ILO 169 mandates governments to "establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them." This right also extends to participating in decision-making on developmental plans of the

[432] See, for instance, *Katangese Peoples' Congress v Congo* (Communication No 75/92) 1995, where the Commission insisted that a group within a Member State cannot seek the right to self-determination.
[433] Tadeusz Gadkowski (n 389) 26.
[434] Human Rights Committee, *Concluding observations of the Human Rights Committee: Mexico* (CCPR/C/79/Add 109, 1999) para 19.
[435] Human Rights Committee, *Concluding observations of the Human Rights Committee: Finland* (CCPR/C/ FIN /co/6, 2013) para 16.
[436] Alexandra Tomaselli, "The Right to Political Participation of Indigenous Peoples" (2017) 24(4) *International Journal on Minority and Group Rights* 390, 392.
[437] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989, C169.

governments,[438] measures for the preservation and protection of the environment,[439] and plans on the use, management, and conservation of natural resources.[440]

Furthermore, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minority Declaration)[441] emphasises the right to effective participation of minorities in their political affairs. Article 2 (1) is explicit on this right by providing that "[p]ersons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life" and to participate in decisions on the national and regional levels, especially if the decisions at the regional level are on issues that concern them.[442] Also, States should take appropriate steps to allow minorities to participate fully in their country's economic growth and development.[443] Even though the Minority Declaration is on the rights of minorities, it has been observed that indigenous claims and rights frequently overlap substantially with those of minorities,[444] and they both suffer comparable obstacles to political involvement.[445] In other words, the Minority Declaration can technically apply to Indigenous Peoples.[446]

With the adoption of the UNDRIP, the right to political participation has further been defined. Article 5 of UNDRIP establishes many aspects of the right to cover legal and cultural issues. It thus provides that

> Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The procedural aspect of the right is also protected because Indigenous Peoples have the right to participate in decision-making concerning matters that will affect their rights directly or

[438] Ibid, art 7(1).
[439] Ibid, art 7(2).
[440] Ibid, art 15 (1).
[441] UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135.
[442] Ibid, art 2(3).
[443] Ibid, art 4 (5).
[444] Luis Rodríguez-Piñero Royo, "Political Participation Systems Applicable to Indigenous Peoples" in Marc Weller and Katherine Nobbs (eds) *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press, Oxford, 2010) 308, 309; Alexandra Tomaselli (n 39) 392.
[445] Prosper Nobirabo Musafiri, "Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/National Minority?" (2012) 17(4) *International Journal on Minority and Group Rights* 481, 527; Alexandra Tomaselli (n 39) 392.
[446] Some scholars have objected to recognising indigenous peoples as ethnic minorities. See United Nations Economic and Social Council, *Proposal Concerning a Definition of the Term "Minority"* submitted by Mr Jules Deschenes at the Thirty-eighth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1985/31 14 May 1985 [para 170].

through their elected representatives.[447] While States are mandated to establish mechanisms for the protection of the rights of Indigenous Peoples, they must do so with the full participation of the Indigenous Peoples.[448] The UN and its agencies and other intergovernmental bodies are to allow Indigenous Peoples to participate in the full realisation of the provisions of the UNDRIP.[449]

The right to participation is also protected at regional levels. The American Declaration on the Rights of Indigenous Peoples re-echoes the UNDRIP's provision on the right of Indigenous Peoples to maintain and develop their own decision-making institutions and to participate in decision-making in matters that would affect their rights.[450] In addition, the UDRIP stipulates that Indigenous Peoples have the right to equal access and participation in all national institutions and forums, including legislative organisations.[451] The African Charter also has similar provisions but only within the context of individual rights. In other words, [e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".[452] However, the African Commission has gone ahead to adopt some resolutions that recognise the right of Indigenous Peoples to participate in political affairs.[453] The analyses of these resolutions form part of Chapter Six.

2. External self-determination

As earlier pointed out, the right to self-determination has two legal aspects – internal and external elements. In this section, this thesis aims to examine the right to external self-determination as an emerging right distinct from the internal self-determination. The ultimate result of the right to external self-determination is secession from another State to form an independent State.[454] Barsh argues that the controversies surrounding the recognition of the right to self-determination for Indigenous Peoples were the main reasons the draft copy of the UNDRIP took thirteen years before it was transmitted to the UN General Assembly. The

[447] UNDRIP (n 11) art 18.
[448] Ibid, art 27.
[449] Ibid, art 41.
[450] The American Declaration, art XXI.
[451] Ibid, art XXI (2).
[452] The African Charter (n 82) art 13(1).
[453] See for instance *Resolution on the Recognition and Protection of the Right of Participation, Governance and Use of Natural Resources by Indigenous and Local Populations in Africa* - ACHPR/Res 489 (LXIX)2021 and *Resolution on Extractive Industries and the Protection of Land Rights of Indigenous Populations/Communities in Africa* - ACHPR/Res. 490 (LXIX)2021.
[454] Szpak (n 383) 184.

UNDRIP, even though it recognises the right to self-determination, limits the application of its provisions within an already existing State. Article 46 (1) of the UNDRIP expresses this sentiment by providing that no Article of it should "be interpreted as implying … or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." In Article 3 of UNDRIP, the right of Indigenous Peoples to self-determination is guaranteed, but Article 4 subsequently limits it only to "the right to autonomy or self-government in matters relating to their internal and local affairs." This is despite many Indigenous Peoples seeking Statehood as a means of determining their political status.

The territorial integrity and boundaries of States are protected under the *uti possidetis, ita possideatis* principle (*uti possidetis*). Its origin is traced to Roman private law as a Praetorian Edict, which was instrumental in settling disputes over property ownership.[455] Translated to "as you possess, so may you possess," it prohibits any change in the current State of possession of immovable property between two contending parties. It places the burden of proof of ownership on the party who is not in possession, thereby giving an advantage to the possessor even though he might be in wrongful possession.[456] Over some years, *uti possidetis* was developed as an international law principle to prevent any boundary conflicts between newly created States and the decolonisation of Africa. As a justification against any claims of secession, several States assert the inviolability of *uti possidetis* as a norm of international law and, by extension, claims of Indigenous Peoples to the right to external self-determination.[457]

Generally, the external aspect of the right to self-determination can be achieved in two ways – the decolonisation of former colonies and the self-determination of peoples subjected to different domination, subjugation, or exploitation. As Ljubović contends, the two situations result in a change of sovereignty in a given territory.[458] He points to the fact that these cases are products of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United

[455] Freddy D Mnyongani, "Between a Rock and a Hard Place: The Right to Self-determination versus Uti Possidetis in Africa" (2008) 41 (3) *The Comparative and International Law Journal of Southern Africa* 463, 468.
[456] Shrinkhal (n 181) 77; Steven R Ratner, "Drawing a Better Line: Uti Possidetis and the Borders of New States" (1994) 90(4) *The American Journal of International Law* 590, 593.
[457] See generally Shrinkhal (n 181) 78.
[458] Mirza Ljubović, "The Right to Self-Determination of Peoples through Examples of Åland Islands and Quebec: Recommendations for a Peaceful International Legal Order" (2023) 53(2) *Review of European and Comparative Law* 189, 197.

Nations,[459] which provides for the safeguard clause prohibiting any act that tends to dismember or impair a State unless for a people subjected to domination, subjugation, or exploitation. In other words, it prohibits "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described."[460] The CERD's General Recommendation 21, discussed earlier, refers to this position to underscore that even though nothing in their activities should be interpreted as supporting secession, it supports external right to self-determination where a State is not "in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[461]

The above notwithstanding, international courts are willing to recognise self-determination as a remedial secession in rare cases of extreme threat to lives and restrict the right to decolonisation. The ICJ, in its recent Opinion on the *Separation of the Chagos Archipelago* case, reiterated the ICJ's attitude to this right when it held that it "will confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonization." The majority opinion applied this restriction despite many submissions that the issue should be addressed.[462] Nevertheless, scholars have found a way of extending this right to those acts in which Indigenous Peoples can exercise beyond and independently of the States they are currently in.

There is another sense in which Indigenous Peoples are said to be exercising the right to external self-determination, as Szpak argues that by negotiating and participating in the drafting process of treaties and engaging at various international conferences, Indigenous Peoples are exercising the external aspect of self-determination.[463] Some of these treaties and conferences, as Szpak mentions, include the UN Permanent Forum on Indigenous Issues,[464] the Arctic Council, where the Sami people take part as permanent members, and Indigenous Peoples'

[459] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV)
[460] Ibid
[461] CERD's General Recommendation 21 (n 392) para 6.
[462] See particularly the separate opinion of Trindade J in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion) ICJ GL 169 ICGJ 534 (ICJ 2019), 25th February 2019.
[463] Szpak (n 383) 188.
[464]UN Permanent Forum on Indigenous Issues <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-%202.html> accessed 26 January 2024.

active participation at the various Conference of the Parties (COP) under the UN Framework Convention on Climate Change, the most recent being the COP 28 held in December 2023 in Dubai.[465] This active participation in the negotiation of agreements at the international level is essential because, as observed by Miranda, "through their participation in transnational conferences, leaders and representatives of indigenous communities have contributed to the solidification of a transnational indigenous identity."[466]

Consequently, the various recognition of the rights of Indigenous Peoples under various instruments, according to Åhrén, means that Indigenous Peoples have attained the status of international legal subjects, with all the rights and privileges enjoyed by other subjects of international law.[467] In concluding his analysis of Indigenous Peoples' right to the full measure of external self-determination and the emergence of new States, Barsh argues that with the current attitude of States towards the right anchored on *uti possidetis*, the right has become more symbolic than substantive.

3.2. Right to Land, Territories, and Resources

Land rights extend to territories and natural resources;[468] for Indigenous Peoples, these rights are collectively held as part of their cultural distinctiveness. The bundle of rights often comprises access, withdrawal, management, exclusion, and alienation of land. The bundle may also include rights to numerous natural resources on and beneath the land's surface.[469] The right to own land traditionally occupied by Indigenous Peoples has not always been guaranteed, as it was subsumed under the right to property. Article 17 of the UDHR provides that "everyone has the right to own property alone as well as in association with others. No one shall be

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[465] COP 28 UAE, "Energy and Industry/Just Transition/Indigenous Peoples" <https://www.cop28.com/en/energy-and-industry/presidency-indigenous-ppl> accessed 26 January 2024.

[466] Lillian Aponte Miranda, "Introduction to Indigenous Peoples' Status and Rights under International Human Rights Law" in Randall S Abate and Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013) 39, 44.

[467] Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford Press, 2016) 81. The certainty of this is yet to be agreed upon. See Katja Göcke (n 180) 17 – 29.

[468] See article 13 (2) of the ILO Convention 169, which provides that "the use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."

[469] The International Fund for Agricultural Development, "Indigenous Peoples' Collective Rights to Lands, Territories and Natural Resources: Lessons from IFAD-supported Projects," April 2018, p 4 <https://www.ifad.org/documents/38714170/40272519/IPs_Land.pdf/ea85011b-7f67-4b02-9399-aaea99c414ba> accessed 7 December 2022. This position aligns with the common law principle of *quicquid plantatur solo, solo cedit*, which means that anything attached to the land is part of the land, and consequently, an owner of a piece of land owns everything attached to the land. See generally Peter Luther, "Fixtures and Chattels: A Question of More or Less..." (2004) 24 *Oxford Journal of Legal Studies*, 597, 598; Hossein Esmaeili, "Property Law and Trusts (waqf) in Iran" in Nadirsyah Hosen (ed) *Research Handbook on Islamic Law and Society* (Edward Elgar Publishing, 2018) 188.

arbitrarily deprived of his property." The drafting history of this Article was so controversial among States that it became the only right in the UDHR that did not appear in the ICESCR and ICCPR.[470] The arguments were whether to include the right to land as part of property rights and whether property rights should be collective rights or to make the right to land a separate right. The argument for land rights to be subsumed under the right to property as an individual right was later accepted.[471]

In spite of the absence of the right to land expressly being mentioned in the ICESCR and ICCPR, the CESCR, in 2022, published General Comment No 26 on land and economic, social and cultural rights.[472] It makes a purposive interpretation of the right to land by linking it to six other ICESCR rights, like the right to adequate food and housing, the right to water, the right to the highest attainable standard of physical and mental health, the right to take part in cultural life, and the right to self-determination.[473] Secure and equitable access to land has direct and indirect implications for the enjoyment of other rights.[474] General Comment No. 26 also makes elaborate references to Indigenous Peoples. While linking equitable access to land and the right to take part in cultural life, it recognises that this linkage is particularly relevant for Indigenous Peoples and other peasant groups[475] whose identities are closely tied to the land they occupy.

Equally, on the realisation of the internal aspect of the right to self-determination, General Comment No. 26 noted that while the right to self-determination entails the freedom to dispose of natural wealth and resources, such disposal of natural wealth and resources can only be actualised if "they have land or territory in which they can exercise their self-determination.[476] Furthermore, referring to the ILO 169 and the UNDRIP, General Comment No 26 asserts that these two instruments have internationalised Indigenous Peoples' right to land.[477] Furthermore, the spiritual connection Indigenous Peoples have with the land extends beyond religious ceremonies and encompasses various activities on the land, including hunting, fishing, herding, and collecting plants, medicines, and food. It goes ahead to provide that it is imperative for States parties to guarantee the right of Indigenous Peoples to preserve and enhance their

[470] Jérémie Gilbert, "Land Rights as Human Rights: The Case for a Specific Right to Land" (2013) 10(18) *International Journal On Human Rights* 115, 118.
[471] Ibid; Jacob Mchangama, "The Right to Property in Global Human Rights Law" (2011) XXXIII (3) *Cato Policy Report* 1.
[472] CESCR, *General Comment No. 26 (2022) on Land and Economic, Social and Cultural Rights* (22 December 2022) E/C.12/GC/26.
[473] Ibid, paras 6 to 11.
[474] Ibid, para 5.
[475] Ibid, para 10.
[476] Ibid, para 11.
[477] Ibid, para 16.

spiritual connection with their lands, territories, and resources, encompassing bodies of water and seas that are currently under their control or were formerly owned or utilised by them. It further stresses that Indigenous Peoples retain the right to have their lands clearly delineated, with relocation permitted only in specific situations and subject to the prior, free and informed consent of the affected groups.[478]

The ILO Convention 169 changed the whole dynamic of indigenous land ownership as it recognises Indigenous Peoples' right to own lands they have traditionally occupied. It provides that "the rights of ownership and possession of [Indigenous Peoples] over the lands which they traditionally occupy shall be recognised."[479] It obligates States to identify Indigenous Peoples' lands and effectively protect their rights of ownership and possession.[480] Similarly, ILO Convention 169 guarantees Indigenous Peoples' rights to natural resources on traditionally occupied lands.[481] Unfortunately, unlike the rights to lands where "ownership and possessory" rights are guaranteed, rights to natural resources are limited to Indigenous Peoples' participation "in the use, management and conservation of these resources."[482]

To make this point clearer, the ILO Convention 169 gives States the authority to determine the nature of ownership of natural resources; whether a "State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands."[483] The non-recognition of Indigenous Peoples' right to own minerals deposited on their lands may be counterproductive or at variance with the spirit of the ILO Convention 169. This is because most of the natural and mineral resources in a State are located in the lands of the Indigenous Peoples, and if their lands are continuously explored or exploited for mineral and natural resources, States will always use it as an excuse to remove Indigenous Peoples from the lands they traditionally occupy. Meanwhile, land rights also include the non-removal of Indigenous Peoples from the lands they traditionally occupy.[484]

The UNDRIP provides for similar land rights as the ILO Convention 169. It acknowledges the tripartite elements of lands, territories, and natural resources over which Indigenous Peoples have rights.[485] It explicitly gives Indigenous Peoples "the right to own, use, develop and control

[478] Ibid.
[479] The ILO Convention 169 (n 12) art 14 (1).
[480] Ibid, art 14 (2).
[481] Ibid, art 15.
[482] Ibid.
[483] Ibid, art 15 (2).
[484] Ibid, art 16 (1).
[485] UNDRIP (n 11) art 26 (1).

the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."[486] While mandating States to recognise and protect Indigenous Peoples' lands, territories and natural resources, such recognition and protection must be according to Indigenous Peoples' customs, traditions, and land tenure systems.[487] Respect for customs, traditions, and land tenure systems also extends to when States are to establish adjudicatory bodies on the rights to land, territories and natural resources.[488] Removing Indigenous Peoples from the land they have traditionally occupied is prohibited unless with the free, prior, and informed consent (FPIC) of the Indigenous Peoples concerned,[489] and if any of the land rights are violated, they are entitled to seek redress for restitution or just, fair and equitable compensation.[490] Also prohibited from being done on the lands and territories of Indigenous Peoples without their FPIC are the storage or disposal of hazardous materials[491] and military activities.[492]

The UNDRIP is more far-reaching in its provisions than the ILO Convention 169. First, it prohibits storing or disposing of hazardous materials on Indigenous Peoples' lands which are not covered by the latter. Secondly, it guarantees Indigenous Peoples' ownership of natural resources, unlike under the ILO Convention 169, where ownership of natural resources is left for States to determine. Finally, as pointed out by Barsh, the use of past tense in the UNDRIP in relation to land – "owned", "occupied", and "acquired" suggests that the UNDRIP intends to make restitution more effective for the lands of Indigenous Peoples that might have been wrongfully confiscated, taken, occupied, used or damaged.[493]

The provisions on land rights have been applied in some judicial claims by Indigenous Peoples. For instance, the ILO Committee on the Application of Conventions and Recommendations had urged India to pay restitution to Indigenous Peoples displaced when the hydroelectric dam was being developed.[494] In *Mayagna (Sumo) Indian Community of Awas Tingni v Nicaragua*,[495] the Inter-American Court observed that the right to property guaranteed under

[486] Ibid, art 26(2).
[487] Ibid, art 26(3).
[488] Ibid, art 27.
[489] Ibid, art 10.
[490] Ibid, art 28 (1).
[491] Ibid, art 29 (2).
[492] Ibid, art 30 (1).
[493] Barsh (n 377) 847.
[494] *Report of the Committee of Experts on the Application of Conventions and Recommendations* (International Labour Conference, 1996), 83rd Session, Report III (Part IVA) (India) at 269, cited in Barsh (n 377) 847.
[495] The Inter-American Court, *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, reparations and costs, IACHR Series C No 79, [2001] IACHR 9, IHRL 1462 (IACHR 2001), 31 August 2001, Inter-American Court of Human Rights [IACtHR].

the American Convention under Article 21 stems from indigenous traditions, and consequently, Nicaragua did not have the right to grant the concession of indigenous lands to third parties. The Inter-American Court further held that Nicaragua must create adequate measures for land tenure systems based on the customs and traditions of the Indigenous Peoples.

The African Charter provides for the right to property,[496] just like the American Convention. It also recognises the possibility of the collective right to property and the right of all peoples to dispose of their wealth and natural resources in the exclusive interest of the people concerned.[497] In the event of spoliation or wrongful dispossession of property, the people concerned are entitled to the lawful recovery of the land and adequate compensation.[498] Just like in the Inter-American Court decision in the *Mayagna case,* the African Commission's attitude is to expand property rights and the right to cultural development under Article 22 (1) of the African Charter to include land rights. The connection between land rights and cultural integrity was given recognition by the African Commission in the *Endorois case*.[499] Here, the African Commission acknowledged that removing the Endorois Indigenous People of Kenya from their ancestral land violated their right to cultural integrity and freedom of religion. When any infringement of the right to land has occurred, the African Court will order reparation. This was the conclusion of the African Court in June 2022, where it ruled on the question of reparation by ordering the restitution of the land that the Ogiek are entitled to by delimitation, demarcation, and titling in order to define and reaffirm which sections of the Mau Forest are historically and effectively belonging to the Ogiek people.[500]

On the policy side, the United Nations Conference on Environment and Development (UNCED)'s Agenda 21[501] called on States to fully partner with Indigenous Peoples to recognise Indigenous Peoples' land and protect the land from environmentally unsound policies considered socially and culturally inappropriate by Indigenous Peoples.[502] In its General Recommendation 23,[503] the Committee on the Elimination of Racial Discrimination called

[496] African Charter (n 82) art 14 (1)
[497] Ibid, art 21 (1).
[498] Ibid, art 21 (2).
[499] *Endorois Peoples case* (n 86).
[500] ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment, Application No. 006/212 (June 2022).
[501] United Nations, *Agenda 21: Programme of Action for Sustainable Development, Rio Declaration on Environment and Development, Statement of Forest Principles: The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development* (UNCED), 3-14 June 1992, Rio de Janeiro, Brazil.
[502] Ibid, para 26 (3)(a)(ii).
[503] Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of Indigenous Peoples* (Fifty-first session, 1997), UN Doc A/52/18, annex V at 122 (1997).

"upon States parties to recognize and protect the rights of Indigenous Peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories."[504] Based on these recognitions of the right of Indigenous Peoples to own lands collectively, Barsh argues that the "land rights of Indigenous Peoples have attained the status of customary international law."[505]

3.4.The Right to Free, Prior and Informed Consent

The right to free, prior and informed consent (FPIC) is also embedded in the universal right to self-determination, which, when interpreted, means that whenever any project is to be carried out within the territory of Indigenous Peoples, their consent must be sought before the project is commenced. This consent must be obtained freely after full disclosure of all information on the project to the Indigenous Peoples. Put differently, Pillay refers to FPIC as the right of Indigenous Peoples to provide or withhold their consent on any decision or project that will impact their lands, territories or other rights.[506] Normatively, even though the FPIC has its foundations laid in the common Article 1 of the ICCPR and ICESCR regarding self-determination, a great import of its meaning and elements is set out in the UNDRIP. Pillay further stresses that apart from flowing from the right to self-determination, the right to FPIC is equally a product of other rights like the right to develop and maintain cultures[507] and the principle of non-discrimination under the ICERD.[508]

In relating this right to the principle of non-discrimination, the CERD, in its General Recommendation No. 23 on Indigenous Peoples,[509] calls on States to ensure that individuals belonging to Indigenous communities have equal rights to participate in public affairs actively and that no decisions directly affecting their rights and interests are made without their FPIC.[510] The CERD emphasises explicitly the need for restitution in cases where decisions have been

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[504] Ibid, para 5.
[505] Barsh (n 377) 847.
[506] Navi Pillay, "Free, Prior and Informed Consent of Indigenous Peoples" United Nations High Commissioner for Human Rights, August 2013 <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf> accessed 5 December 2022.
[507] See ICCPR (n 13) art 27; ICESCR (n 14) art 15.
[508] ICERD (n 391).
[509] CERD, *General Recommendation 23, Rights of Indigenous Peoples* (Fifty-first session, 1997), UN Doc A/52/18, annex V at 122 (1997).
[510] Ibid, para 4(d).

made without the FPIC of Indigenous Peoples, particularly in relation to land and resource rights. Furthermore, it has emphasised the obligation of States to guarantee that the right of Indigenous Peoples to give FPIC is respected when devising and executing initiatives that impact the utilisation of their territories and assets.[511]

In its interpretation of cultural rights, the CESCR, in its General Comment No. 21 on the right of everyone to take part in cultural life,[512] expanded on the requirements of the right to FPIC. The CESCR asserts that the right to take part in cultural life encompasses the right of Indigenous Peoples to have their lands, territories, and resources, which have traditionally been utilised and enjoyed by indigenous communities, restituted or returned to them if they were taken without the FPIC of the affected peoples.[513] It also calls on States to "respect the principle of free, prior, and informed consent of Indigenous Peoples in all matters covered by their specific rights"[514] and to "obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."[515]

As Stated earlier, the UNDRIP elaborately provides about this right. Article 19 of UNDRIP mandates "States [to] consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions … to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." While consulting with Indigenous Peoples on any project, consent must be at the heart of each consultation which includes:

1. Enacting legislative or administrative measures that may affect Indigenous Peoples.[516]
2. Embarking on any project that will affect Indigenous Peoples' rights to land, territory and resources, including mining and other utilisation or exploitation of resources.[517]

FPIC, in many cases, goes beyond merely consulting with Indigenous Peoples before carrying out any project or enacting legislative measures to include the compulsory obtaining of consent.

[511] Ibid, para 5.
[512] CESCR, *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.
[513] Ibid, para 36.
[514] Ibid, para 37.
[515] Ibid, para 55 (e). See also Pillay (n 506).
[516] UNDRIP (n 11) art 19.
[517] Ibid, art 32 (2); Pillay (n 506).

For instance, the UNDRIP requires States to obtain the prior consent of Indigenous Peoples in the following circumstances:

1. Relocating Indigenous Peoples from their traditional lands or territories.[518]
2. Storing or disposing of hazardous materials in the lands or territories of Indigenous Peoples.[519]

Failure to observe the FPIC entitles the Indigenous Peoples to seek redress for restitution or "just, fair and equitable compensation."[520] There are controversies surrounding the mandatory nature of FPIC, which stem from the consequences of failure to obtain such consent. This is particularly so because some of the provisions of the UNDRIP are couched in a tone that makes them not mandatory, while others are strict on their requirements for FPIC. For instance, Articles 10 and 29 of UNDRIP on the relocation of Indigenous Peoples and the storing of hazardous materials are clearly pre-conditions to any State actions in that regard. On the other hand, Articles 19 and 32 (2) of UNDRIP on enacting legislative and administrative measures and embarking on developmental projects that will impact the right to land, respectively, are less clear on their mandatory nature.[521] Newman argues for the purposive interpretation of UNDRIP, where the whole document would be read together rather than a provision in isolation. He argues that a textual interpretation focusing on the UNDRIP's precise wordings may result in a somewhat constrained conception of FPIC as an extension of consultation processes.[522] For Barelli,[523] FPIC provisions should be understood to be mandatory since the right is embedded in other rights, and he concludes that

> allowing States to implement projects which may have serious negative consequences on the lands, lives and, ultimately, existence of Indigenous Peoples, without their consent, appears to be incompatible with both the spirit and normative framework of the Declaration.[524]

Barelli further argues that whenever there is a consent requirement in the UNDRIP, it should be read to be mandatory, especially in matters that concern their fundamental human rights and

[518] Ibid, art 10.
[519] Ibid, art 29 (2).
[520] Ibid, art 28 (1).
[521] Dwight Newman, "Interpreting FPIC in UNDRIP" (2019) 27 *International Journal on Minority and Group Rights* 233, 238.
[522] Ibid, 240.
[523] Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge, 2016).
[524] Ibid, 38.

can negatively affect them.[525] While arguing in favour of mandatory consent, Anaya, former Special Rapporteur on the Rights of Indigenous Peoples, was of the view that

> A significant, direct impact on Indigenous Peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without Indigenous Peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.[526]

In its General Comment number 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,[527] the CESCR commented that it is mandatory that, in all business activities that will affect the rights, lands, territories, and natural resources of Indigenous Peoples, States and businesses have an obligation to obtain the FPIC of the Indigenous Peoples.[528] While reiterating the provisions of Article 19 of the UNDRIP, the General Comment further States that before beginning business activities, TNCs should consult and cooperate in good faith with Indigenous Peoples through their representative institutions to gain their FPIC in accordance with human rights due diligence.[529] The FPIC must also be in advance of the business activities rather than after that. The Inter-American Court, while interpreting Article 15(2) of ILO Convention No 169, which provides for the consultation of Indigenous Peoples by the government before the exploitation of their natural resources, was specific on the time FPIC must be carried out. In the case of the *Kichwa Indigenous People of Sarayaku v Ecuador*,[530] the Inter-American Court observed that

> consultation should take place, in accordance with the inherent traditions of the Indigenous People, during the first stages of the development or investment plan and not only when it is necessary to obtain the community's approval, if appropriate, because prior notice allows sufficient time for an internal discussion within the community to provide an appropriate answer to the State.[531]

The effectiveness of FPIC and not mere consultation is more paramount when the proposed activity will fundamentally alter the rights of Indigenous Peoples. The HRC contends in *Poma Poma v Peru*[532] that the admissibility of activities that significantly undermine or interfere with

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[525] Ibid.
[526] Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc. A/66/288 (10 August 2011) paras 82 and 83.
[527] CESCR, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24.
[528] Ibid, para 12.
[529] Ibid, para 17.
[530] The Inter-American Court on Human Rights, *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits, Reparations, Costs) IACtHR Series C No 245 (27 June 2012).
[531] Ibid, para 180.
[532] The Human Rights Committee, *Poma Poma v Peru*, Communication 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (HRC 27 March 2009).

Indigenous Peoples' culture is dependent on whether the Indigenous Peoples were allowed to participate in the relevant decision-making process. Notably, the HRC stressed that, under those circumstances, participation must be effective, indicating that this would include not just consultation but the FPIC of the affected community.[533] In another case, the Inter-American Court held that consulting Indigenous Peoples fourteen years after the continuous violation of their title rights did not amount to prior or effective consultation.[534]

Furthermore, the African Commission has read the right of FPIC into other rights even though FPIC is not explicitly provided for in the African Charter. In the Endorois case, the African Commission held that removing the Endorois people from their traditionally occupied land was without an effective consultation. Even though the State was of the view that the Endorois people were informed of the eviction, the African Commission found out that the State did not obtain the prior and informed consent of all the Endorois peoples, nor were they informed that they would never return to the land to perform some religious activities.[535] The court concluded that "the State has a duty not only to consult with the [Endorois people], but also to obtain their free, prior, and informed consent, according to their customs and traditions"[536] regarding development or investment projects that would have a significant impact within their territory.

3.5. Right to Environmental Information

The right to receive environmental information, although not expressly provided for in the ICCPR and ICESCR, is part of the general environmental democracy and governance, where the public plays a vital role in the protection of the environment. However, even though it is mainly a product of national laws,[537] it could be gleaned from various international law instruments, especially the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[538] This right has been linked to the full realisation of other rights, like the right to water. The CECSR, in its General Comment No. 15 on the right to water,[539] recalls that "individuals and

[533] Ibid; Barelli (n 523) 39.
[534] The Inter-American Court of Human Rights, *Mary and Carrie Dann v United States*, Case 11.140, Report No 75/02, Inter-American Court of Human Rights, Doc 5 rev 1 at 860 (2002).
[535] *The Endorois case* (n 86) para 290.
[536] Ibid, para 291.
[537] Viktor Ladychenko and Liudmyla Golovko, "The Right of Access to Environmental Information in Ukraine and the EU" (2018) 7(3) *European Journal of Sustainable Development* 455-459.
[538] United Nations, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* of 1998 (entered into force on 30 October 2001) UNTS , vol 2161. See Sean Whittaker, "Exploring a Right to Submit Environmental Information Under International Environmental Law" (2023) 35 *Journal of Environmental Law* 401.
[539] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11.

groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties."[540] Equally, prior to the implementation of any action that infringes upon an individual's right to water, individuals have the right to receive timely and full disclosure of information on the proposed measures.[541]

Although all ratifying States of the Aarhus Convention are European and some Central Asians, in April 2023, Guinea-Bissau became the first African country to accede to it.[542] Article 1 provides that for States to fulfil their obligation toward the protection of the right of everyone to live in an environment adequate to their health and well-being, States shall guarantee "the rights of access to information, public participation in decision-making, and access to justice in environmental matters." It goes ahead to define environmental information as "any information in written, visual, aural, electronic or any other material form on" the State of elements of the environment, factors affecting or likely to affect the elements of the environment, and the State of human health and safety, conditions of human life, cultural sites and built structures that are likely to be affected by the State of the elements of the environment or the factors that affect the State of the elements of the environment.[543] For Indigenous Peoples, receiving information about the State of the elements of the environment is vital, especially regarding their right to religion. This is because many Indigenous Peoples observe elements of the environment as part of Indigenous religions.

Additionally, the Rio Declaration on Environment and Development[544] further expands on the form of information that individuals have the right to receive to include "information on hazardous materials and activities in their communities."[545] For Indigenous Peoples, as provided by Article 29(2) of UNDRIP, States are to ensure that there is no storage or disposal of hazardous materials in the lands or territories of Indigenous Peoples without their prior knowledge and consent. Other legal instruments refer to this form of information as an "environmental impact assessment" (EIA) report which individuals have the right to receive.

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[540] Ibid, para 48.
[541] Ibid, para 56.
[542] United Nations Treaty Collections, "13. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27> accessed 01 January 2024; UNECE, "Guinea-Bissau accedes to the Aarhus Convention, Opening New Horizons for Environmental Democracy in Africa and Worldwide" (*UNECE*, 25 April 2023) <https://unece.org/climate-change/press/guinea-bissau-accedes-aarhus-convention-opening-new-horizons-environmental> accessed 01 January 2024.
[543] Aarhus Convention (n 23) art 2(3).
[544] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, 12 August 1992, A/CONF.151/26 (Vol. I).
[545] Ibid, Principle 10.

For instance, Principle 17 of the Rio Declaration provides that "environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

EIA is an extensive term that covers the critical concept of assessing planned activities (from strategies to projects) for their likely impact on all components of the ecosystem, ranging from cultural to biophysical, before taking steps to commit to those actions and develop appropriate solutions to the problems identified in that assessment.[546] The Canadian government developed seven steps in impact assessments on the rights of Indigenous Peoples to include identifying and understanding the rights of the indigenous community, understanding the context in which impacts on rights would occur, identifying guiding values and topics (what to assess), identifying pathways of impact from the project, assessing the level of the impact, dialoguing on measures to address impacts, and validating and following-up on assessment outcomes.[547] Within the context of Indigenous Peoples, a right exists for them to receive an EIA whenever any actions or projects are to be carried out on their lands, territories, and natural resources.

As part of the principles guiding the global consensus on management, conservation and sustainable development, the UN agreed during the UNCED that "national policies should ensure that environmental impact assessments should be carried out where actions are likely to have significant adverse impacts on important forest resources."[548] The Convention on Biodiversity (CBD)[549] also reiterates States' obligation to carry out EIA on their proposed projects that have the potential to affect biological diversity negatively.[550] Once the EIA has been carried out, the report must be presented to the Indigenous Peoples directly or to their elected representatives to allow for more exercise of their right to participation. This is contained in the Akwé: Kon Guidelines adopted by the Conference of the Parties to the United

[546] Richard K Morgan, "Environmental Impact Assessment: The State of the Art" (2012) 30 (1) *Impact Assessment and Project Appraisal* 5, 5.
[547] Government of Canada, "Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples" <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html > accessed 11 December 2022.
[548] UNCED, *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests* 14 June 1992 A/CONF.151/26 [para 8(h)].
[549] UN General Assembly, *The Convention on Biological Diversity* (CBD) of 5 June 1992 (entered into force on 29 December 1993) 1760 UNTS 79.
[550] Ibid, art 14 (1)(a).

Nations Framework Convention on Climate Change (UNFCCC).[551] The EIA should contain all the details of the proposed project and a public notice to allow for sufficient public consultation and time for the affected indigenous or local community to prepare its response.[552] The Akwé: Kon Guidelines particularly require an EIA to be carried out if the proposed project will negatively impact "sacred sites and lands and waters traditionally occupied or used by [Indigenous Peoples]" and to accord them respect at all stages of the EAI.[553]

The African Commission, in the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Ogoni Case),[554] observed that Articles 16 and 24 of the African Charter require that State parties provide EIA to Indigenous Peoples. While Article 16 is on the right to enjoy the best attainable State of physical and mental health and the obligation of States to protect this right, Article 24 is on the right to a general satisfactory environment. The African Commission specifically held, while observing that the Nigerian government failed to provide EIA to the Ogoni Indigenous Peoples,

> Government compliance with the spirit of Article 16 and Article 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[555]

3.6.Right to a Healthy Environment

This is a relatively new right of Indigenous Peoples, and indeed for all individuals. Before now, the approach was to interpret existing rights expansively by "greening" them so that the right to a healthy environment was inferred.[556] National courts are at the forefront of developing this approach. Such existing rights as the right to life and the right to health were harmoniously interpreted by various judicial bodies to embody the right to a healthy environment. In the case

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[551] Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* UNEP/CBD/COP/DEC/VII/16 13 April 2004.
[552] Ibid, Guideline No 11.
[553] Ibid, Guideline No 12.
[554] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (*Ogoni case*), Communication 155/96, ACHPR/COMM/A044/1 27 May 2002.
[555] Ibid, para 53.
[556] Sumudu Atapattu, "Environmental Rights and International Human Rights Covenants: What Standards Are Relevant?" in Stephen J Turner and others (eds) *Environmental Rights: The Development of Standards* (Cambridge University Press, 2019) 19.

of *Subhash Kumar v State of Bihar,*[557] the Indian Supreme Court employed the harmonious construction or interpretation to hold that even though the right to a clean environment was not justiciable under the Indian Constitution, an unhealthy and damaged environment breaches the right to life. The same approach was used in Nigeria by linking the right to a healthy environment to the right to life in the case of *Gbemre v Shell.*[558] Here, the plaintiffs sued for themselves and on behalf of their community, alleging that the gas flaring operation of the defendants infringed on their right to life and the dignity of the human person by denying them a clean environment. The court adopted an indirect approach[559] by linking the right to a clean environment and life. While awarding damages against the defendants, the court held that the activities of the companies threatened the plaintiffs' right to life by breaching their "right to clean, poison-free, pollution-free and healthy environment."[560] Although this case has been praised as marking a "new era"[561] and an initiation of "momentum"[562] in environmental litigation in Nigeria, it is sad to note that neither can this case serve as a precedent as it was not delivered by the Supreme Court or the Court of Appeal, nor was it ever enforced.[563]

The recognition of the right to a healthy environment by linking it with other rights was adopted by the CESCR in its General Comment No. 15,[564] where the Committee commented that the obligation of States in Article 12 (2)(b) of the ICESCR regarding "improvement of all aspects of environmental and industrial hygiene" extends to making clean water available. It also declared that the right to clean water, which is part of the environment, can be inferred from Article 12 (2)(b). For the Committee, "water is necessary to ensure environmental hygiene (right to health)",[565] and States should put in measures to ensure that "natural water resources are protected from contamination by harmful substances and pathogenic microbes" that will end up posing "a risk to human living environments."[566]

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[557] *Subhash Kumar v State of Bihar* 1991 1 SCC 598 (India).
[558] *Gbemre v Shell* (n 362).
[559] See Centus C Nweze, "Evolution of the Concept of Socio-Economic Rights in Human Rights Jurisprudence: International and National Law Perspectives" in Centus C Nweze (ed) *Justice in the Judicial Process* (Fourth Dimension Publishers, 2002) 521.
[560] ibid, para 1.
[561] Abdulkadir Bolaji Abdulkadir, "The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria" (2014) 3 *Journal of Sustainable Development Law and Policy* 118, 129.
[562] Bukola Faturoti, Godswill Agbaitoro and Obinna Onya, "Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v Shell PDC Nigeria Limited: Let the Plunder Continue?" (2019) *African Journal of International and Comparative Law* 1, 2.
[563] ibid.
[564] CESCR *General Comment No. 15* (n 539).
[565] Ibid, para 6.
[566] Ibid, para 8.

The African Charter was the first regional human rights instrument to recognise environmental rights[567] by providing that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development." The Additional Protocol (the San Salvador Protocol) of 1988[568] to the American Convention gives a similar provision to the African Charter in its Article 11 (1): "Everyone shall have the right to live in a healthy environment and to have access to basic public services." The Arab Charter on Human Rights[569] is very comprehensive in recognising the right to a healthy environment but on an individual level. Article 38 provides that "every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment."

The *Ogoni Case* presents an in-depth jurisprudence of the African Commission on the right to a healthy environment in the context of Africa's Indigenous Peoples. In this case, the Ogoni Indigenous Peoples alleged that Shell Petroleum and the Nigerian oil company engaged in various oil productions that damaged the environment through oil spillage that polluted rivers and lands. They also alleged that the companies engaged in indiscriminate gas flaring that polluted the air. The African Commission found that the companies violated many articles of the African Charter, like the right to life, the right to health, the right to free disposal of wealth and resources, and most significantly, the right to a healthy environment. It concluded that

> The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[570]

In a new development, the right to a clean, healthy, and sustainable environment was adopted as a fundamental human right under international law by the UN General Assembly in July

[567] Louis J Kotzé and Anél du Plessis, "The African Charter on Human and Peoples' Rights and Environmental Rights Standards" in Stephen J Turner and others (eds) *Environmental Rights: The Development of Standards* (Cambridge University Press, 2019) 98; Werner Scholtz, "Human Rights and the Environment in the African Union Context" in Werner Scholtz and Jonathan Verschuuren (eds) *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Edward Elgar, 2015) 102.
[568] Organisation of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador"), adopted 17 November 1988, entered into force on 16 November 1999, A-52.
[569] League of Arab States, *Arab Charter on Human Rights*, 15 September 1994.
[570] *Ogoni Case* (n 554) para 52.

2022. In the Resolution,[571] UNGA notes that the right to a clean, healthy, and sustainable environment is "related to other rights and existing international law"[572] and affirms that its protection and realisation "requires the full implementation of the multilateral environmental agreements under the principles of international environmental law."[573] It finally calls on "States, international organisations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all."[574] The Resolution followed an earlier UN Human Rights Council (UNHRC) adoption in October 2021 that contained similar resolutions.[575]

3.7.The Right to Religion, Culture, and Intellectual Property

The right to religion and the right to culture are intertwined since, in most cases, religion forms part of a people's culture. The link among the rights to culture, religion, and intellectual property has been established by the CESCR's General Comment No. 21.[576] In interpreting the right to take part in cultural life under Article 15 of the ICESCR, the CESCR contends that such right is expressed in other international instruments as the right to profess and practise own religion for persons belonging to minorities under Article 27 of the ICCPR and for Indigenous Peoples, as the right to traditional knowledge under the UNDRIP.[577] Also, the right to take part in cultural life is intrinsically linked to the right to education through which people and communities pass on their values, religion, and traditional knowledge.[578] For Indigenous Peoples, their cultural values are associated with their ancestral lands, which have a relationship with natural elements[579] that serve as sacred objects in Indigenous religions.

Natural entities like rivers, mountains, trees, particular kinds of animals, caves, and so on form part of some sacred objects of some Indigenous religions and cultures, and the right to use them for religious rites and cultural practices are protected under various international instruments.

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[571] UN General Assembly, *The Human Right to A Clean, Healthy and Sustainable Environment* adopted 28 July 2022 A/76/L 75 <https://digitallibrary.un.org/record/3983329?ln=en > accessed on 9 December 2022.
[572] Ibid, Resolution 2.
[573] Ibid, Resolution 3.
[574] Ibid, para 3.
[575] UN Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment* adopted on 8 October 2021 https://digitallibrary.un.org/record/3945636?ln=en accessed on 9 December 2022.
[576] CESCR's General Comment No. 21 (n 512).
[577] Ibid, para 3.
[578] Ibid, para 2.
[579] Ibid, para 36.

Similarly, traditional and cultural practices and indigenous knowledge are protected under intellectual property rights when such practices insofar as they meet some thresholds.

The ICESCR, even though protects the right to culture, is so broad as it covers both the tangible and intangible aspects of culture. It protects the right of everyone to take part in cultural life[580] and also recognises the right as a collective right that can be realised under the right to self-determination.[581] Article 17(2) of the African Charter protects this right under collective rights. The right to freedom of religion or belief is an inalienable human right guaranteed in most human rights treaties. Article 18 of the UDHR, Article 18(1) of the ICCPR, Article 8 of the ACHPR, Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[582] and Article 12 of the American Convention all guarantee freedom of thought, conscience and religion.

More specifically, regarding Indigenous Peoples, the UNDRIP makes an elaborate provision that incorporates the recognition of Indigenous Peoples' right to religion, cultural practices, and objects of religious practices. Article 12 (1) of UNDRIP provides that

> Indigenous Peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

It goes further to mandate that "States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with the Indigenous Peoples concerned."[583] Furthermore, religious and cultural rights of Indigenous Peoples are interconnected to territorial claims. Ronald Niezen[584] argues that one practical tendency of legislation geared toward religious protection is to associate religious rights with key sites and things designated as "sacred" while removing the intangibles of indigenous cosmologies and natural spirituality from the exercise of rights and recognition. He further argues that the most significant visible consequence of protecting religious rights is defending ownership and control of places and

[580] ICESCR (n 14) art 15 (1)(a).
[581] Ibid, art 1.
[582] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5.
[583] UNDRIP (n 11) art 12 (2).
[584] Ronald Niezen, "Indigenous Religion and Human Rights" in John Witte, Jr and M Christian Green (eds) *Religion and Human Rights: An Introduction* (Oxford University Press, 2011) 119 – 134.

objects. For him, spiritual traits and cultural practices peculiar to a particular indigenous region are sometimes used in constructing territorial claims.[585] Niezen uses some cases to explain these points. In *Hopu and Bessert v France*,[586] the HRC found that the Indigenous Polynesians' rights to family and privacy under the ICCPR were violated by the construction of a luxury hotel complex on ancient burial grounds in Tahiti, a territory traditionally occupied by the Polynesians. The HRC concluded that "the failure of the State party to respect a site that has obvious importance in the cultural heritage of the Indigenous population of French Polynesia" is a violation of the provisions of ICCPR as it relates to cultural practices.[587] Similarly, the same method is used at national courts as typified in *Navajo Nation v US Forest Service*.[588] Here, the US Court of Appeal found that the approval of the construction of recycled sewage effluent in a mountain considered sacred by some native and indigenous groups was a violation of their right to religion.

In many cases, environmental entities considered sacred by Indigenous Peoples are accorded some fundamental human rights as though they were humans as an extension of the protection of the right to religion. According to Łaszewska-Hellriegel,[589] environmental personhood is the act of transferring the "essence of human rights to animals and ecosystem,"[590] usually in response to Indigenous Peoples' demand that those environmental entities constitute objects of religious worship.[591] In New Zealand, the Whanganui River was recognised as a living being with legal personality, rights, and responsibility. This recognition was in response to the Maori Indigenous People's belief that the river serves as their ancestor and a harbinger of good fortunes.[592] The Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017,[593] while giving legal personhood to the Te Awa Tupua river provides that it is "an indivisible and living

[585] Ibid, 126.
[586] Human Rights Committee, *Hopu and Bessert v France*, Merits, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1, IHRL 2148 (UNHRC 1997), 29th July 1997
[587] Ibid. Even though this was said in the dissenting decision, it is an agreement with the majority decision.
[588] *Navajo Nation v US Forest Service*, (2007) 479 F 3d 1024 (USA).
[589] Martyna Łaszewska-Hellriegel, "Environmental Personhood as a Tool to Protect the Nature" (2022) *Philosophia* 1 -16.
[590] Ibid; Gwendolyn J Gordon, "Environmental Personhood" (2018) 43(1) *Columbia Journal of Environmental Law* 49 – 91; Catherine Iorns Magallanes, "From Rights to Responsibilities using Legal Personhood and Guardianship for Rivers" in Betsan Martin, Linda Te Aho, and Maria Humphries-Kil (eds) *ResponsAbility: Law and Governance for Living Well with the Earth* (1st edn Routledge, 2018) 216 – 239.
[591] Dame Anne Salmond, "Rivers as Ancestors and other Realities: Governance of Waterways in Aotearoa/New Zealand" in Betsan Martin, Linda Te Aho, and Maria Humphries-Kil (eds) *ResponsAbility: Law and Governance for Living Well with the Earth* (1st edn Routledge, 2018) 183 – 192.
[592] Ibid, 184.
[593] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, No 7 <https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html> accessed 02 June 2024.

whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements."[594]

With the rise in the political power of Indigenous Peoples in Ecuador and Bolivia, more Indigenous Peoples were recognised in their new constitutions in 2008 and 2010, respectively. In both constitutions, *Pachamama* or nature – a goddess for many Indigenous Peoples in Ecuador and Bolivia[595] – was accorded "the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[596] In Bolivia's constitution, similar protection is granted to "Mother Earth" or *Madre Tierra*.[597] The Bolivian government is obligated to put measures in place to protect Mother Earth from harm based on the principle of *Vivir Bien* or "live well," a concept that opposes "the neoliberal consumerist, growth-without-limit paradigm" that has bedevilled the natural resources of Bolivian Indigenous Peoples.[598] The Indian courts have proactively protected natural entities as sacred objects of worship. In *Mohd Salim v State of Uttarakhand*,[599] the High Court of Uttarakhand was of the view that for the Hindus, rivers Ganga and Yamuna were not mere rivers but objects of sacred worship that are held as juristic entities. Consequently, the court considered these rivers as legal persons and appointed human persons to preserve these rivers.

The interface between the rights to religion and cultural practices on the one hand and the right to the intellectual property of Indigenous Peoples on the other second is made clear by the Rio Declaration.[600] While Principle 22 of the Rio Declaration appreciates the important role of indigenous "knowledge and traditional practices" in environmental protection, Agenda 21 insists that indigenous knowledge must be respected, recorded, protected, and promoted.[601] The CBD subsequently legally codified this principle in some of its articles. On the obligation

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[594] Ibid, s 12.
[595] Miriam Tola, "Between Pachamama and Mother Earth: Gender, Political Ontology and the Rights of Nature in Contemporary Bolivia" (2018) 118 *Feminist Review* 25, 28.
[596] Constitutión Politica de la República del Ecuador 2008, revised in 2021 as translated by the Constitute Project <https://www.constituteproject.org/constitution/Ecuador_2021?lang=en> accessed 12 December 2022 [art 71].
[597] Constitution of the Plurinational State of Bolivia 2009 as translated by Max Planck Institute <https://www.constituteproject.org/constitution/Bolivia_2009?lang=en> accessed 12 December 2022.
[598] Paola Villavicencio Calzadilla and Louis J Kotzé, "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 *Transnational Environmental Law* 397, 403; Bachmann and Ugwu (n 89) 572.
[599] *Mod Salim v State of Uttarakhand*, Writ Petition No 126 of 2014 in the High Court of Uttarakhand at Nainital (2017) (India). A similar decision was reached in *Lalit Miglani vs State Of Uttarakhand And Others* on 30 March, 2017.
[600] 1992 Rio Declaration on Environment and Development (n 544)
[601] Ibid, Agenda 21 para 15 (5)(e).

regarding the sustainable use of components of biological diversity, a State party shall "protect and encourage *customary use* of biological resources in accordance with *traditional cultural practices* that are compatible with conservation or sustainable use requirements."[602] Additionally, States agreed to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."[603] The consent of the Indigenous Peoples holding traditional knowledge must be obtained before States can promote the knowledge, and any benefit from the promotion, especially in the form of innovation, must be shared equitably with the Indigenous Peoples.[604] In 2002 during the World Summit on Sustainable Development in Johannesburg, States adopted some critical agreements, including the Plan of Implementation of the World Summit on Sustainable Development (Plan of Implementation).[605] Plan 44(j) of the Plan of Implementation repeats the obligation of States to respect, preserve, and maintain the cultural knowledge of Indigenous Peoples, just as in Article 8(j) of the CBD.

3.8. Right to an Adequate Standard of Living

Another right from the ICESCR is the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing."[606] In other words, the right to an adequate standard of living encompasses various components such as adequate food, housing, and continuous improvement of living conditions. The right to an adequate standard of living traces its origin to Article 25(1) of the UDHR, which provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." Furthermore, Article 11(2) of ICESCR recognises the fundamental right of everyone to be free from hunger and includes specific obligations to ensure an equitable distribution of world food supplies in relation to need. From the provisions of Article 11, three further rights are generally discussed under it – rights to food, housing, and water. Each of these rights is examined below:

1. Right to Food

The right to adequate food encompasses the entitlement of every individual to have physical and economic access to sufficient, safe, and nutritious food that meets their dietary needs and

[602] CBD (n 549) art 10 (c).
[603] Ibid, art 8(j).
[604] Ibid.
[605] UN, *Plan of Implementation of the World Summit on Sustainable Development* adopted during the World Summit on Sustainable Development, 4 September 2002, A/CONF 199/20.
[606] ICESCR (n 14) art 11 (1).

food preferences for an active and healthy life.[607] The right has also been described by the CESCR in General Comment No. 12 on the Right to Adequate Food[608] thus: "The right to adequate food is realised when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement."[609] This right has to be progressively realised, meaning an obligation by States to move as expeditiously as possible towards the realisation of the right,[610] taking into consideration the available resources. In the event that a State claims that limited resources prevent it from providing food to those who cannot obtain it themselves, the State must prove that it has made every possible effort to utilise all available resources in order to prioritise meeting these basic obligations. However, if a State claims it cannot fulfil its responsibility due to unforeseen circumstances, it must provide evidence to support this claim. Additionally, it must demonstrate that it has made unsuccessful efforts to seek international assistance in order to guarantee the availability and accessibility of the necessary food.[611]

The Office of the High Commissioner for Human Rights (OHCHR), in its Fact Sheet No. 34 on the right to adequate food (Fact Sheet 34),[612] identifies three parameters to the right to food – food must be available, accessible, and adequate.[613] The *availability* parameter entails, on the one hand, the presence of food derived from natural resources, achieved through food production, cultivation of land, animal husbandry, or alternative methods like fishing, hunting, or gathering. On the other hand, it signifies that food should be accessible for purchase in markets and stores.[614] In addition, *accessibility* entails ensuring both economic and physical access to food. Economic accessibility implies that food must be reasonably priced, allowing individuals to afford it for a well-balanced diet without compromising other essential needs like education fees, medical expenses, or housing. Physical accessibility means that food should be easily afforded by everyone, including those who are physically vulnerable, such as children, the sick, individuals with disabilities, or the elderly, who may face challenges in

[607] António Raposo and Heesup Han, "The Multifaceted Nature of Food and Nutrition Insecurity around the World and Foodservice Business" (2022) 14 *Sustainability* 1.
[608] CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.
[609] Ibid, para 6.
[610] Ibid, para 14.
[611] Ibid, para 17.
[612] UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 34, The Right to Adequate Food*, April 2010, No 34.
[613] Ibid, 2.
[614] Ibid.

obtaining food. Furthermore, States must secure access to food for people in remote regions, victims of armed conflicts or natural disasters, and prisoners.[615]

Finally, food adequacy involves ensuring that food meets dietary requirements, considering factors such as age, living conditions, health, occupation, and gender. The food should meet the requirement of being safe for human consumption and free of harmful substances like contaminants from industrial or agricultural processes, including residues from pesticides, hormones, or veterinary drugs. Additionally, adequate food must align with cultural norms, meaning it should be culturally acceptable. For instance, food aid that goes against the religious or cultural beliefs of the recipients or conflicts with their eating habits would not be culturally acceptable.[616]

For Indigenous Peoples, the right to food is particularly important, especially when examined within the three parameters of the right to food. Availability of food entails the presence of food derived from natural resources, achieved through food production, cultivation of land, animal husbandry, or alternative methods like fishing, hunting, or gathering. Indigenous Peoples largely depend on their lands and natural resources for their sustenance; unfortunately, they have struggled to assert their rights over their lands and resources. This also affects the requirement that food must be adequate since most Indigenous Peoples have had their lands contaminated by industrial wastes. Also, on the availability requirements, for the right to food to be realised, it must be available to the most "vulnerable" individuals in society. Indigenous Peoples fall within the category of the most vulnerable persons, and for Knuth, Indigenous Peoples fall within the poorest segment of society.[617] According to the International Fund for Agricultural Development, Indigenous Peoples constitute 6 per cent of world's population, yet they make up nearly eighteen per cent of individuals residing in conditions of extreme poverty.[618] The implication of this level of poverty is that "the majority of Indigenous Peoples are among the most vulnerable to hunger and malnutrition."[619]

The right to food encompasses various dimensions. The fulfilment and enjoyment of this right are contingent upon the successful implementation of other fundamental human rights. Regarding Indigenous Peoples, the essential rights that must be fulfilled in order to enjoy the

[615] Ibid, 2 – 3.
[616] Ibid, 3.
[617] Lidija Knuth, *The Right to Adequate Food and Indigenous Peoples: How can the Right to Food Benefit Indigenous Peoples?* (Food and Agriculture Organization of the United Nations, 2009) 8.
[618] International Fund for Agricultural Development, "Building a more inclusive, sustainable future" <https://www.ifad.org/en/indigenous-peoples> accessed 29 January 2024.
[619] Fact Sheet 34 (n 612) 12.

right to food fully include the rights to culture, land, territory, resources, self-determination, and non-discrimination.[620] According to Fact Sheet 34, the realisation of the right to food for Indigenous Peoples is significantly tied to their ability to access and govern the natural resources found on their ancestral lands. This is because they typically sustain themselves through activities such as farming, gathering food, fishing, hunting, or raising animals on these lands. So, a violation of their right to land is a direct violation of their right to food.[621]

In addition, the access to and control over genetic resources of plants and animals, including seeds traditionally cultivated by indigenous communities, are also under threat for Indigenous Peoples. Meanwhile, the Right to Food Guidelines by the Food and Agriculture Organisation of the United Nations (FAO)[622] suggest that it is the responsibility of States to take measures to "prevent the erosion of and ensure the conservation and sustainable use of genetic resources for food and agriculture" and "by encouraging, as appropriate, the participation of local and Indigenous communities and farmers" in decision-making regarding the "sustainable use of genetic resources for food and agriculture."[623] The UNDRIP reiterates the right of Indigenous Peoples in this regard in Article 31, which provides that the Indigenous Peoples have the right to maintain, control, protect and develop their sciences of "human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora."

The African Commission has adopted a purposive interpretation of the right to food, which has been interpreted to be realisable through other rights like the right to life, the right to health, and the right to economic, social and cultural development.[624] This is similar to the position adopted by the CCPR in its General Comment No. 6 on the right to life,[625] which requires that States implement positive actions, such as initiatives to eradicate malnutrition, in order to protect the right to life.[626] In *SERAP v Nigeria,*[627] one of the complaints was that the Nigerian government, through its irresponsible oil development, poisoned sources of food for the Ogoni people as the soil and water upon which Ogoni farming and fishing depended on were all

[620] Knuth (n 617) 14.
[621] Fact Sheet 34 (n 612) 13.
[622] FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted by the 127th Session of the FAO Council November 2004.
[623] Ibid, Guideline 8.12.
[624] *Ogoni case* (n 554) para 64.
[625] UN Human Rights Committee, *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982.
[626] Ibid, para 5.
[627] *Ogoni case* (n 554)

degraded by oil pollution.[628] While holding that the right to food is implicit in the African Charter, the African Commission had this to say:

> The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources and prevent peoples' efforts to feed themselves.[629]

2. Right to Adequate Housing

The second right under the general right to an adequate standard of living under Article 11 of ICESCR and Article 25 of UDHR is the right to adequate housing. This right, as protected in these provisions, does not just refer to the provision of just shelter but includes many factors related to the physical structure of housing, access to services, environment, and location.[630] To this end, therefore, the right to adequate housing is linked to other rights, such as the right to electricity, property rights, civil liberties, and the right to food.[631] The OHCHR takes a similar position in linking the right to adequate housing to other fundamental human rights. In the OHCHR Fact Sheet No. 21 on the Right to Adequate Housing,[632] adequate housing is a precondition for enjoying other rights like the "rights to work, health, social security, vote, privacy or education."[633]

In its General Comment No. 4 on the Right to Adequate Housing,[634] the CESCR, while expanding on the meaning of the right, commented that the right should not be interpreted restrictively to the mere provision of a roof over one's head or to interpret shelter exclusively as a commodity. As pointed out in General Comment No. 4, the right to adequate housing covers the freedom of an individual to reside in a place with security, tranquillity, and dignity. Two reasons justify this position. Firstly, the right to housing is closely linked with other human

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[628] Ibid, para 9.
[629] Ibid, para 65.
[630] Mohammad Ismail, Abukar Warsame, and Mats Wilhelmsson, "An Exploratory Analysis of Housing and the Distribution of COVID-19 in Sweden" (2022) 12(1) *Buildings* 1.
[631] Lars Löfquist, "Is there a Universal Human Right to Electricity?" (2019) 24(6) *The International Journal of Human Rights* 711, 716.
[632] UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 21, The Human Right to Adequate Housing*, November 2009, Fact Sheet No 21/Rev.1.
[633] Ibid, 9.
[634] CESCR, General Comment No. 4: *The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, E/1992/23, 13 December 1991.

rights and the fundamental principles that underpin the ICESCR. The concept of "the inherent dignity of the human person" from which ICESCR rights are derived requires that that "housing" should be interpreted in such a way as to take into consideration various factors. The crucial emphasis, therefore, is to ensure the right to housing for all individuals, regardless of income or access to economic resources. Secondly, the provision of the right in Article 11 of the ICESCR should be interpreted not only as a reference to housing but specifically to adequate housing.[635]

However, although the adequacy of the right is influenced by social, economic, cultural, climatic, ecological, and other factors, the CESCR in General Comment No. 4 asserts that specific elements of the right can still be pinpointed and considered in any given instance.[636] Some of these elements include:

a. Legal security of housing: Regardless of the type of tenure, it is essential for all individuals to have a certain level of security of tenure that ensures legal safeguards against forced eviction, harassment, and other forms of threats. States should promptly implement measures to grant legal certainty of occupancy to individuals and households who now lack such protection while engaging in genuine consultations with the affected individuals and organisations.[637]
b. Availability of services, materials, facilities and infrastructure: Every individual entitled to the right to adequate housing shall possess sustainable access to natural and shared resources, potable water, energy for cooking, heating, and lighting, sanitation and washing facilities, provisions for food storage, waste management, site drainage, and emergency services.[638]
c. Affordability: The right to adequate housing should not be impaired because of financial constraints, and the cost of housing should not be such as to prevent the enjoyment of other rights. To achieve this, States should put measures in place to ensure that the cost of housing is commensurate with the general level of income, subsidise the cost of housing for those who are unable to provide adequate housing, protect tenants from unreasonable rental increase, and ensure the availability of building materials, especially where such building materials are natural materials.[639]

[635] Ibid, para 7.
[636] Ibid, para 8.
[637] Ibid, para 8(a).
[638] Ibid, para 8(b).
[639] Ibid, para 8(c).

d. Cultural adequacy: Housing construction methods, choice of building materials, and related legislation should effectively facilitate the expression of cultural identity and promote housing diversity. Initiatives focused on housing development or modernisation should prioritise the preservation of cultural dimensions, ensuring that aspects such as modern technological amenities are appropriately incorporated.[640]

Other elements of adequate housing, as pointed out in Para 8 of the General Comment No. 4, include easy access to the location of the housing, accessibility to adequate housing for disadvantaged members of society, and the habitability of the housing in accordance with the World Health Organisation's Health Principles of Housing.[641]

In addition, the OHCHR Fact Sheet No. 21 further enumerates the freedoms that arise from the right to adequate housing to include:

a. Protection against forced evictions and the arbitrary destruction and demolition of one's home;
b. The right to be free from arbitrary interference with one's home, privacy and family; and
c. The right to choose one's residence, to determine where to live and to freedom of movement.[642]

The right to adequate housing applies explicitly to Indigenous Peoples as members of the disadvantaged group in society. In other words, Indigenous Peoples are at a higher risk, compared to other demographics, of residing in inadequate housing conditions and frequently encountering systemic discrimination within the housing market.[643] These generally poor housing conditions, described as "overwhelmingly abhorrent" by the UN's special rapporteur on adequate housing, Leilani Farha,[644] are products of frequent displacement of Indigenous Peoples, land pollution, discriminatory housing policies,[645] colonisation, forced assimilation, and frequent dispossession of their lands.[646] These discriminatory policies are despite the fact that Article 11(1) of the ICESCR applies to "everyone," and by the provision of Article 2(2),

[640] Ibid, para 8(g).
[641] The current version: World Health Organisation, *WHO Housing and Health Guidelines* (WHO 2018) <https://ghhin.org/wp-content/uploads/Bookshelf_NBK535293.pdf> accessed 31 January 2024.
[642] OHCHR Fact Sheet No. 21 (n 632) 3.
[643] Ibid, 27 – 28.
[644] UN General Assembly, *Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in this Context*, being a report of the Special Rapporteur on Adequate Housing, Leilani Farha (Report by Leilani Farha) (Seventy-fourth session) 17 July 2019, A/74/183 [Summary].
[645] OHCHR Fact Sheet No. 21 (n 632) 28.
[646] Report by Leilani Farha (n 644) para 2.

all the ICESCR rights must be exercised without discrimination. While recognising the impact of housing discrimination on specific groups of society, the HRC Guidelines for the Implementation of the Right to Adequate Housing (HRC Guidelines)[647] contends that "Indigenous Peoples …and members of racial, ethnic and religious minorities are disproportionately represented among those living in homelessness, in informal accommodation and inadequate housing, and are often relegated to the most marginal and unsafe areas. These groups often experience intersectional discrimination as a result of their housing status."[648]

To solve the issue of housing discrimination and to provide adequate protection of Indigenous Peoples' right to adequate housing, the HRC Guidelines recommends the active participation of Indigenous Peoples in developing and determining housing programmes that affect them. This participation extends to States' consultation of Indigenous Peoples to obtain their FPIC before implementing any measures that may affect their housing.[649] Also, States must take preventive actions to address the root causes of eviction and displacement, including issues like land speculation in real estate and housing. The relocation of Indigenous Peoples is strictly prohibited unless it is based on their FPIC.[650]

With regard to the adverse impact of climate change on Indigenous Peoples, the HRC Guidelines provide that States should guarantee that the right to housing is taken into account and adapted to the challenges posed by climate change, actively addressing the impacts of the climate crisis on housing rights.[651] In this regard, the unique vulnerability of Indigenous Peoples to the impacts of climate change must be acknowledged, and comprehensive assistance should be provided to empower them in formulating their own strategies to address these challenges. It is imperative to safeguard forests and conservation areas while upholding the rights of Indigenous Peoples to their lands, resources, and traditional environmentally sustainable practices related to housing.[652] Finally, according to the HRC Guidelines, States must ensure that Indigenous Peoples' right to housing is in accordance with the provisions of the UNDRIP and other domestic and international agreements with Indigenous Peoples.[653]

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[647] Human Rights Council, *Guidelines for the Implementation of the Right to Adequate Housing*, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 26 December 2019, A/HRC/43/43.
[648] Ibid, para 44.
[649] Ibid, para 24 (d).
[650] Ibid, para 38 (d).
[651] Ibid, Guideline 13.
[652] Ibid, para 72(d).
[653] Ibid, para 48(d) (ii).

Flowing from the need of States to take into consideration provisions of international instruments regarding Indigenous Peoples' rights in the context of the right to adequate housing, it is essential to mention the obligation of States in the ILO Convention 169 to make sure that Indigenous workers are not discriminated against with respect to housing.[654] Similarly, the UNDRIP imposes some obligations on States. Article 21(1) of the UNDRIP provides that Indigenous Peoples have the right to enhance their economic and social conditions, including housing, without facing discrimination. It further recognises the fact that Indigenous Peoples need to be actively involved in determining and developing housing programmes and administering such programmes through their own institutions.[655]

Indigenous Peoples in Africa, just like elsewhere, struggle to realise their right to adequate housing. Although this right is not explicitly mentioned in the African Charter, its protection could be tied to the realisation of other rights which are expressly protected, like the rights to property, privacy, and the protection of family.[656] This jurisprudence of linking the right to adequate housing to the enjoyment of other rights was developed in the case of *SERAP v Nigeria*, where some of the violations complained of were the brutal attack, burning, and destruction of villages and homes of the Ogoni people by the Nigerian military[657] which "left thousands of villagers homeless."[658] The African Commission, in finding an implicit breach of the right to adequate housing, held that:

> Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable State of mental and physical health, … the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the [African] Charter a right to shelter or housing, which the Nigerian Government has apparently violated.[659]

Interestingly, the African Commission equally held that the right to housing goes further than a roof over one's head but "extends to embody the individual's right to be let alone and to live in peace, whether under a roof or not."[660] It recognises that the destruction of homes and the

[654] ILO Convention 169 (n 12) art 20 (2)(c).
[655] UNDRIP (n 11) art 23.
[656] OHCHR Fact Sheet No. 21 (n 632) 12.
[657] *Ogoni case* (n 554) para 7.
[658] Ibid, para 8.
[659] Ibid, para 60.
[660] Ibid, para 61.

killing of Ogoni people who attempted to return to their land to rebuild their burnt homes amounted to "forced evictions." The African Commission, in adopting the definition of forced evictions as offered in the CESCR General Comment No. 4,[661] held that forced evictions are "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy without the provision of, and access to, appropriate forms of legal or other protection."[662] The same principle was adopted with approval by the African Court in the case of *African Commission v Republic of Kenya,*[663] where it found that over the years, the Ogiek people have been subjected to continuous eviction from the Mau Forest without consultation. The violation of their housing rights also involved the refusal by the Kenyan government to involve them in determining and developing housing programmes affecting them.[664]

3. Right to Water

Water as an important element for survival, especially regarding public health, explains the clamour for the recognition of right to water and sanitation as a human right. This clamour points to the necessity of its recognition as a standalone right in an international human rights instrument. Although the UN General Assembly in 2010 expressly recognised the right to water as a fundamental human right,[665] thereby recognising that it is "essential for the full enjoyment of life and all human rights,"[666] the call for such an action had existed a long time ago. According to the OHCHR Fact Sheet No. 35 on the Right to Water,[667] the idea of basic water requirements to fulfil fundamental human requirements was first created at the UN Water Conference in 1977 in Mar del Plata, Argentina. The Action Plan,[668] as one of its guiding principles provided that all individuals, notwithstanding their level of development and socio-economic circumstances, have right to drinking water that meets their fundamental needs in terms of quantity and quality. Subsequently, several policies, treaties, comments by

[661] CESCR, General Comment No. 4 (n 634).
[662] *Ogoni case* (n 554) para 63.
[663] *African Commission on Human and Peoples' Rights v Republic of Kenya* (*2022 Ogiek Judgement on Reparations*), No 006/2012, Reparations, AfrCtHPR, (23 June 2022).
[664] Ibid, para 139.
[665] UN General Assembly, *The Human Right to Water and Sanitation: resolution/adopted by the General Assembly*, 3 August 2010, A/RES/64/292.
[666] Ibid, para 1.
[667] UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 35, The Right to Water*, August 2010, No. 35.
[668] *Report of the United Nations Water Conference, Mar del Plata*, 14-25 March 1977, No E77 II A 12.

committees, and declarations have included safe drinking water and sanitation as a fundamental human right for specific groups.[669]

Although Article 25 of the UDHR and Article 11 (1) of the ICESCR do not expressly mention the right to water, the CESCR, in its General Comment No. 15[670] on the right to water, underlines that the right to water should be interpreted as forming part of the right to an adequate standard of living in Article 11(1). It arrived at this interpretation because of the use of "including" in the enumeration of the rights that form part of "standard of living" in Article 11(1), which shows that the intention of the drafters of the ICESCR was to accommodate all rights, as necessary as possible, that advance the realisation of an adequate standard of living.[671]

According to CESCR General Comment No. 15, the concept of the right to water encompasses both individual rights and freedoms. The rights include the right to retain access to existing water supply that is necessary for the enjoyment of the right to water. It equally entails the right not to be disturbed from freely accessing water, such as arbitrary termination or pollution of water supplies. In contrast, entitlements encompass the right to a water supply and management system that ensures equal opportunities for everybody to access and enjoy the right to water.[672] Like the other ICESCR Article 11(1) rights, the right to water must be adequate. The adequacy of the right to water should not be narrowly interpreted merely by considering volumetric quantities and technologies. In other words, "water should be treated as a social and cultural good, and not primarily as an economic good."[673]

To ascertain the adequacy of the right to water, the following factors apply in all situations, notwithstanding that the realisation of the right may vary depending on existing conditions:

1. Availability: Everyone must have a sufficient and uninterrupted water supply for personal and household needs. Typically, the use of water include water for

[669] OHCHR Fact Sheet No. 35 (n 667) 3. See for instance, UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS, vol 1249, p 13 [art 14(2)]; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol 1577, p 3 [art 24(2)]; UN General Assembly, *Follow-up to and implementation of the Mar del Plata Action Plan of the United Nations Water Conference*, 18 December 1979, A/RES/34/191; UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106 [art 28(2)(a)]. Under regional frameworks, the following exist: AU, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990) [art 14(2)(c)]; AU, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003 [art 15(a)]; UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109 [art 18(2)(a)].

[670] CESCR, General Comment No. *15* (n 539)

[671] Ibid, para 3.

[672] Ibid, para 10.

[673] Ibid, para 11.

drinking, personal sanitation, washing of clothes, cooking, and maintaining personal and household hygiene.[674]

2. Quality: The quality of water necessary for individual or household purposes should be safe and devoid of microorganisms, chemicals, and radiological dangers. These elements, when they are present in water, pose a health risk. The quality of water also means that the colour, odour, and taste should be acceptable for each personal or domestic use.[675]
3. Accessibility: However, accessibility of water involves the provision of access to water, as well as water-related amenities and services, to all individuals without any form of discrimination. Furthermore, water accessibility entails these four dimensions – physical accessibility, economic accessibility, information accessibility, and non-discrimination.[676]

Water plays an important role in the daily lives of Indigenous Peoples because it serves a role in their traditions, culture, and institutions. As reported by the UN Special Rapporteur on the human rights to safe drinking water and sanitation, Pedro Arrojo Agudo in 2022,[677] water is reported as representing life in its essence in the customs of numerous Indigenous Peoples. Water is regarded as an integral component of the whole existence, which involves other natural resources and living entities. Water is not viewed as a resource or independent of the community of man. Consequently, its governance is founded on an integrated territorial perspective and profound regard and preservation for rivers, springs, lakes, and wetlands.[678] The report highlights that for centuries, Indigenous Peoples have nurtured their rivers, wetlands, lakes, and springs while treating water as a shared resource. Over the years, these communities have vehemently resisted the commercialisation and privatisation of water.[679]

As pointed out earlier, the right to water is interlinked with other rights, and Indigenous Peoples can enjoy the right to water through an expansive interpretation of other rights in the UNDRIP. For instance, Article 18 of the UNDRIP provides that Indigenous Peoples have the right to participate in the decision-making process on any issue that would affect their rights. It

[674] Ibid, para 12(a).
[675] Ibid, para 12(b).
[676] Ibid, para 12 (c).
[677] Human Rights Council, *Human Rights to Safe Drinking Water and Sanitation of Indigenous Peoples: State of Affairs and Lessons from Ancestral Cultures*, report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Pedro Arrojo Agudo, 27 June 2022, A/HRC/51/24.
[678] Ibid, para 19.
[679] Ibid, para 22.

supposes that States should incorporate Indigenous Peoples when programmes are formulated regarding the right to water. The OHCHR Fact Sheet No. 35, unfortunately, notes that Indigenous Peoples are often excluded in decision-making related to water and sanitation, which consequently exacerbates their struggle to access water.[680] Article 26 of the UNDRIP on the right to land also serves as a source of the right to adequate water when interpreted expansively to include water as part of land. This is supported by the CESCR General Comment No. 15, which asserts that "Indigenous Peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution."[681] Finally, to underscore the importance of water to Indigenous Peoples, Article 32(2) of UNDRIP requires that States must obtain the FPIC of Indigenous Peoples before approving "any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."

3.9. Right to Development

The right to development, according to the Declaration on the Right to Development,[682] encompasses the idea that every individual and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realised. As an inalienable right, it comprises the importance of not only economic growth and materialistic wealth but also the removal of systemic obstacles that hinder people from accessing opportunities and improving their own lives.[683] The right also aligns with the principles of human rights and social justice,[684] offering an alternative approach to viewing other rights, such as the right to a healthy environment.

The right to development embodies the principle of differentiation, which has become more specific in international environmental law after the 1972 Stockholm Declaration as it recognises the intergenerational inequality between the global South and North and the need to bridge "under-development." The Stockholm Declaration urges the Northern nations to guarantee that environmental technologies are accessible to developing countries under terms

[680] OHCHR Fact Sheet No. 35 (n 667) 24.
[681] CESCR General Comment No. 15 (n 539) para 16(d).
[682] UN General Assembly, *Declaration on the Right to Development: resolution/adopted by the General Assembly*, 4 December 1986, A/RES/41/12.
[683] Elsabé Boshoff, "Rethinking the Premises Underlying the Right to Development in African Human Rights Jurisprudence" (2022) 31(1) *Review of European, Comparative and International Environmental Law* 27
[684] Mara Tignino and Makane Moïse Mbengue, "Climate Change at the Crossroads of Human Rights: The Right to a Healthy Environment, the Right to Water and the Right to Development" (2022) 31(1) *Review of European, Comparative and International Environmental Law* 3, 4.

that promote widespread dissemination without imposing an economic burden on the Southern nations.[685] This was also replicated in the Rio Declaration, which links the realisation of the right to development to the obligation of States to ensure that the needs of the present and future generations are met. In addition, States should prioritise efforts toward meeting the needs of "developing countries, particularly the least developed and those most environmentally vulnerable."[686] Since Indigenous Peoples are considered "environmentally vulnerable,"[687] this right is of utmost importance to them. The preambular Statement of the 2015 Paris Agreement[688] calls upon participating States to take into account the human rights impact of their climate policies on "*Indigenous Peoples*, local communities, migrants, children, persons with disabilities and people in vulnerable situations and *the right to development*, as well as gender equality, empowerment of women and intergenerational equity."[689]

Unfortunately, Boshoff contends that there is a conflict between the right to development and environmental protection because development usually results in "increased extraction and destruction of natural resources, and air, water and ground pollution."[690] She further notes that for developing economies, it is crucial to prioritise environmental protection and restoration only after achieving significant levels of development. This is because, at that point, these States would have the financial means to commit resources towards environmental sustainability.[691] As discussed in Chapter Seven, the African Charter and the jurisprudence of the African Court and African Commission, over the years, have tried to develop a means to balance these two rights. This is based on the way the right to a healthy environment was couched in the African Charter thus: "All peoples shall have the right to a general satisfactory environment favourable to their development."[692] This provision links development to a general satisfactory environment and has ultimately led to the "interpretation by the African

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[685] United Nations, *Report of the United Nations Conference on the Human Environment* (5–16 June 1972) UN Doc A/CONF 48/14/Rev.1, 3, ch 1—'Declaration of the United Nations Conference on the Human Environment', principles 2, 9, 20. See also Philippe Cullet, "Differentiation" in Lavanya Rajamani and Jacqueline Peel (eds) *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press, 2021) 324.
[686] *Rio Declaration on Environment and Development* (n 544) Principles 2 and 6.
[687] Cesar Cervantes Benavides and others, "Indigenous Communities and Climate-related Hazards: A Protocol for a Systematic Review" (2024) 12 *MethodsX* 1, 2; Luciana Rocha Leal da Paz and Katia Cristina Garcia, "Vulnerability to Climate Change and Indigenous People in the Amazon Region" in Walter Leal Filho Johannes M Luetz and Desalegn Ayal (eds) *Handbook of Climate Change Management: Research, Leadership, Transformation* (Springer, 2021) 5189–5206.
[688] UNFCCC, *Paris Agreement*, (12 December 2015) Report No FCCC/CP/2015/ L.9/Rev.1, UNTS vol 3156, p79 <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 02 January 2024.
[689] Emphasis supplied.
[690] Boshof (n 683) 27.
[691] Ibid.
[692] African Charter (n 82) art 24.

Commission and the African Court [] in the establishment of important principles towards a revised understanding of development, not based on economic considerations, but rather as human well-being (physical, mental, emotional and social considerations) within a healthy environment."[693]

The above position has been adopted in the Revised Draft Convention on the Right to Development,[694] as one of its general principles, as stated in its Preamble, requires that "development must be achieved in its three dimensions, namely, economic, social and environmental, in a balanced and integrated manner and in harmony with nature." The Draft Convention imposes an obligation on States to "respect, protect and fulfil the right to development for all, without discrimination of any kind…."[695] The Draft Convention also reiterates the right of Indigenous Peoples to pursue their development according to their needs and interests. Consequently, "they have the right to determine and develop priorities and strategies for exercising their right to development."[696] Furthermore, any developmental project intended to be carried out by a State must be with the FPIC of Indigenous Peoples and tribal communities on whose territories and lands the intended project would be done.[697]

The way the definition of the right to development is couched in Article 1 of the 1986 Declaration on the Right to Development and the Draft Convention, indicates that the right is both an individual and a collective right. This was as a result of a compromise reached as a result of the debate between the South and North on who should be the subject of the right during the adoption of the 1986 Declaration. While the global South wanted it to be a collective right, the global North argued for an individual enjoyment of the right to development. The compromise was to couch the provision to reflect it as both an individual and a collective right, exercisable by "every individual and all peoples."[698]

The above provisions of the Draft Convention are *impari materia* with the provisions of the UNDRIP on the right of Indigenous Peoples to development. But the UNDRIP further links the right to development with the right of Indigenous Peoples to self-determination. This is because Indigenous Peoples "freely pursue their economic, social and cultural development"

[693] Boshof (n 683) 28.
[694] Working Group on the Right to Development, *Draft Convention on the Right to Development* ('the Draft Convention'), 6 April 2022, A/HRC/WG.2/23/2
[695] Ibid, art 8.
[696] Ibid, art 17(1).
[697] Ibid, art 17(2 – 3).
[698] See Roman Girma Teshome, "The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?" (2022) 2 *Human Rights Law Review* 1, 7.

in the exercise of the right to self-determination.[699] According to Article 23 of the UNDRIP, in exercising the right to development, Indigenous Peoples have the right to determine their priorities, strategies, and programmes, which should be administered by their institutions. These strategies and priorities extend to those concerning the use of their lands or territories and natural resources.[700] Finally, whenever States intend to implement developmental plans, especially those that will have an impact on the natural resources of Indigenous Peoples, such States must first obtain the FPIC of Indigenous Peoples.[701]

In the *Ogiek Judgement on Merits*, the Ogiek people of Kenya were evicted from the Mau forest, which the government had earlier designated as a water reserve and government land. The complainants alleged that such designation of their ancestral land for a water reserve violated their right to development as they did not participate in the plan, nor was their FPIC obtained. They, therefore, requested that the government should recognise their right to be consulted regarding the "development, conservation or investment projects on Ogiek ancestral land."[702] Relying on the provisions of the UNDRIP, especially Article 23, the African Court found out that the right to development of the Ogiek was violated by the government because they were not consulted or allowed adequate participation in the development of programmes and strategies that affected them. Consequently, the action of the Kenyan government violated the Ogiek people's right to development, which is protected in Article 22 of the African Charter. Article 22 of the African Charter provides that "all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

3.10. Concluding Remarks

Indigenous Peoples have, over the years, struggled for recognition and inclusion in the general scheme of things, which has resulted in the development and recognition of *sui generis* rights for Indigenous Peoples and the interpretation of other general rights as equally enjoyable by Indigenous Peoples. For instance, the right to water and the right to food are general rights for all individuals but have been interpreted as rights which States should pay special attention to regarding Indigenous Peoples because of their vulnerable State. These rights collectively paint a nuanced picture of the challenges and opportunities faced by Indigenous communities,

[699] UNDRIP (n 11) art 3.
[700] Ibid, art 32(1).
[701] Ibid, art 32(2).
[702] *Ogiek Judgement on Merits* (n 168) para 43.

specifically in Africa, especially as they relate to TNCs that carry out business operations in their territories.

These rights are generally intertwined. Rights to land, territories, and natural resources and the right to political participation are offshoots of the right to self-determination. Equally, the right to water, the right to food, and the right to housing are components of the right to an adequate standard of living as recognised in Article 11(1) of ICESCR and Article 25 of UDHR. Although the right to water is not expressly mentioned as a component of the right to an adequate standard of living, the CESCR, in its General Comment No. 15,[703] underlines that the right to water should be interpreted as forming part of the right to an adequate standard of living in Article 11(1). The interconnectedness of these rights indicates that a violation of one right would result in the violation of more other rights. In the *Ogoni* case, for instance, the allegations included the violation of the right to self-determination, land rights, housing, and natural resources.

The right to self-determination, as argued by Szpak and confirmed by the ICJ in the *Separation of the Chagos Archipelago* case, has an *erga omnes* obligation and so requires that all States have a legal interest in protecting it. The indirect implication of this is that since many other rights flows directly from the right to self-determination, all States should have legal interests in protecting those rights. This makes it possible for some scholars to argue that the rights contained in the UNDRIP are customary international law[704] or, at least, certain aspects of it.[705] The customary international law status requires that those rights should be given special protection by States.

Although the international community has advanced in the recognition of the rights of Indigenous Peoples, Indigenous Peoples still witness some challenges concerning the protection of these rights. Such issues like land dispossession, denial of the right to self-determination, and inadequate representation persist, which undoubtedly requires more efforts,

[703] General Comment No. 15 (n 539).
[704] Shea Esterling, "Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples" (2021) 28 *International Journal on Minority and Group Rights* 280, 299 – 303; The Special Rapporteur on the rights of indigenous peoples muted similar opinion thus: "the emergence of customary international law in the area of indigenous peoples' rights" in UN Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 11 August 2016, A/HRC/33/42, para 14; William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press, 2021) 190 where the author concludes that although the US and Canada have opposed the customary status of the UNDRIP, the rights contained therein are nonetheless "an area of customary international law that is evolving quickly."
[705] Sabaa Ahmad Khan, "Legally Sculpting a Melting Arctic: States, Indigenous Peoples and Justice in Multilateralism" in Karen N Scott (eds) *Changing Actors in International Law* (vol 74, Brill, 2020) 130, 140 where the author contends that "certain aspects of the UNDRIP are considered international customary law."

especially for Indigenous Peoples in Africa. To improve on the situation, States, TNCs, and lawmakers should relate and work in collaboration with Indigenous Peoples to discover areas that need more attention concerning the protection of these rights. In the next chapter of this thesis, State obligations to protect, fulfil, and respect the rights of Indigenous Peoples will be explored.

Chapter FOUR

Obligations of States

4.1.Introductory Remarks

In the previous chapter, this work focused on the various ways Indigenous Peoples' rights and the interpretations of those rights by different bodies. In this chapter, the work examines the obligation of States to protect human rights, especially within the context of Indigenous Peoples' rights. The obligations arise from different sources, including international human rights instruments and international investment. There is a link between obligations and accountability because, as pointed out by Fabián Salvioli, a UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, "[a]ccountability is a legal obligation of States, based on international human rights law."[706] Even though State responsibility is always viewed in the sense of human rights violations by States or their agents and in the area of international criminal law, there is a possibility of incorporating the violation of States of their obligations in business and human rights and the environment into the international criminal law regime, particularly with the recent legal definition of ecocide.[707]

The aim of this Chapter is to explain the tripod obligation of States, that is, the obligation to protect, respect, and fulfil human rights, especially those of Indigenous Peoples. While the obligation and responsibility of States to human rights exist under various regimes, these obligations are not well observed by States. The scope of this chapter is limited to those obligations related to business and human rights, even though references are made to other areas of human rights to either expatiate on a point or to trace the origin of these obligations. Finally, there will be a brief discourse on the jurisprudence of States failing to keep to their obligations.

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[706] UN General Assembly, Human Rights Council, *Accountability: Prosecuting and Punishing Gross Violations of Human Rights and Serious Violations of International Humanitarian Law in the Context of Transitional Justice Processes*, being a Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, 9 July 2021, A/HRC/48/60 [para 84] <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/176/75/PDF/G2117675.pdf?OpenElement> accessed 30 December 2023.

[707] Stop Ecocide Foundation, "Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text" <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf> accessed 17 May 2024.

4.2.The Legal Basis for State Obligations to Human Rights

Even though a well-managed investment has the potential to advance and protect human rights, as indicated by the Secretary General of the UN General in 2021,[708] the reverse has always been the case with reports of human rights abuses witnessed in the course of business activities, as discussed in Chapter Two. This potential to advance and promote the protection of human rights lies in the obligations imposed on States to ensure that while foreign investors carry out business operations within the territories of Indigenous Peoples, adequate mechanisms should be put in place to prevent any violations of human rights and where violations occur, that adequate remedy must be provided. These obligations require that States protect, respect, and fulfil the human of individuals within their territories and jurisdiction against violations, including violations by TNCs. These obligations arise from human rights treaties, bilateral investment treaties, and regional and national laws. The State receiving the foreign investment, otherwise called the host State, is the first addressee on issues regarding the protection of human rights from the standpoint of human rights treaties.[709] As private entities within a State's territory, TNCs, first and foremost, are subject to the domestic law of the host State where they operate, notwithstanding the TNCs' nationality.[710] The protection of human rights as the obligation of States is a product of State sovereignty dating from the 1648 Westphalian sovereignty of "non-intervention" and decolonisation through self-determination, both of which recognise the right of a people, represented by their government, to lay claim over an established territory and protect it without interference from other States.[711]

Based on the contents of the UDHR, ICCPR, ICESCR, and UN Charter, some scholars have argued that State obligations to human rights within their territories are part of customary international law (CIL) in the sense of obligations *erga omnes* and *jus cogens*.[712] This means

[708] UN General Assembly, "Human Rights-Compatible International Investment Agreements" a note by the Secretary General on the 27 July 2021 A/76/238 [para 3] <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/208/09/PDF/N2120809.pdf?OpenElement> accessed 29 December 2023.
[709] Annamarie Bindenagel Šehović, *Reimagining State and Human Security Beyond Borders* (Palgrave Macmillan, 2018) 13; Ursula Kriebaum, "The State's Duty to Protect Human Rights" <https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Kriebaum/Publikationen/States_duty_protect_human_rights.pdf> accessed 27 January 2023.
[710] Antal Berkes, "Extraterritorial Responsibility of the Home States for TNCs' Violations of Human Rights" in Yannick Radi (ed) *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing, 2018) 304.
[711] See generally, Harald Bauder and Rebecca Mueller, "Westphalian Vs. Indigenous Sovereignty: Challenging Colonial Territorial Governance" (2023) 28(1) *Geopolitics* 156-173.
[712] Malgosia Fitzmaurice, "Interpretation of Human Rights Treaties" in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 740, 743; Anna Czaplińska, "Responsibility in International Law: General Principle or Institution of Customary Law?" (2018) 8(2) *Wroclaw Review of Law, Administration and Economics*, 249, 252; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005) 258 – 262.

that States, by signing international treaties, agree to be bound by their provisions, including provisions on obligations, as legal entities. This sense that they are bound by the provisions of such treaties is often captured in *pacta sunt servanda* and *bona fide* principles. According to Article 2(1)(d) of the Vienna Convention on the Law of Treaties (Vienna Convention),[713] a contracting State is a State that has agreed to be bound by the contents of a treaty they have signed whether or not the treaty has entered into force. According to Tagle, this is the foundation of international obligations for States: legal responsibility based on the provisions of a mutual agreement.[714] As international law is founded on other legal principles, its duties and obligations extend beyond treaties to include customary law and *jus cogens* norms.[715] Doing so solidifies the binding nature of international agreements, specifically the responsibility of States to take proactive measures that encourage compliance.[716]

To further establish State responsibility within its territory, the International Law Commission (ILC) adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001.[717] The ARSIWA provide a comprehensive framework for the legal consequences that arise when a State breaches its international obligations. However, there are still ongoing arguments as to the nature of the ARSIWA. For instance, Crawford argues that although the ARSIWA do not essentially constitute general international law, they have been referenced by both international and national courts on the responsibility of States for acts committed within their territories.[718] Again, Czapliński, while recognising the position of the UN General Assembly that the ARSIWA codify existing law of States responsibility, nonetheless argues that because of the "doubt as to the role of *jus cogens*, countermeasures and position of third States in respect to international responsibility for wrongful act," the Articles do not constitute general international law.[719] On the other hand, Bordin thinks otherwise because, according to him, "at the time of their adoption, the Articles were already perceived as generally restating the customary international law of international responsibility."[720] His

[713] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS, vol 1155, p 331.
[714] Gonzalo Sánchez de Tagle, "The Objective International Responsibility of States in the Inter- American Human Rights System" (2015) VII(2) *Mexican Law Review* 115, 120.
[715] Ibid.
[716] Ibid, 121.
[717] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1
[718] James Crawford S C, "Investment Arbitration and the ILC Articles on State Responsibility" (2010) 25(1) *ICSID Review - Foreign Investment Law Journal* 127, 128.
[719] Władyslaw Czapliński, "UN Codification of Law of State Responsibility" (2003) 41(1) *Archiv Des Völkerrechts* 62, 82.
[720] Fernando Lusa Bordin, "Reflections Of Customary International Law: The Authority of Codification Conventions And ILC Draft Articles in International Law" (2014) 63(3) *The International and Comparative Law Quarterly* 535, 536.

argument is plausible based on the widespread acceptance of the principles set out in the articles by States, international organisations, and other actors in the international legal system and the fact that they represent the opinions of internationally renowned publicists.[721] Numerous international tribunals, including the ICJ, have cited and applied the ARSIWA as evidence of CIL.[722]

As earlier indicated, State obligations to protect Indigenous Peoples' rights arise from several international human rights instruments, including bilateral treaties, as well as from the emerging standards of international investment law, regional laws, and national laws. Furthermore, environmental and climate change laws impose some obligations on States even though they are intertwined with their human rights obligations.[723]

4.3.State Tripod Obligations to Business and Human Rights

The general understanding of the obligations of States to human rights is encapsulated in the 'respect, protect, and fulfil' framework. This framework, often generally associated with the international human rights discourse, is derived from various international instruments. It acknowledges that States not only have a negative duty to refrain from violating rights but also a positive duty to actively promote and fulfil these rights.[724] This dichotomy, as suggested by Karp, between negative and positive duties made it extremely difficult for the realisation of economic, social, and cultural rights because the recently decolonised States feared the possibility of an absolute demand on the government to provide for all in spite of resource scarcity. Also, the Western countries feared that the advancement of positive duties, that is, the duty to actively and affirmatively intervene in the implementation of human rights, could be

[721] David Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority" (2002) 96 *American Journal of International Law* 857, 867; Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential means of Holding Private Actors Accountable For Human Rights" (2004) 5 *Melbourne Journal of International Law* 1, 5.

[722] See Sylwia Stryjkowska, "The International Legal Issue of Attribution of Conduct to a State – The Case Law of the International Courts and Tribunals" (2018) 8 *Adam Mickiewicz University Law Review* 143, 148. Before the UN General Assembly adopted the Draft copy of the Articles on States Responsibility, States responsibility for internationally wrongful act was already widely cited by courts and tribunals. See International Court of Justice, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p 14: the ICJ relied heavily on the Articles of States Responsibility to determine the US's responsibility for its actions in Nicaragua; International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p 168 (December 19): "The Court considers that the rules set out in the Articles on Responsibility of States for Internationally Wrongful Acts reflect customary international law."

[723] Nicolas de Sadeleer, "Environmental Law in the EU: A Pathway Toward the Green Transition" in Maria da Glória Garcia and António Cortês (eds) *Blue Planet Law: The Ecology of our Economic and Technological World* (Springer, 2023) 21, 22.

[724] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, Oxford University Press, 2019) 87.

an indirect way of introducing communism or socialism.[725] To avoid the impact of this dichotomy, the 'respect, protect, and fulfil' framework rejects the "false binary divide between so-called 'negative' and 'positive' rights" and instead unifies all human rights as being "associated with a full spectrum of duties."[726]

4.3.1. Obligation to Respect

At a fundamental level, adequate protection of all human rights requires the absence of State interference in their enjoyment, especially from the standpoint of rights holders. To this extent, the obligation to respect is regarded as negative because State parties are expected to refrain from interfering with guaranteed rights. The State fulfils the obligation to respect by being passive, as it does not need any positive action.[727]

Regarding the obligation to protect as it relates to the business activities of TNCs, the CESCR in General Comment 24[728] made an elaborate analysis of what is expected of States. General Comment 24 observes that a violation of the obligation to respect economic, social, and cultural rights occurs when State parties, without sufficient justification, prioritise the interests of business entities over ICESCR rights or when they pursue policies that have adverse effects on those rights. Such a circumstance might arise, for example, when investment initiatives result in forced evictions or displacement of Indigenous Peoples. This has the potential to jeopardise the cultural values and rights associated with the ancestral land they have traditionally occupied.[729]

To achieve this obligation to respect human rights, States are required to observe some principles. Firstly, States should respect the FPIC of Indigenous Peoples whenever any decisions that will affect them are to be made, especially in matters affecting their lands, territories, and natural resources.[730] Secondly, in accordance with the principle of the legally binding nature of treaties, States parties are obligated to identify any possible inconsistency between their obligations under the ICESCR and investment or trade treaties. In the event that such inconsistencies are discovered, they should refrain from entering into those treaties. Thirdly, States are strongly encouraged to include an explicit reference to their human rights

[725] See David Jason Karp, "What Is the Responsibility to Respect, Protect, and Fulfill Framework" (2020) 12(1) *International Theory* 83, 88.
[726] Kälin and Künzli (n 724) 86.
[727] Ibid, 90.
[728] CESCR, *State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (General Comment No 24, 2017) 10 August 2017, E/C.12/GC/24.
[729] Ibid, para 12.
[730] Ibid.

obligations in future treaties. Additionally, they should ensure that human rights considerations are incorporated into mechanisms for resolving investor-State disputes, particularly in regard to the interpretation of investment treaties or investment chapters within trade agreements.[731]

Earlier in 2009, in its General Comment No. 21,[732] the CESCR commented on the obligations of States in relation to the rights of everyone to take part in cultural life, especially as it pertains to the rights of Indigenous Peoples. To this end, General Comment No. 21 posited that the obligation to respect human rights involves implementing particular measures with the goal of ensuring the respect of the rights of all individuals, whether they are acting alone, in association with others, or as part of a community or organisation. The exercise of the obligation to respect will ultimately make it possible for Indigenous Peoples to, among others, choose their cultural identity, access their own cultural and linguistic heritage, and actively take part in any important decision-making process that will affect them.[733]

4.3.2. Obligation to Protect

It has been pointed out that in situations involving third parties like TNCs or where human rights are threatened by natural disasters, States obligation to respect human rights becomes grossly inadequate to guarantee the full enjoyment of human rights.[734] The obligation to protect, as a positive obligation, entails that authorities must not only respond when an individual is threatened but also, as held by the IACtHR in *Velásquez-Rodríguez v Honduras*,[735] "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[736] For Kälin and Künzli, apart from the obligation to protect against private actors like TNCs, this obligation extends to the protection of human rights in specific instances that may include instances of human rights violations of individuals within State jurisdiction as a result of decisions made by international organisations, whether they are ongoing or about to occur[737] and potential violations of human rights caused by natural disasters or technological installations.[738]

[731] Ibid, para 13.
[732] CESCR, General comment no. 21 (n 512).
[733] Ibid, para 49.
[734] Kälin and Künzli (n 724) 95.
[735] IACtHR, *Velásquez-Rodríguez v Honduras*, Series C, No 4 (1988).
[736] Ibid, para 166.
[737] Kälin and Künzli (n 724) 96.
[738] Ibid; ECtHR (Grand Chamber), *Öneryildiz v Turkey*, Reports 2004-XII.

However, in General Comment 24, the CESCR commented that the obligation to protect human rights entails that State parties are required to prevent violations of economic, social, and cultural rights within the context of business operations.[739] State parties must enact laws, establish administrative systems, implement educational programmes, and take other suitable actions to protect against violations of ICESCR rights related to business activities. Additionally, they must ensure that victims of such corporate abuses have access to effective means of seeking redress. By extension, effective means of seeking redress would include imposing criminal and administration sanctions on TNCs where they violate ICESCR rights and encouraging civil suits as a means of claiming reparations by victims of corporate abuses.[740] States are also to revoke permits and licences of TNCs that violate ICESCR rights. This revocation is consistent with the police power of States under international investment law, which will be analysed later in this chapter. Finally, States parties must ensure that human rights impact assessments consider the specific effects of business operations on Indigenous Peoples.[741]

Furthermore, General Comment No. 21 links the obligations to respect and protect together, especially as it pertains to the obligations to respect and protect freedoms, cultural heritage and diversity. Hence, the obligation to protect requires that States implement steps to prevent third parties from impeding the exercise of Indigenous Peoples' cultural rights.[742] In this respect, States should pay particular attention to the economic development and environmental policies and programmes of disadvantaged groups to avoid the negative impact of globalisation on the cultural life of these groups. Broadly interpreted, this obligation covers the protection of the "cultural productions of Indigenous Peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression." This encompasses protecting against unlawful or unfair exploitation of their lands, territories, and resources by governmental or private entities and TNCs.[743]

4.3.3. Obligation to Fulfil

The last obligation in the tripod obligation of States to human rights is the obligation to fulfil human rights. As a positive obligation, the obligation to fulfil requires that States should "create the legal, institutional, and procedural conditions that rights holders need in order to realize

[739] General Comment 24 (n 728) para 14.
[740] Ibid, para 15.
[741] Ibid, para 17.
[742] General Comment No. 21 (n 512) para 50.
[743] Ibid, para 50 (b – c).

and enjoy their rights in full."[744] General Comment 24 States that State parties to the ICESCR have a responsibility to fulfil their obligations by taking necessary steps to the maximum available resources to support and enhance the enjoyment of ICESCR rights. This may sometimes involve directly providing essential goods and services essential to such enjoyment.[745] Fulfilling this obligation equally requires States to direct the efforts of TNCs towards fulfilling the rights contained in the ICESCR. Additionally, General 24 requires that State parties recognise and protect Indigenous Peoples' rights to manage the intellectual property pertaining to their traditional knowledge, cultural expressions, and cultural heritage.[746]

General Comment No. 21 is more elaborate regarding the obligation to fulfil as it subdivides the obligation into three further obligations – obligations to facilitate, promote, and provide.[747] On the obligation to facilitate, States are obligated to provide some positive measures like financial measures that will facilitate the full realisation of everyone's right to participate in cultural life. This equally extends to measures to assist groups like Indigenous Peoples in their effort to preserve their culture.[748] States have the obligation to actively promote education and public awareness regarding the right to participate in cultural life. This is especially important in rural and disadvantaged urban areas, as well as for minority groups and Indigenous Peoples. This involves promoting education and raising awareness about the importance of respecting cultural heritage and embracing cultural diversity.[749] Finally, on the third leg of State obligations to fulfil, that is, the obligation to provide, States are required to provide all that is necessary for the realisation of the right to take part in cultural life, especially when individuals or communities are unable to realise this right on their own due to insufficient resources. This involves the provision of adequate mechanisms that will aid the participation of Indigenous Peoples in the decision-making process and seek compensation whenever their rights have been violated.[750]

4.4.Sources of State Obligations in Human Rights Law

Basically, as already analysed earlier in this chapter, the obligations of States were initially grouped into the binary of positive and negative obligations until the adoption of the 'respect,

[744] Kälin and Künzli (n 724) 104.
[745] General Comment 24 (n 728) para 23.
[746] Ibid, para 24.
[747] General Comment No. 21 (n 512) para 51.
[748] Ibid, para 52.
[749] Ibid, para 53.
[750] Ibid, para 54 (a).

protect, and fulfil' framework because the binary division made it extremely difficult for the realisation of economic, social, and cultural rights. So, in this subchapter, these obligations will be examined based on hard and soft law instruments. Some of these obligations are products of CIL, so while discussing these obligations, references will be made to those obligations that are products of CIL.

4.4.1. Hard Law Obligations

Numerous human rights treaties and conventions address State obligations, which are interconnected and draw from a range of international legal instruments and principles. Many instruments have been made to establish the obligations of States to protect human rights in general, which could be widely interpreted to extend to business and human rights. The foundational basis for these obligations is the UDHR, which, although legally non-binding,[751] serves as a source of "the recognition and guarantee of human rights in the international arena"[752] and the foundation for the creation of more than seventy global and regional human rights treaties.[753] Because of this, the provisions of the UDHR are considered part of CIL and, therefore, universally obligatory,[754] or at least some provisions of it.[755] Most of the arguments about the CIL nature of the UDHR point to the fact that in its Preamble, the UDHR was envisaged as a "common standard of achievement for all peoples and all nations"[756] and has been described as the "Magna Carta of all mankind"[757] which will "set the stage for a system of international accountability that has been unparalleled in history."[758] So, to this extent, the UDHR is examined as part of CIL in this section.

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[751] Kathryn McNeilly, "'If Only for a Day': The Universal Declaration of Human Rights, Anniversary Commemoration and International Human Rights Law" (2023) 23 *Human Rights Law Review* 1, 4.
[752] Ángeles Solanes Corella, "The Political, Legal and Moral Scope of the Universal Declaration of Human Rights: Pending Issues" (2018) 11 *The Age of Human Rights Journal* 1.
[753] Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" (2005) 49(6) *Journal of Conflict Resolution* 925.
[754] William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press, 2021) 18 – 21; Mustafa Burak Şener, "A Review of the Meaning and Importance of the Universal Declaration of Human Rights" (2021) 7(3) *International Journal of Political Studies* 15, 20; Ildus Yarulin and Evgeny Pozdnyakov, "Are Universal Human Rights Universal?" (2021) 2(71) *Politeja* 67.
[755] Shea Esterling, "Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples" (2021) 28 *International Journal on Minority and Group Rights* 280, 289.
[756] UDHR (n). See also McNeilly (n 751) 4.
[757] Şener (n 754) 15. The UDHR was first described as the Magna Carta of all humanity in 1948 by Eleanor Roosevelt, the Chairperson of the UN Commission on Human Rights. See UN General Assembly, "180th Plenary Meeting", UN Doc A/PV 180 (9 December 1948) p 862 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL4/812/20/PDF/NL481220.pdf?OpenElement> accessed 31 December 2023.
[758] Marco Odello and Sofia Cavandoli, "Introduction" in Marco Odello and Sofia Cavandoli (eds) *Emerging Areas of Human Rights in the 21st Century The Role of the Universal Declaration of Human Rights* (1st edn, Routledge, 2011) 4.

The UDHR provides that States "pledged themselves to achieve, in cooperation with the UN, the promotion of universal respect for and observance of human rights and fundamental freedoms." It States that "every individual and organ of society" has a responsibility to "promote respect for these fundamental rights and freedoms" and the various human rights enunciated in the document.[759] Particularly, it creates a negative obligation on States to avoid engaging "in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[760] As pointed out earlier, the UDHR serves as the foundation for some other human rights treaties and conventions.

For instance, Article 2 of the ICCPR provides that "[e]ach State … undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant." Notwithstanding that the ICCPR is not an environmental law instrument as it concerns the civil and political rights of individuals, the right to life,[761] which has been interpreted as embodying the right to a clean environment, is guaranteed. Examining this provision and how it relates to the obligation of States over breaches by private actors, Chirwa argued that the duty to "ensure" implies that States must take proactive actions to guarantee the enjoyment of human rights. He also argued that according to the requirements of the ICCPR, this obligation has two limbs. The first is the obligation to take preventive steps in the case of human rights breaches committed by private actors. The second is the obligation to take corrective action after violations have occurred.[762]

Also, the duty of States to protect human rights in the context of foreign investment, which includes a duty to prevent, investigate, punish, and provide remedies for human rights violations committed by foreign investors, could be found in the ICESCR. Article 2 of the ICESCR contains undertakings by State parties to fully realise economic, social, and cultural rights. As pertaining to Indigenous Peoples, some of the essential rights guaranteed under the ICESCR include rights to self-determination[763] and an adequate standard of living, which encompass adequate food and housing.[764] This is particularly important because some litigations concerning the rights of Indigenous Peoples have always been based on the denial of housing and environmental pollution, which in turn affects food availability.[765] In its General

[759] UDHR (n 27) Preamble.
[760] Ibid, art 30.
[761] ICCPR (n 13).
[762] Chirwa (n 721) 11.
[763] ICESCR (n 14) art 1.
[764] Ibid, art 11.
[765] See for instance, *Ogoni case* (n 554); *Ogiek Judgement on Merits* (n 168).

Comment No. 15, the CESCR observed that the ICESCR imposes an obligation on States to prevent violations of these rights by private actors. In relation to the availability of potable water, the CESCR pointed out that the right to water falls under the category of guarantees necessary for ensuring an adequate standard of living under Article 11 of the ICESCR, especially given that it is one of the most fundamental prerequisites for survival.[766] While stating the obligation of States, the CESCR observed that it is the duty of States to prevent third parties from "compromising equal, affordable, and physical access to sufficient, safe and acceptable water"[767] and to take steps to "prevent …companies from violating the right to water of individuals and communities."[768]

More specifically, on the obligation of States to protect human rights in the context of business activities, the CESCR General Comment 24 of 2017 pointed out that some groups, like Indigenous Peoples, are disproportionately affected by the adverse impact of business activities,[769] especially due to investment-linked evictions and displacements.[770] On this basis, the CESCR reiterated State tripod obligation in business and human rights – obligations to respect, protect, and fulfil. Regarding the obligation to respect, State parties violate the obligation to respect economic, social, and cultural rights when, without adequate justification, they prioritise the interests of business entities over rights guaranteed under the ICESCR or pursue policies that negatively impact such rights.[771] Flowing from this and in accordance with the concept of the binding character of treaties, States Parties are obligated to examine any potential conflicts between their duties under the ICESCR and trade or investment treaties and refrain from entering into such treaties where such conflicts are found to exist.[772]

The second level of the obligation tripod, the obligation to protect, requires States to prevent violations of economic, social, and cultural rights in the context of business activities. This requires States Parties to take adequate legal, administrative, educational, and other measures to guarantee adequate protection against the ICESCR rights violations related to business activities and provide victims of such corporate abuses with access to effective remedies.[773]

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[766] CESCR, (General Comment No 15, 2002), *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2002/11 [para 3].
[767] Ibid, para 24.
[768] Ibid, para 33.
[769] General Comment 24 (n 728) para 7.
[770] Ibid, para 8.
[771] Ibid, para 12.
[772] Ibid, para 13.
[773] Ibid, para 14.

Criminal or administrative sanctions and penalties should be imposed by States, especially where business activities result in human rights breaches to ensure the effectiveness of this obligation.[774] Finally, on the obligation to fulfil, it is the obligation of States to fulfil their responsibilities to human rights by taking appropriate measures, to the fullest extent possible with their available resources, to facilitate and promote the enjoyment of rights outlined in the ICESCR. In some instances, they must also directly supply needed goods and services to ensure such enjoyment.[775] It is worth noting that the International Commission of Jurists, while interpreting the obligations of a State towards economic, social, and cultural rights in what is now called the Maastricht Guidelines, arrived at the same interpretation as the CESCR General Comment 24 on the tripod obligations to respect, protect and fulfil economic, social, and cultural rights.[776]

The ILO Convention 169[777] is one of the two specific international legal instruments for indigenous and tribal peoples and establishes the obligations of States in relation to these groups. With other instruments, the ILO Convention 169 starts by reiterating the general responsibility of States to protect the rights of Indigenous Peoples through the development of coordinated and systematic action plans.[778] Its foundation is based on the obligation of State to consult with Indigenous Peoples.[779] It further imposes on the State the obligation to carry out consultations on the effects on the interests of Indigenous and tribal peoples, by considering the particular sociological situation of the respective peoples. Before any development or business activities are carried out on the lands occupied by Indigenous Peoples, it is the duty of the State to take appropriate measures to protect and preserve the environment of the territories inhabited by Indigenous Peoples.[780] This duty is important because of Indigenous Peoples' rights to land and resources, that requires that States must recognise and protect the land and resource rights of indigenous and tribal peoples, including in relation to business activities.

[774] Ibid, para 15.
[775] Ibid, para 23.
[776] International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997. It has been noted by Chirwa (n 721) 12 that even though the Maastricht Guidelines are not binding, they have been persuasive in the interpretation of economic, social, and cultural rights.
[777] ILO Convention 169 (n 12).
[778] Ibid, Art 2(1).
[779] Maria Victoria Cabrera Ormaza and Martin Oelz, "The State's Duty to Consult Indigenous Peoples: Where Do We Stand 30 Years after the Adoption of the ILO Indigenous and Tribal Peoples Convention No. 169?" in Erika de Wet and Kathrin Maria Scherr (eds) *Max Planck Yearbook of United Nations Law Online* (Brill, 2020).
[780] ILO Convention 169 (n 12), art 7 (3-4).

The ICERD[781] provides a legal framework to combat racial discrimination and promote human rights for all individuals without discrimination. The ICERD is important for the Indigenous Peoples because, as Balcerzak argues, discrimination worsens the "disproportionate impact of climate change on disadvantaged communities … [such as] ethnic minorities and Indigenous populations."[782] In the ICERD, States agreed to end any form of racial discrimination by carrying out the following main obligations:

> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
> (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organisations;
> (c) Each State Party shall take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
> (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;
> (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organisations and movements and other means of eliminating barriers between races and to discourage anything which tends to strengthen racial division.[783]

In accordance with the core responsibilities outlined in Article 2 of the ICERD, the States Parties agreed to ban and eradicate all forms of racial discrimination. They also pledged to work towards ensuring that everyone, regardless of race, colour, or national or ethnic origin, has the right to equality before the law, especially concerning the following rights, most relevant for Indigenous Peoples: the right to equal treatment before the tribunals and all other organs administering justice,[784] the right to political participation, the right to nationality, the right to own property individually or collectively as a group, and the right to freedom of thought, conscience and religion.[785] Other economic, social, and cultural rights relevant to

[781] ICERD (n 391).
[782] Michał Balcerzak, "The Racial Dimension of Disasters through the Prism of International Law" (2023) 4(1) *Yearbook of International Disaster Law Online* 410, 430 – 431.
[783] ICERD (n 391) art 2.
[784] Ibid, art 5(a).
[785] Ibid, art 5(d).

Indigenous Peoples which States must protect include the right to housing, the right to health, the right to education and training, and the right to equal participation in cultural activities.[786]

The ICERD establishes the Committee on the Elimination of Racial Discrimination (CERD) to oversee the compliance of the provisions of the ICERD.[787] In its General Recommendation No 23 on Indigenous Peoples,[788] the CERD called on States to:

> (a) Recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
>
> (b) Ensure that members of Indigenous Peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
>
> (c) Provide Indigenous Peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
>
> (d) Ensure that members of Indigenous Peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[789]

The CERD finally urges States Parties to recognise and protect the rights of Indigenous Peoples to own, develop, control, and utilise their communal lands, territories, and resources. Where Indigenous Peoples have been deprived of these lands and territories, which they traditionally owned or used, without their free and informed consent, steps must be taken to return these lands and territories. In the event that restitution of the lands is factually impossible, the right to restitution should be replaced with the right to just, fair, and prompt compensation, which should preferably be in the form of lands and territories.[790]

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[786] Ibid, art 5(e).
[787] Ibid, art 8(1).
[788] CERD *General Recommendation No. 23* (n 509).
[789] Ibid, para 4.
[790] Ibid, para 5.

4.4.2. Soft Human Rights Instruments

Although legally non-binding, these instruments serve as good sources of States' obligations towards the protection of the rights of Indigenous Peoples. There are two main instruments in this regard: the UN Guiding Principles[791] and the UNDRIP.[792]

The UN Guiding Principles were endorsed by the United Nations Human Rights Council as a framework for international businesses, aiming to set a universal standard in mitigating and managing potential human rights risks associated with business operations and to establish the extent of State obligations to protect human rights. The inclusion of the obligations of States to protect human rights is a total departure from an earlier attempt, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[793] which interestingly required TNCs to impose human rights obligations on States, even if States failed to ratify the human rights instruments establishing these responsibilities.[794] According to Miretski and Bachmann, States opposed the primacy of the role given to TNCs by the Norms on the Responsibilities of Transnational Corporations as it undermined the well-established principles that States hold the primary responsibility for protecting human rights.[795] The UN Guiding Principles, therefore, was initiated to remedy this.

The UN Guiding Principles effectively set out the obligations of States to protect human rights and corporate responsibility to respect human rights as a direct attempt at improving the shortfall of the Norms on the Responsibilities of Transnational Corporations. One of its three guiding principles is the recognition of "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms."[796] Principle 1 provides that it is the obligation of States to protect against violations of human rights within their territories or under their authority by external entities, including business entities. This entails implementing suitable

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[791] UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) [E/2012/131] <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 02 January 2024.
[792] UNDRIP (n 11).
[793] UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (13 August 2003) E/CN 4/Sub 2/2003/12/Rev 2.
[794] Pini Pavel Miretski and Sascha Dominik Bachmann, "The Un 'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights': A Requiem" (2012) 17 *Deakin Law Review* 5, 8.
[795] Ibid, 20. See also the criticism by the United States Council for International Business, where they expressed the fears that an attempt to enforce the Norms on the Responsibilities of Transnational Corporations would lead to "effectively privatizing the enforcement of human rights laws" cited in Erika George, *Incorporating Rights: Strategies to Advance Corporate Accountability* (Oxford University Press, 2021) 79.
[796] The UN Guiding Principles (n 28) General Principle A.

policies, legislation, regulations, and adjudication in order to prevent, investigate, sanction, and redress such abuse. Principle 1 underscores the general principle of international human rights law that even though States are not per se responsible for human rights violations contributed by TNCs, they nevertheless breach their international human rights law obligations where they fail to put necessary steps to prevent, investigate, and remedy such abuses or the action is attributable to them.

This obligation to protect human rights against corporate abuse extends even to TNCs directly or indirectly linked to the State,[797] and when this State-business nexus is widely interpreted, it could cover sovereign wealth funds and export credit agencies.[798] In this regard, States must implement appropriate monitoring mechanisms to fulfil their international human rights responsibilities when engaging business enterprises through contracts or legislation to deliver services that could affect the enjoyment of human rights.[799] When entering into contracts with TNCs, States should create the opportunity to promote awareness and respect for human rights by ensuring that there are relevant clauses in the contract promoting human rights.[800] In the event that an abuse of human rights occurs while business activities are carried out, the State must provide *effective remedy* through judicial, administrative, legislative or other appropriate means.[801] In other words, when there is a risk of significant harm, a State is obligated to prevent that harm and take appropriate measures to provide an effective remedy when such harm occurs.[802]

The UN Guiding Principles do not define what an effective remedy means. In recent years, the term has been widely used in discussions on business and human rights, where it has been used to emphasise attempts to end corporate impunity. Although the term is commonly used, its meaning often remains unclear for the parties involved in a legal conflict regarding TNCs' human rights abuse.[803] It is settled that one of the most popular approaches to achieving an effective remedy is through the establishment and improvement of judicial remedies. This

[797] Ibid, Principle 4.
[798] Mihaela Maria Barnes, "The United Nations Guiding Principles on Business and Human Rights, the State Duty to Protect Human Rights and the State-business Nexus" (2018) 15(2) *Revista De Direito Internacional* 42, 47.
[799] The UN Guiding Principles (n 28) Principle 5.
[800] Ibid, Principle 6.
[801] Ibid, Principle 25.
[802] This obligation of a State to prevent and provide remedy for human rights abuses committed in its territory was interpreted to also include the duty to prevent transboundary environmental pollution. See *Trail Smelter Arbitration (United States v Canada)*, Final Decision and Award, 3 United Nations Reports of International Arbitral Awards 1905 (1941).
[803] Angela Lindt, "Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?" (2020) 4(2) *Journal of Legal Anthropology* 57, 59.

involves making the legal systems stronger to hold corporations accountable for their actions and providing avenues for victims to seek justice.[804] Fortunately, the UN Guiding Principles provide elements that point to a State providing effective remedies like effective investigation of the harm, prompt and quick justice system, and community engagement and participation.[805]

There are some shortfalls that have been identified in the UN Guiding Principles, especially in the situation of Indigenous Peoples. One of these is its failure to impose mandatory obligations on TNCs' home States to protect human rights. Principle 2 provides that States "should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations." The phrase "set out the expectation" suggests that the UN Guiding Principles do not recognise a legal obligation for the home States of TNCs to enforce binding regulations that prevent these TNCs from violating human rights in foreign countries.[806] Moreover, there are no provisions for consequences when home States of TNCs fail "to set out expectations." This voluntarist approach to defining obligations has also undermined the effective protection of the rights of Indigenous Peoples, especially in countries in Africa with weak regulatory regimes. This concern was notably raised by the UN Special Rapporteur on the Rights of Indigenous Peoples in 2013 when he said that "in many cases in which extractive companies have been identified as responsible for, or at least associated with, violations of the rights of Indigenous Peoples, those violations occur in countries with weak regulatory regimes, and the responsible companies are domiciled in other, typically much more developed, countries."[807]

Identifying this gap in the UN Guiding Principles, the Maastricht Principles[808] was agreed upon by the International Commission of Jurists in 2011 to serve as an instrument establishing extraterritorial obligations of home States to take regulatory action to prevent human rights abuses, as mandated by their current human rights commitments. In its General Principles, The Maastricht Principles provide that "[a]ll States have obligations to respect, protect and fulfil

[804] Zhuoheng Du, "Human Rights Violations by Multinational Corporations and the Outlet to Judicial Difficulties" (2022) 219 *Advances in Economics, Business and Management Research* 679.
[805] See UN Guiding Principles (n 28) Principles 26 to 31.
[806] IWGIA, "Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples" (2014) IWGIA Report 16 [16]<https://www.iwgia.org/images/publications/0684_IGIA_report_16_FINAL_eb.pdf> accessed 1 October 2023.
[807] UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples, James Anaya*, 1 July 2013, A/HRC/24/41 [para 47] <https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf> accessed 1 October 2023.
[808] International Commission of Jurists, "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2011) 29(4) *Netherlands Quarterly of Human Rights* 578–590.

human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially."[809] A State is required to respect, protect, and fulfil economic, social, and cultural rights in any of the following areas: situations where a State has authority or effective control, where acts or omissions of a State have foreseeable effects on the enjoyment of economic, social and cultural rights, and where a State has influence to realise economic, social and cultural rights extraterritorially.[810] These obligations extend to acts or omissions by third parties under the control or influence of a State, including TNCs,[811] but only to the extent that a State does not act beyond its obligations under the UN Charter and general international law.[812]

The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Working Group on Business and Human Rights), in its report to the UN General Assembly,[813] contended that one of the gaps and challenges in current practice as regards the implementation of the UN Guiding Principles is that there is a "lack of participation of … community members and Indigenous Peoples" and their "forced resettlements or lack of access to remedy."[814] Other challenges identified by the Working Group on Business and Human Rights include misidentification of risk due to TNCs focusing more on risks to the business rather than risks to rights holders, such as communities[815] and the temptation of TNCs to focus only on those risks that attract attention instead of real "risks to people affected by the activities and business relationships of the enterprise."[816] The media attention seeking and its impact on human rights protection is exacerbated by the era of digital disinformation and propaganda, aided by the advancement in information technology.[817] Finally, the refusal by governments to promulgate legislation that addresses business and human rights[818] is also a challenge to the realisation of the principles in the UN Guiding Principles.

[809] Ibid, Principle 1(3).
[810] Ibid, Principle 9.
[811] Ibid, Principle 12(b).
[812] Ibid, Principle 10.
[813] UN General Assembly, *Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, Note by the Secretary-General at the 73rd session of the UN General Assembly, A/73/163, 16 July 2018 <https://digitallibrary.un.org/record/1639520?v=pdf> accessed 02 June 2024.
[814] Ibid, para 35.
[815] Ibid, para 25(a).
[816] Ibid, para 25(b).
[817] Michał Balcerzak and Julia Kapelańska-Pręgowska, "International Human Rights Law in the Era of Digital Disinformation and Propaganda: Case Studies from Myanmar and Ukraine" (2023) 4(96) *Studia Prawnicze Kul* 7 – 26.
[818] Working Group on Business and Human Rights (n 813) para 31.

Another important soft law instrument that sets out State obligation to protect business and human rights is the UNDRIP. In its Preamble, the UNDRIP underscores that the obligations assumed by States under the UN Charter underpin the duties imposed on States in the various articles of the UNDRIP.[819] Furthermore, as one of the most comprehensive instruments on the rights of Indigenous Peoples, States are encouraged to comply with and implement all their obligations regarding Indigenous Peoples under international instruments.[820] For the full enjoyment of the rights in the UNDRIP, States are encouraged to put some mechanisms in place for the realisation of those rights. For instance, regarding the right not to be subjected to forced assimilation or destruction of their culture,[821] States shall put in place effective mechanisms to prevent the dispossessing of Indigenous Peoples of their lands, territories or resources.[822]

Indigenous Peoples have the right to FPIC whenever decisions are made regarding their relocation,[823] adopting and implementing legislative or administrative measures,[824] disposal of hazardous materials on their lands,[825] and approval of any project affecting their lands or natural resources.[826] It is the obligation of the State to ensure that Indigenous Peoples enjoy this right. While interpreting a similar provision, the Inter-American Court of Human Rights ruled in the *Saramaka People v Suriname* case[827] that the Suriname government violated the rights of the Saramaka people by granting logging and mining concessions on their traditional lands without their consent. The Court recognised that the Suriname government failed to fulfil its obligation to obtain the FPIC of the Saramaka people.

4.4.3. The Legally Binding Instrument and State Obligations

In 2014, the UN Human Rights Council adopted a resolution[828] "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally

[819] UNDRIP (n 11) Preamble, para 1.
[820] Ibid, Preamble, para 19.
[821] Ibid, art 8.
[822] Ibid, art 8(2)b.
[823] Ibid, art 10.
[824] Ibid, art 19.
[825] Ibid, art 29(2).
[826] Ibid, art 32(2).
[827] *Saramaka v Suriname* (n 89).
[828] UN Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights*, 14 July 2014 (A/HRC/RES/26/9) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement> accessed 02 December 2023.

binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[829] Consequently, the Open-ended Intergovernmental Working Group (OEIGWG) was established to draft a legally binding instrument concerning human rights for transnational corporations and other business enterprises.[830] Historically, Karska pointed out that the OEIGWG was chaired by Ecuador, and it presented its first draft in 2018 together with the Draft Optional Protocol with many revised versions presented thus far.[831] The recent version of the Legally Binding Instrument was released in July 2023[832] as a clean version of a previous amendment adopted by the UN Human Rights Council in December 2022.[833] Although this is an ongoing process, it is crucial to examine it as it will serve, if eventually adopted, as an authoritative instrument on the obligations of States and bring together all other sources of State obligations scattered in different binding instruments. In other words, it will serve as a one-stop instrument in this area.

One of the purposes of the Legally Binding Instrument is to "clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities, particularly those of transnational character." This covers the direct obligations of States and does not limit its scope merely to business activities but extends it to business activities of transnational character.[834] In addition, this obligation of States to respect, protect, fulfil and promote human rights covers "all internationally recognised human rights and fundamental freedoms binding on [States]."[835] The obligation equally extends to groups and organisations that promote and defend human rights and the environment because States would be required to provide effective and adequate measures to guarantee the safety of these groups.[836] Whenever human rights abuses occur, States are obligated to investigate such abuses "effectively, promptly, thoroughly, and impartially" and institute action against those responsible, whether they are individuals or TNCs, according to domestic and international law.[837] Victims of corporate human rights abuses can request the State to

[829] Ibid, para 1.
[830] Ibid, paras 2 and 3.
[831] Elżbieta Karska, "Drafting an International Legally Binding Instrument on Business and Human Rights: The Next Step towards Strengthening the Protection of Human Rights" (2021) 23 *International Community Law Review* 466, 474 – 475.
[832] Legally Binding Instrument (n 32).
[833] UN Human Rights Council, *Report on the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, 30 December 2022, A/HRC/52/41 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/616/26/PDF/G2261626.pdf?OpenElement> accessed 02 December 2023.
[834] Legally Binding Instrument (n 32). See particularly art 3(1).
[835] Ibid, art 3(3).
[836] Ibid, art 5(2).
[837] Ibid, art 5(3).

adopt precautionary measures related to urgent situations that present a severe risk of or an ongoing human rights abuse pending the determination of the case instituted by the State.[838]

In terms of the prevention of human rights violations, States are recognised as having the primary role of preventing human rights violations within their territories and, therefore, are required to regulate the activities of TNCs or other enterprises within their control. To achieve this obligation, a further obligation is imposed on States to implement appropriate legislative, regulatory, and other measures which will prevent the involvement of TNCs in human rights violations, ensure that TNCs respect internationally recognised human rights, ensure that TNCs incorporate human rights due diligence, and promote the participation of individuals and groups like Indigenous Peoples in the development and implementation of laws regarding the prevention of human rights abuse by TNCs.[839] States are to provide "adequate, timely and effective remedy and access to justice"[840] that are not cumbersome and financially burdensome on the victims of corporate human rights abuse.[841] Finally, States are to afford one another the highest form of assistance regarding criminal, civil, and administrative proceedings, especially in the exchange of information and experts.[842] This is akin to the international cooperation obligation in Article 13, where States are to cooperate in good faith to realise the purpose of the Legally Binding Instrument.

One major flaw in this Legally Binding Instrument is the absence of recognition and enforcement of a foreign judgment obtained in one State party to another State party. The issue of enforcement of a foreign judgment is gaining traction with the increasing number of cases involving foreign direct liability litigations, especially in Europe, where foreign victims of TNCs' human rights abuse are allowed to institute cases in European national courts. It usually involves a parent TNC being sued for the acts of its subsidiaries in another jurisdiction.[843] This defect in the current version of the Legally Binding Instrument did not exist in the 2018 Zero Draft.[844]

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[838] Ibid, art 5(4).
[839] Ibid, art 6(1- 2).
[840] Ibid, art 7(1)
[841] Ibid, art 7(4).
[842] Ibid, art 12.
[843] Ikechukwu P Ugwu, "Foreign Direct Liability as an Emerging Norm for the Accountability of Transnational Corporations: The European Experience" in Tilak Ginige and others (eds) *Social and Scientific Uncertainties in Environmental Law* (Intersentia, 2024) 399 – 417.
[844] Open-ended intergovernmental working group, Zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, 4th session, 16 July 2018 (Zero Draft)

Article 11(9) of the 2018 version provided that "[a]ny judgment […] which is enforceable in the State of origin of the judgment and is no longer subject to ordinary forms of review shall be recognised and enforced in any Party […]." According to Bialek, this provision ensures the legal validity of undisputed national court decisions in other States that are parties to the legal instrument.[845] It would have made it easier for victims who obtained judgements outside their home States to enforce it on the TNC easily. The only exceptions to this requirement were if there is evidence that (a) the defendant was not given reasonable notice and a fair opportunity to present his or her case; (b) where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or (c) where the judgement is contrary to the public policy of the Party in which its recognition is sought."[846]

It is important to point out that the African Commission's Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI) advisory note to the African group that participated in the negotiation of the Legally Binding Instrument (Advisory Note by WGEI) largely influenced the current outcome of the document.[847] For instance, it noted that it is fundamental to provide special protection for vulnerable groups such as women, children, the elderly, persons with disabilities, Indigenous Peoples, and rural populations. These groups are often more susceptible to harm from TNCs, and it is essential to safeguard their human rights through legislative and other measures at both national and international levels.[848] States have the primary responsibility for ensuring the stewardship of natural resources, in accordance with the principle of State sovereignty. This responsibility is carried out in the exclusive interest of the people. Regarding this matter, according to Article 21 of the African Charter, it is the responsibility of States to eradicate any kind of foreign economic exploitation, especially that which is carried out by international monopolies.[849] However, it noted that it is important to ensure that the rights of individuals directly affected by the activities of TNCs are not

<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf > accessed 03 January 2024.

[845] Julia Bialek, "Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?" (2019) 9(3) *Goettingen Journal of International Law* 501, 521.

[846] Zero Draft (n 844) art 11(10).

[847] African Commission, *Advisory note to the African Group in Geneva on the Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations*, being an advisory note by the Working Group on Extractive Industries, Environment and Human Rights Violations, 04 November 2019 <https://achpr.au.int/en/news/communiques/2019-11-04/advisory-note-african-group-geneva-legally-binding-instrument> accessed 17 May 2024.

[848] Ibid.

[849] Ibid.

overshadowed by the broader rights of the State as a whole. These individuals should be able to reap the benefits from the exploitation and development of resources.[850]

4.4.4. The Jurisprudence of State Breach of its Human Rights Obligations

At the onset, it is pertinent to point out that there is a difference between State obligation or responsibility on one hand and State liability or accountability on the other hand, even though the two categories have been used colloquially to refer to the same notion. However, the works of the International Law Commission have led to State liability assuming a distinct meaning.[851] In a report titled "International Liability for the Injurious Consequences of Acts not Prohibited by International Law,"[852] the ILC distinguished between responsibility and liability where it referred to liability as "the State's obligation to provide reparation for damage that arises from [unlawful] activities."[853] In other words, "States are liable for breaches of their obligations, provided that the breach is attributable to the State itself."[854] This is equally confirmed by Article 139(2) of the United Nations Convention on the Law of the Sea,[855] which provides that "[…]damage caused by the failure of a State Party or international organisation to carry out its responsibilities under this Part shall entail liability." Ultimately, as pointed out by Schmalenbach, the term "responsibility" is equivalent to the term "liability", especially in domestic law.[856] So, in this subchapter, references are made to instruments that refer to liability as responsibility.

Another way to draw this distinction, as pointed out by Nyka, is to differentiate between "responsibility for torts under international law and liability for acts not prohibited by international law."[857] Even though this distinction was first made by the ILC, Nyka argues that it has not been given the importance it deserves in his assessment.[858] While citing the PCIJ's decision in the *Factory at Chorzów (Germany v Poland*)[859] case, he observed that the obligation

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[850] Ibid.
[851] Kirsten Schmalenbach, "States Responsibility and Liability for Transboundary Environmental Harm" in Peter Gailhofer and others (eds) *Corporate Liability for Transboundary Environmental Harm: An International and Transnational* (Springer, 2023) 44.
[852] UN General Assembly, *Report of the International Law Commission*, 23 July 1999, A/54/10.
[853] Schmalenbach (n 851) 45.
[854] Malcolm Shaw, "International Law" (*Encyclopedia Britannica*, 15 December 2023) <https://www.britannica.com/topic/international-law> accessed 03 January 2024.
[855] UN General Assembly, *United Nations Convention on the Law of the Sea* (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
[856] Schmalenbach (n 851) 45.
[857] Maciej Nyka, "State Responsibility for Climate Change Damages" (2021) XLV(2) *Review of European and Comparative Law* 131, 133.
[858] Ibid, 134.
[859] Permanent Court of International Justice, *Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ (ser A) No 17.

to make reparation for damage arising from a breach of the norms of international law is widely recognised as a fundamental principle of this law.[860] As he correctly contends, when States' liability is in relation to environmental damage, it serves two functions. First, they strengthen primary norms originating from various international agreements and established customs within the field of protecting the environment and averting environmental harm. Second, they empower States to pursue legal claims stemming from breaches of international legal standards in the field of environmental protection.[861]

Generally, regarding the establishment of liability, obligations are generally grouped into primary and secondary obligations, the former setting out the contents of a particular rule while the latter defining the consequences that follow the violation of the rule. This distinction is credited to Roberto Ago, a former UN Special Rapporteur on State Responsibility, when he commented that "it is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation."[862] In other words, primary obligations are fundamental duties and obligations derived from customary international law or treaty law, the breach of which gives rise to responsibility. In contrast, secondary obligations pertain to actions necessary to fulfil primary obligations. The ARSIWA embodies secondary obligations, as confirmed in the International Law Commission commentaries. Paragraph 1 of the Commentaries provides that "[t]he emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom."[863]

For responsibility to arise under the ARSIWA, the wrongful act of the State must be "attributable to the State under international law" and "constitutes a breach of an international obligation of the State."[864] Some provisions of the ARSIWA could be traced as the basis for State responsibility for private acts or omission of persons or corporations. Article 5 provides that a State may be held liable for the actions of a non-State actor if that actor was "empowered by the law of that State to exercise elements of the governmental authority", provided the entity was exercising such power at the time of the act or omission. For Crawford, this provision is

[860] Maciej Nyka (n 857) 134.
[861] Ibid, 134 – 135.
[862] Roberto Ago, "State Responsibility" (1970) *II Yearbook of the International Law Commission* 177, 178.
[863] ARSIWA (n 717).
[864] Ibid, art 2.

expansive as to cover "private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character."[865]

Considering the increasing involvement of States in businesses through public-private partnerships, it is not uncommon to see a State empowering TNCs to carry out activities that might cause human rights issues for Indigenous Peoples. In the case of *Social and Economic Rights Action Centre v Nigeria*,[866] the allegation was that the Nigerian government was responsible for environmental contamination in the territory of the Ogoni people caused by the Nigerian National Petroleum Company in conjunction with the Shell Petroleum Development Corporation.[867] Equally, the plaintiffs contended that the Nigerian government provided military assistance to the company and allowed the military to attack, burn, and destroy Ogoni villages and food supplies.[868]

Under international law, the general rule is that acts or omissions of private persons are not attributable to the State.[869] Article 8 of the ARSIWA gives room for an exception where a factual relationship exists between the State and the private persons. In other words, "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[870] Liability arises for a State where the State authorises conduct regardless of whether the authorised person is a private individual or not.[871] Furthermore, Article 12 provides that a State is in breach of its international obligation when its act "is not in conformity with what is required of it by that obligation, regardless of its origin or character." For Crawford, Article 12 is evidence that the ARSIWA are of general application since they apply to all international obligations of States, which may be "established by *a customary rule of international law*, by *a treaty* or by *a general principle applicable within the international legal order*."[872]

[865] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge University Press, 2002) 100
[866] *Ogoni case* (n 554).
[867] Para 1.
[868] Para 3.
[869] Thomas Weatherall, *Duality of Responsibility in International Law: The Individual, the State, and International Crimes* (Brill Nijhoff, 2022) 188.
[870] ARSIWA (n 717) art 8.
[871] Chirwa (n 721) 6.
[872] James Crawford (n 865) 126.

4.5. State Protection of Indigenous Peoples' Rights in Environmental and Climate Change Laws

Although these two areas of public international law overlap, there is a growing attempt to separate climate change law as a distinct field. International environmental law is a broader area, while climate change is a unique and specific area that establishes new requirements as a *lex specialis*. The hallmark of knowledge in this era is that it is fragmented to give room for specifics not fully covered by existing general knowledge. This is equally seen in the broader public international law, where new areas are developed to address new issues like new actors besides States and "new types of international norms outside the acknowledged sources."[873]

Even though Peters acknowledges the need for harmonisation of the different fields of public international law,[874] the ILC has suggested that where a conflict exists between two norms, priority should be given to the *lex specialis.*[875] Additionally, in the area of climate change as a distinct field of international environmental law, French and Rajamani argue that the "climate change regime is an exemplar of both international environmental law and indeed public international law,"[876] and Carlarne argues that "the international legal regime for climate change epitomizes the fragmented nature of international environmental law."[877] The benefit, as she argues, is that maintaining a sole-issue focus has the advantage of allowing States with different interests and attitudes to negotiate within established parameters. It also enables States to negotiate the best legal solution for a particular issue.[878] So, while international environmental law covers broad areas of environmental issues beyond climate change, such as biodiversity conservation, pollution control, and sustainable development, climate change law, on the other hand involves legal measures to address the impacts of climate change, including mitigation, adaptation efforts, and ability to reduce emissions.[879]

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[873] Anne Peters, "The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization" (2017) 5(3) *International Journal of Constitutional Law* 671, 673.
[874] Ibid.
[875] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (18 July 2006) A/CN 4/L 702 [page 8].
[876] Duncan French and Lavanya Rajamani, "Climate Change and International Environmental Law: Musings on a Journey to Somewhere" (2013) 25(3) *Journal of Environmental Law* 437, 438.
[877] Cinnamon Piñon Carlarne, "Good Climate Governance: Only a Fragmented System of International Law Away?" (2008) 30(4) *Law and Policy* 450, 451.
[878] Ibid.
[879] Shaikh M S U Eskander and Sam Fankhauser, "Reduction in Greenhouse Gas Emissions from National Climate Legislation" (2020) 10 *Nature Climate Change* 750.

4.5.1. Hard Law

International environmental law regime, which includes various multilateral environmental agreements (MEAs), Bilateral Environmental Agreements (BEAs), and CIL, imposes some obligations on States to protect the environment. MEA is the generic word for a treaty, convention, protocol, or other legally binding agreement relating to the environment and signed by more than two parties.[880] As of 31st December 2023, the University of Oregon's International Environmental Agreements (IEAs) Database Project lists 1458 MEAs and 2295 BEAs.[881] MEAs often incorporate substantive and procedural obligations, such as the conservation and sustainable use of natural resources, environmental impact assessment, and the duty to adopt adaptation and mitigation measures.

It would appear that the most recent of these agreements is the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction,[882] otherwise called the Biodiversity Beyond National Jurisdiction Treaty (the BBNJ Treaty), which was signed in September 2023. Although it has obviously not entered into force as it needs the ratification of sixty UN members,[883] it is a legally binding instrument for "the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction."[884] Article 7, which sets out the general principles and approaches guiding the BBNJ Treaty, provides that States are to be guided by "the respect, promotion and consideration of their respective obligations, as applicable, relating to the rights of Indigenous Peoples or of, as appropriate, local communities when taking action to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction."

With this in mind, States are encouraged to use traditional knowledge associated with marine genetic resources, but when this kind of knowledge is to be used within the areas beyond national jurisdiction that is held by Indigenous Peoples and local communities, States have an obligation to put in place legislative, administrative, or policy measures to make it mandatory for the free, prior and informed consent of the indigenous group to be obtained before the

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[880] Schmalenbach (n 851) 49.
[881] Ronald B Mitchell, "International Environmental Agreements (IEAs) Database Project" (*University of Oregon*) <https://iea.uoregon.edu/iea-project-contents> accessed 31 December 2023.
[882] UN General Assembly, *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* (adopted on 19 June 2023 and 20 September 2023) A/CONF 232/2023/4.
[883] Ibid, art 68.
[884] Ibid, art 2.

Indigenous Peoples and their knowledge are used.[885] What these provisions on the environmental obligation of States and the rights of Indigenous Peoples is to establish the link between environmental protection and human rights. This link is also extended to the obligation of States to carry out environmental impact assessments. In other words, States must assess the potential impacts on the marine environment of planned activities under their jurisdiction or control that occur in areas beyond national jurisdiction before authorising the planned activities.[886] Ultimately, the environmental impact assessment must take into consideration the relevant traditional knowledge of Indigenous Peoples,[887] which, as mentioned earlier, requires obtaining the free, prior, and informed consent of the indigenous group.

The CBD[888] is an international treaty that aims to promote the conservation and sustainable use of biodiversity and ensure the fair and equitable sharing of benefits derived from genetic resources. States are obligated to perform or refrain from doing certain acts to achieve the objective of the CBD. States are obligated, for instance, to establish a legal framework to ensure the fair and equitable sharing of benefits arising from the utilisation of genetic resources. This includes obtaining prior informed consent from Indigenous and local communities and ensuring that they receive a fair share of the benefits derived from the use of traditional knowledge.[889] Although the right of a State to exploit the natural resources within its territory is guaranteed under various international law instruments, a State is responsible for ensuring that activities falling under its jurisdiction or control do not harm the environment.[890] The duty not to harm the environment extends even to preventing TNCs from violating the environment. So, the CBD balances the interest of TNCs, which seek adequate protection for their investment and the interest of Indigenous Peoples and communities that seek to protect their way of life and their environment.[891]

The Aarhus Convention[892] is another convention that establishes that States' human rights obligations may also imply their environmental obligations. The Aarhus Convention grants the public certain rights related to obtaining information, participating in public processes, and seeking legal redress in governmental decision-making procedures concerning environmental

[885] Ibid, art 13.
[886] Ibid, art 28(1).
[887] Ibid, art 31 (1)(c).
[888] CBD (n 549).
[889] Ibid, art 8(j).
[890] Ibid, art 3.
[891] Edgar J Asebey and Jill D Kempenaa , "Biodiversity Prospecting: Fulfilling the Mandate of the Biodiversity Convention" (1995) 28(4) *Vanderbilt Law Review* 703, 707.
[892] Aarhus Convention (n 23).

issues at the local, national, and transboundary levels. Although all ratifying States are European and some Central Asians, in April 2023, Guinea-Bissau became the first African country to accede to it.[893] It outlines the obligations of States in ensuring environmental democracy and the protection of environmental rights, and by ratifying the Aarhus Convention, States commit to guaranteeing access to information on the environment, public participation in environmental decision-making, and broad access to justice in environmental matters at both the national and international levels.[894]

Article 3(3) of the Aarhus Convention is explicit on the obligation to be assumed by any State that ratifies the convention. It provides that each has the obligation to promote environmental education and awareness among the public. States have the obligation to provide support to groups that are into the promotion of environmental protection.[895] Whenever there is a proposed plan with potential adverse impacts on the environment, States shall inform the public about this proposal early in the environmental decision-making procedure and provide sufficient information to the public held by relevant government agents about the scope of the environmental information.[896] These provisions further expand on the obligations of States generally to Indigenous Peoples, especially when activities on the environment will have adverse environmental impacts.

Furthermore, the protocol to the Aarhus Convention, known as the Protocol on Pollutant Release and Transfer Registers (PPRTR),[897] is regarded as the first legally binding international instrument on the obligation of States to establish registers on the "major sources of threat to health and the environment"[898] and "the only legally binding global instruments on environmental democracy" together with the Aarhus Convention.[899] The PPRTR imposes an

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[893] United Nations Treaty Collections, "13. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27> accessed 01 January 2024; UNECE, "Guinea-Bissau accedes to the Aarhus Convention, opening new horizons for environmental democracy in Africa and worldwide" (*UNECE*, 25 April 2023) <https://unece.org/climate-change/press/guinea-bissau-accedes-aarhus-convention-opening-new-horizons-environmental> accessed 01 January 2024.

[894] Viktor Ladychenko, "Information Policy in the Environmental Sphere in the Context of Sustainable Development of Ukraine and the EU" (2017) *Proceedings of the 8th International Scientific Conference Rural Development 2017* 1145, 1147.

[895] Aarhus Convention (n 23) art 3(4).

[896] Ibid, art 6.

[897] UN, *Protocol on Pollutant Release and Transfer Registers* (PPRTR) 21 May 2003, Ch XXVII, vol II.

[898] United Nations Economic Commission for Europe, *Your Right to a Healthy Community: A Simplified Guide to the Protocol on Pollutant Release and Transfer Registers* (UNECE, 2011) 4.

[899] African News, "Guinea-Bissau has Become the First non-European Country to Join an International Agreement on Government Accountability for Human Rights and the Environment, the United Nations Announced Tuesday" (*African News*, 25 April 2023) <https://www.africanews.com/2023/04/25/guinea-bissau-joins-un-agreement-on-

obligation on States to "establish and maintain a publicly accessible national pollutant release and transfer register" that is "pollutant-specific" and "facility-specific"[900] on a periodic basis. The essence of imposing this obligation to establish pollutant release and transfer registers (PRTRs) is to "facilitate public participation in environmental decision-making as well as contribute to the prevention and reduction of pollution of the environment."[901] A pollutant is defined as "a substance or a group of substances that may be harmful to the environment or to human health on account of its properties and of its introduction into the environment."[902] Among some of the eighty-six pollutants, as listed in the PPRTR, include arsenic and compounds, copper and compounds, nickel and compounds, and atrazine.[903]

Similarly, States have an obligation to mandate owners or operators of facilities within their jurisdiction that engage in the activities specified in Annex I to the PPRTR to submit to the State relevant information about their activities that produce pollutants, including the name, location, and amount of the pollutants.[904] Some of the activities listed in Annex I that could adversely impact Indigenous Peoples include mineral oil and gas refineries, installations for gasification and liquefaction, coal rolling mills, and metal ore roasting or sintering installations, among others.[905] It is worth noting that the PPRTR uses "facilities" widely, and its definition accommodates a reference to TNCs that engage in those activities. In other words, a facility "means one or more installations on the same site, or on adjoining sites, that are owned or operated by the same natural or legal person."[906]

In the field of climate change law, the United Nations Framework Convention on Climate Change (UNFCCC)[907] is an international treaty with the objective of stabilising greenhouse gas concentrations in the atmosphere to prevent dangerous anthropogenic interference with the climate system.[908] It sets out a framework for international cooperation to address climate

environment-and-human-rights//> accessed 01 January 2024; Szilárd Erhart and Kornél Erhart, "Application of North European Characterisation Factors, Population Density and Distance-to-coast Grid Data for Refreshing the Swedish Human Toxicity and Ecotoxicity Footprint Analysis" (2022) 92 *Environmental Impact Assessment Review* 1.

[900] PPRTR (n 897) art 4.

[901] Ibid, art 1.

[902] Ibid, art 2(6).

[903] Ibid, Annex II.

[904] Ibid, art 7.

[905] Ibid, Annex I.

[906] Ibid, art 2(4).

[907] UN General Assembly, *United Nations Framework Convention on Climate Change*: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

[908] Ibid, art 2. See also, Maciej Nyka, "Trade Related Instruments of Promotion of Human Right to the Environment in International Climate Law," in Soňa Košičiarová (ed) *Právo na životné prostredie a nastroje jeho presadzovania* (Trnavská univerzita v Trnave, 2016) 174.

change and its impacts. To achieve this objective, the UNFCCC expects States to carry out some obligations as enumerated in Article 3. For instance, States are to promote sustainable development.[909] Even though sustainable development may be described as an international law principle,[910] and by some scholars, as forming part of CIL,[911] the ICJ sees it more only as an "international objective."[912] Judge Weeramantry, in his dissenting Opinion in the case of *Hungary v Slovakia*,[913] unequivocally held that the obligation of States to promote sustainable development has already entered the corpus of CIL. For Weeramantry, there are many indications to show the obligatory nature of sustainable development as it has been reflected in many international agreements and declarations and amplified by *opinion iuris*.[914]

The UNFCCC also imposes the obligation on States to take precautionary measures to prevent harm to the environment or humans. Accordingly, where there is a reasonably foreseeable threat of substantial or irreparable damage, States must take actions to anticipate or avoid it without waiting for conclusive scientific proof.[915] To this extent, Malaihollo argues that the precautionary principle is a due diligence obligation.[916] While this obligation is closely related to the obligation to prevent harm, there is an underlying difference. The major distinction is that the precautionary principle applies before scientific data is conclusive, whereas the duty to prevent applies to known or knowable situations of harm and risk.[917] Article 3 of the UNFCCC also imposes an obligation on States to carry out environmental impact assessments and the duty to cooperate with other States.[918]

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[909] Ibid, art 3(4).
[910] Christina Voigt, *Sustainable Development as a Principle of International Law Resolving Conflicts between Climate Measures and WTO Law* (Brill, 2009).
[911] Philippe Sands, *Principles of International Environmental Law* (3rd edn, Oxford University Press, 2012) 208.
[912] International Court of Justice, *Case concerning the Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports (2010) 14, para 177. See also the analysis by Legal Response International, "States' Duties and Obligations vis-à-vis other States and their own Population in the Climate Change Context" < https://legalresponse.org/legaladvice/%EF%BF%BCStates-duties-and-obligations-vis-a-vis-other-States-and-their-own-population-in-the-climate-change-%EF%BF%BCcontext/> accessed 18 October 2023.
[913] International Court of Justice, *Case concerning the Gabc˘íkovo-Nagymaros Dam (Hungary v Slovakia)*, 25 September 1997, Separate Opinion of Vice-President Weeramantry.
[914] ibid, p 101.
[915] Legal Response International (n 912).
[916] Medes Malaihollo, "Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights" (2021) 68 *Netherlands International Law Review* 121, 128.
[917] Legal Response International (n 912).
[918] UNFCCC (n 907) art 3(5).

The Paris Agreement,[919] a landmark agreement under the UNFCCC, aims to limit global warming to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius.[920] As of May 2024, 194 States and the EU have either ratified or acceded to the Paris Agreement. Out of these States, 54 are African States.[921] The Paris Agreement has a special "hybrid legal form… it is a treaty within the meaning of international law, but not all its provisions are legally binding."[922] In other words, its provision regarding the effort to limit the temperature increase to 1.5 degrees Celsius is considered legally binding because "all States party must be in line with the overall objective of the treaty to some extent."[923] Furthermore, the requirement of States to establish nationally determined contributions (NDCs)[924] is binding, but States are not bound to "meet the requirements of the NDC" they set for themselves.[925] So, the Paris Agreement, to the extent that some of its provisions are legally binding on States, is considered a hard law instrument.[926]

Unfortunately, during the final draft of the document, the specific recognition of the rights of Indigenous Peoples and the obligations of States to protect these rights were removed from the operative articles of the final text.[927] The Paris Agreement mentions in its Preamble the acknowledgement of the responsibilities of States; unfortunately, Preambles are nonbinding.[928] The Preamble provides thus: "[a]cknowledging that climate change is a common concern of humankind, Parties should when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, [and] the rights of Indigenous Peoples." Regarding the global goal of adaptation, the Paris Agreement encourages

[919] UNFCCC, *Paris Agreement*, (12 December 2015) Report No FCCC/CP/2015/ L.9/Rev.1, UNTS vol 3156, p79 <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 02 January 2024.
[920] Ibid, art 2(2).
[921] UNTC, "Paris Agreement/List of Participants" (Status as of 17 May 2024) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> accessed 17 May 2024.
[922] Daniel Bodansky, "Paris Agreement" (*United Nations Audiovisual Library of International Law*, July 2021) <https://legal.un.org/avl/ha/pa/pa.html> accessed 19 May 2024.
[923] Carter Hanson, "Hard and Soft Law in the Paris Climate Agreement" (2021) 925 *The Cupola: Scholarship at Gettysburg College* 1, 7.
[924] Paris Agreement (n) Art 4(2).
[925] Carter Hanson (n) 8; Peter Lawrence and Daryl Wong, "Soft law in the Paris Climate Agreement: Strength or weakness?" (2017) 26(3) *Review of European, Comparative and International Environmental Law* 276, 280.
[926] See arguments by other scholars, Mathilde Hautereau-Boutonnet and Sandrine Maljean-Dubois, "The Paris Agreement on Climate Change: A Subtle Combination of Tools and Actors for Better Enforcement?" (2022) 52 *Environmental Policy and Law* 389 – 398; Lavanya Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations" (2016) 28(2) *Journal of Environmental Law* 337–358.
[927] M. Alexander Pear, "Human Rights, Indigenous Peoples, and the Global Climate Crisis" (2018) 53 *Wake Forest Law Review* 713, 734.
[928] Ibid.

States to follow a fully transparent approach and consider the traditional knowledge of Indigenous Peoples.[929]

This gap notwithstanding, there are general procedural obligations States are required to fulfil under the Paris Agreement, which Indigenous Peoples could benefit from. These obligations include the obligation to "prepare, communicate and maintain successive nationally determined contributions that a State intends to achieve,"[930] a State to provide information necessary for clarity, transparency and understanding while communicating its nationally determined contributions,[931] a State is obligated to "promote environmental integrity, transparency, accuracy, completeness, comparability and consistency,"[932] and to "regularly provide information on national inventories [and] information necessary to track progress made in implementing and achieving its nationally determined contributions."[933] NDC are the pledges and commitments made by individual countries to address climate change. These contributions outline the specific actions a country intends to take to reduce greenhouse gas emissions and adapt to the impacts of climate change.[934]

In some other instruments, States obligations to protect the environment, human rights, and climate change are intertwined. For instance, in the Vienna Convention for the Protection of the Ozone Layer (Convention on Ozone Layer),[935] one of the general obligations of States is to take appropriate measures "to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer."[936] While it recognises that its ultimate goal is to protect human health and the environment, it aims to achieve this by creating obligations for States to protect the ozone layer by phasing out the production and consumption of ozone-depleting substances.[937] In addition, States have the obligation to conduct and cooperate in research and systematic observations of

[929] Paris Agreement (n 919) Art 7(5).
[930] Ibid, art 4(2).
[931] Ibid, art 4(8).
[932] Ibid, art 4(13).
[933] Ibid, art 4(7).
[934] Maria Jernnäs, "Governing through the Nationally Determined Contribution (NDC): Five Functions to Steer States' Climate Conduct" (2023) *Environmental Politics* 1.
[935] United Nations General Assembly, *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, TIAS No. 11,097; 1513 UNTS 323; 26 ILM 1529 (1987). Two African countries signed the Convention, with fifty-four of them either accessioned or ratified it. See UNTC, "2. Vienna Convention for the Protection of the Ozone Layer/Status" <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2&chapter=27&clang=_en> accessed 17 May 2024.
[936] Convention on Ozone Layer (n 935) art 2 (1).
[937] Ibid; Frederike Albrecht and Charles F Parker, "Healing the Ozone Layer: The Montreal Protocol and the Lessons and Limits of a Global Governance Success Story" in Paul't Hart and Mallory Compton (eds) *Great Policy Successes* (Oxford University Press, 2019) 304.

the physical and chemical processes of the ozone layer and the effects of its modification on human health and the environment.[938]

Realising that efforts at reducing the production and consumption of ozone-depleting substances can only be practical through the instrumentality of the law, the Ozone Layer Convention imposes on States the obligation to adopt appropriate legislative or administrative measures and cooperate in harmonising policies to control, limit, reduce or prevent human activities that have or are likely to have adverse effects on the ozone layer.[939] The issue of controlling ozone layer depletion requires the efforts of all, and this means that States are to cooperate in providing assistance, especially to developing countries, in the implementation of the Convention and the protocols adopted under it.[940]

The Ozone Layer Convention does not specify any concrete targets or timetables for the phase-out of ozone-depleting substances, but it provides the basis for the adoption of the Montreal Protocol on Substances that Deplete the Ozone Layer,[941] which does so.[942] The Montreal Protocol is the only protocol to the Convention, and it has been ratified by all parties to the Convention. It has been amended several times to include new ozone-depleting substances and to accelerate their phase-out schedules, and it covers several groups of ozone-depleting substances, such as chlorofluorocarbons (CFCs), halons, hydrochlorofluorocarbons (HCFCs), methyl bromide, and hydrofluorocarbons (HFCs).[943] The States that are parties to the Protocol have different obligations depending on their developmental level, historical and current use of ozone-depleting substances, and capacity to adopt alternative technologies. States are to report annually to the Ozone Secretariat on their implementation of the Protocol[944] and to cooperate with other parties and international organisations in the exchange of relevant information to facilitate the phase-out of ozone-depleting substances.[945]

[938] Convention on Ozone Layer (n 935) art 2(2) (a)
[939] Ibid, art 2(2)(b).
[940] Ibid, art 4(2).
[941] UN General Assembly, *Montreal Protocol on Substances that Deplete the Ozone Layer* (done 16 September 1987, entered into force 1 January 1989) [1989] 28 ILM 1261.
[942] Ibid, art 2A.
[943] Ibid, see art 2A – 2I.
[944] Ibid, art 7.
[945] Ibid, art 9.

4.5.2. Soft Rules

Examples of important soft law documents in international environmental law include the UN Forest Instrument,[946] the Rio Declaration,[947] and Agenda 21.[948] Before these instruments were negotiated, the Stockholm Declaration[949] provided a signpost as to what States are required to do to protect human rights while protecting the environment. It mandates States not to engage in any activity or perform any act capable of violating the rights and freedom of persons as declared in the document.[950]

First, the Stockholm Declaration provides some expectations from States regarding human rights and the environment. It was the first significant attempt to reconcile economic development with environmental integrity, which were commonly regarded as incompatible.[951] Principle 7 requires that "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm Living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea." While recognising the sovereign right of States to exploit natural resources within their jurisdiction, they are obligated to make sure that such exploitative activities do not cause harm to the environment, especially to territories of other States.[952] When such exploitative activities violate human rights or cause harm to the environment, States have the responsibility to cooperate with other States to develop liability and compensation mechanisms for victims of such violations, both within and outside their territorial boundaries.[953] Finally, States have the responsibility to "ensure that international organisations play a coordinated efficient and dynamic role for the protection and improvement of the environment."[954]

The UN Forest Instrument, also known as the non-legally binding instrument on all types of forests, was adopted by the UN General Assembly in December 2007 to complement other

[946] UN General Assembly, *Non-legally Binding Instrument on all types of Forests*, resolution adopted by the General Assembly on 17 December 2007, A/RES/62/98. In December 2015, the UN General Assembly adopted a resolution to rename this instrument as the United Nations Forest Instrument. See UN General Assembly, *70/199 United Nations Forest Instrument*, resolution adopted by the General Assembly on 22 December 2015, A/RES/70/199.
[947] *Rio Declaration on Environment and Development* (n 544).
[948] *Agenda 21* (n 501).
[949] United Nations Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, UN Doc A/CONF.48/14, at 2 and Corr.1 (1972).
[950] Ibid, art 30.
[951] Ben Purvis, Yong Mao, and Darren Robinson, "Three Pillars of Sustainability: In Search of Conceptual Origins" (2019) 14 *Sustainability Science* 681, 683.
[952] Stockholm Declaration on the Human Environment (n 949) Principle 21.
[953] Ibid, Principle 22.
[954] Ibid, Principle 25.

international agreements such as the CBD and UNFCCC.[955] It has three purposes: (1) "to strengthen political commitment and action at all levels to implement effectively sustainable management of all types of forests and to achieve the shared global objectives on forests;" (2) "to enhance the contribution of forests to the achievement of the internationally agreed development goals, including the, 2030 Agenda for Sustainable Development and the Sustainable Development Goals;" (3) "to provide a framework for national action and international cooperation."[956] Among other principles, the UN Forest Instrument declares that its provisions are "voluntary and non-legally binding."[957] It equally underscores that each State is responsible for the sustainable management of its forests and for the enforcement of its forest-related laws. In doing this, States should realise the great contribution of some groups like Indigenous Peoples and local communities in "achieving sustainable forest management and should be involved in a transparent and participatory way in forest decision-making processes that affect them, as well as in implementing sustainable forest management, in accordance with national legislation."[958]

Furthermore, the UN Forest Instrument creates further commitments for States regarding Indigenous Peoples. For instance, in order to accomplish the objective of this instrument, Member States should establish favourable conditions that promote private-sector investment, as well as investment and participation from local and Indigenous Peoples, other forest users, forest owners, and other stakeholders. This can be achieved through a comprehensive framework of policies, incentives, and regulations that support sustainable forest management.[959] States should actively encourage the development and implementation of scientific and technological innovations that can support forest owners and local and Indigenous Peoples in their efforts towards sustainable forest management.[960]

In addition, it is important for States to provide support for education, training, and extension programmes that involve local and Indigenous Peoples, forest workers, and forest owners. These programmes aim to develop resource management approaches that can effectively alleviate the pressure on forests, especially in fragile ecosystems.[961] Meanwhile, it is important

[955] See Maria A Egorova and others, "Climatic Aspects of Ecological and Legal Protection of Forests in the Russian Federation" (2022) 9(3) *Kutafin Law Review* 415, 418.
[956] UN Forest Instrument (n 946) para 1 (1 – c).
[957] Ibid, para 2(a).
[958] Ibid, para 2(b – c).
[959] Ibid, para 6(h).
[960] Ibid, para 6(s).
[961] Ibid, para 6(v).

for States to improve the accessibility of forest resources and relevant markets for households, small-scale forest owners, and forest-dependent local and Indigenous communities. This will help support their livelihoods and allow for income diversification through sustainable forest management.[962] Moreover, in the context of international cooperation, it is vital for States to improve and facilitate the accessibility and transfer of appropriate, environmentally friendly, and innovative technologies, as well as the corresponding expertise, that are essential for sustainable forest management and the effective processing of forest products. This is especially important for developing countries, as it can greatly benefit local communities and Indigenous Peoples.[963]

Other important soft environmental instruments that established standards for States are the Rio Declaration and Agenda 21. Agenda 21 and the Rio Declaration adopted at the 1992 UN Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, are pivotal documents that outline principles for sustainable development and environmental protection. Agenda 21 provides a framework for addressing environmental challenges and promoting sustainable development at the local, national, and global levels through the joint efforts of government, TNCs, and other groups like Indigenous Peoples. Moreover, in the context of the extractive industry, the Rio Declaration has influenced the discourse on corporate social responsibility, particularly in addressing global criticisms of TNC operations beyond ethical business limitations.[964] The Rio Declaration and Agenda 21 are closely linked, as they were adopted at the same conference, and they share the common goal of promoting sustainable development globally through the combined efforts of all.

The Rio Declaration recognises "the sovereign right [of States] to exploit their own resources pursuant to their own environmental and developmental policies, and consequently, "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[965] States are required to give priority to those most environmentally vulnerable,[966] which, when interpreted, includes Indigenous Peoples because of their "close connections to land, water,

[962] Ibid, para 6(y).
[963] Ibid, para 7(k).
[964] Haryo K Wibisono and Semiarto A Purwanto, "Affective Technology and Creative Labour in Indonesia's Extractive Industry" (2020) 6(2) *International Journal of Management, Innovation and Entrepreneurial Research* 55, 58.
[965] The Rio Declaration (n 544) Principle 2.
[966] Ibid, Principle 6.

and ecosystems."[967] States should work together in a spirit of global partnership to preserve, safeguard, and revive the health and integrity of the Earth's ecosystem via "common but differentiated responsibilities."[968] States should widely apply the precautionary approach in order to protect the environment, based on their capabilities. When faced with potential harm that could be irreversible, it is important to take action to prevent environmental degradation, even if there is a lack of full scientific certainty about the situation. The focus should be on implementing cost-effective measures in a timely manner.[969]

The Rio Declaration further points out that environmental issues are most effectively addressed when all concerned citizens participate at the appropriate level. Because of this, everyone should have equal access to information about the environment held by public authorities, including details about hazardous materials and community activities. They should also have the opportunity to participate in decision-making processes. Furthermore, States should actively promote and support public awareness and participation by ensuring that information is easily accessible to all. However, it is of the utmost importance for States to ensure that individuals have fair and unhindered access to both judicial and administrative proceedings, as well as the ability to seek redress and obtain remedies, is of utmost importance.[970] In this regard, Indigenous Peoples and local communities play a important role in environmental management and development due to their extensive knowledge and traditional practices. It is crucial for States to acknowledge and provide proper support for their unique identity, culture, and interests. This will empower them to contribute to the promotion of sustainable development actively.[971]

Agenda 21 also elaborately provides situations where States are responsible for protecting Indigenous Peoples' rights while protecting the environment. In this way, Agenda 21 recognises that Indigenous Peoples have evolved a comprehensive traditional scientific understanding of their territories, natural resources, and environment over many generations, making them effective towards contributing to sustainable development.[972] One of the objectives of incorporating Indigenous Peoples in sustainable development is the importance of recognising the need to protect the lands of Indigenous People and their communities from

[967] Nicole Redvers and others, "Indigenous Peoples: Traditional Knowledges, Climate Change, and Health" (2023) 3(10) *PLOS Global Public Health* 1, 14; Benavides and others (n) 1 – 7.
[968] The Rio Declaration (n 544) Principle 7.
[969] Ibid, Principle 15.
[970] Ibid, Principle 10.
[971] Ibid, Principle 22.
[972] Agenda 21 (n 501) para 26.1.

environmentally harmful activities or those that are deemed socially and culturally inappropriate by the Indigenous People themselves.[973] Similarly, there is a need to recognise Indigenous Peoples' values, traditional knowledge, and resource management practices in order to foster environmentally responsible and sustainable development.[974] This means that States should recognise that the traditional and direct reliance of Indigenous People and their communities on renewable resources and ecosystems, including sustainable harvesting, remains crucial to their cultural, economic, and physical well-being.[975]

4.5.3. Jurisprudence on Indigenous Peoples' Rights in Climate Change and Environmental Laws

Under climate change law, Indigenous Peoples have engaged in many climate litigations, either to mandate States to comply with their climate obligations or to hold States liable for failing to fulfil their existing obligations, usually at national courts. In the *Atrato River Decision*,[976] the Constitutional Court of Colombia ruled that the failure of the Colombian Government to protect the fundamental rights of Indigenous and Afro-descendant communities against river pollution caused by mining constituted a violation. The quality of the water was already impacted by climate, and the government was ordered to always take into consideration climate change in the future when making mining and energy policy decisions. In 2021, ClientEarth brought five similar cases against the Polish government on behalf of private citizens, especially in *ClientEarth v Poland (on behalf of M.G.)*.[977] They claimed that the Government had allowed GHG emissions from its territory to exceed the country's "fair share" according to the Paris Agreement, thereby breaching its human rights obligations. As of May 2024, the case was still pending because the Białystok Court of Appeal returned the case to the Regional Court in Łomża for examination.[978]

In Africa, climate litigation has been used to establish States' liability for failing to observe their climate obligations. In *South Durban Community Environmental Alliance (SDCEA) v Minister of Forestry*,[979] although the matter did not succeed in court, the court nevertheless

[973] Ibid, para 26.3(a)(ii).
[974] Ibid, para 26.3(a)(iii).
[975] Ibid, para 26.3(a)(iv).
[976] *Atrato River Decision* T-622/16, Constitutional Court of Colombia, 10 November 2016 (Colombia).
[977] *ClientEarth v Poland (on Behalf of M.G.)*, Białystok Court of Appeal, 8 September 2021 (Poland).
[978] See Climate Case Chart, "ClientEarth v Poland (on behalf of M.G.)" (*Climate Case Chart*) <https://climatecasechart.com/non-us-case/clientearth-v-poland-acting-on-behalf-of-mg/> accessed 05 January 2023.
[979] South Africa, *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and The Environment and Others* (17554/2021) [2022] ZAGPPHC 741 (6 October 2022).

held that "an assessment of climate change impacts of a project must include both the project's impact on climate change and the project resilience to climate change."[980] In this case, SDCEA, an NGO, contested the approval of offshore oil and gas exploration by the South African Government, arguing that it neglected to assess climate impacts in the Environmental Impact Assessment. A South African High Court, in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*,[981] equally set aside the exploration rights and seismic surveys off the coast of South Africa because of its potential impact on climate change. The court acknowledged the danger of irreparable and impending climate damage, along with the effects on the communities' cultural practices and conservation of the oceans. The court specifically noted, regarding South Africa's climate change obligations, that "authorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments."[982]

The Ugandan case of *Tsama William v Uganda's Attorney General*[983] is equally instructive on how the failure of the government to comply with its climate obligation can trigger liability litigation. In this case, the petitioners pursued reparation and indemnity from the Ugandan government for the loss of life, threats to life, property destruction, and violation of fundamental human rights. Additionally, they sought compensation for the expenses related to relocating to safer regions due to the repeated landslides in Bududa District. The claimants assert that the government has not adequately forestalled and adjusted to climate-induced damages, consequently impacting their human rights. The increased frequency and severity of landslides are attributed to climate-related extreme weather occurrences.[984] Unfortunately, the case has been pending since 2020.

Furthermore, the UNHRC in *Daniel Billy and Others v Australia*[985] found that the Australian government was liable for breaching its human rights obligations through its climate change

[980] Ibid, para 51.
[981] South Africa, *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk) (1 September 2022).
[982] Ibid, para 121.
[983] Uganda, *Tsama William and Others v Uganda's Attorney General and Others* (2020) High Court of Uganda at Mbale, Miscellaneous Case No. 024 of 2020, 14 October.
[984] All the cases regarding climate change in this section and their summaries are from United Nations Environment Programme, *Global Climate Litigation Report: 2023 Status Review* (27 July 2023) <https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review> accessed 05 January 2024.
[985] United Nations Human Rights Committee, *Daniel Billy and others v Australia* (Torres Strait Islanders Petition), United Nations Human Rights Committee, CCPR/C/135/D/3624/2019, 23 September 2022.

inactions in protecting the Indigenous Torres Strait Islanders against the adverse impacts of climate change. The Islanders claimed that changes in weather patterns have had an adverse effect on their sustenance, culture, and traditional way of life. The survival and well-being of their minority culture are contingent upon the islands' continuous existence and habitability, as well as the ecological health of the surrounding seas. The islands have been devastated by recent tidal surges, resulting in severe flooding that has ruined family burial sites and scattered human remains. The UNHRC observed that the obligations of the State party under international treaties addressing climate change form a component of the comprehensive system pertinent to addressing its breaches under the ICCPR.[986] The decision affirms that the interpretation of the ICCPR should be made to uphold and respect the distinct cultural identity of Indigenous Peoples. The UNHRC acknowledged that Indigenous Peoples have the right, as Stated in Article 17 of the ICCPR, to utilise their territory for their sustenance and livelihood.[987] Furthermore, the protection of their culture, which is closely tied to their territory and the utilisation of its resources, as outlined in Article 27 of the ICCPR, aims to guarantee the preservation and continuous development of their cultural identity.[988]

In the area of environmental law, CIL provides an excellent avenue for exploring States' liability for failure to observe their human rights and environmental obligations. For instance, the no-harm rule is considered the pillar of customary environmental and general principle of international environmental law, emphasising its significance in preventing harm in various environmental contexts.[989] The no-harm rule dictates that States should not cause harm to other States through their activities, especially in the context of hazardous activities that have the potential to cause transboundary harm.[990] The breach of the no-harm principle sparks the international obligation of the State causing harm, which includes the need to pay financial compensation for the transboundary harm.

The 1941 *Trail Smelter case*[991] is often cited as laying the foundation for the no-harm rule and the liability that follows when this rule is violated. It centred on a cross-border environmental dispute between the United States and Canada, which involved a smelter in British Columbia,

[986] Ibid, para 3.2.
[987] Ibid, para 8.101.
[988] Ibid, para 8.131.
[989] Maksim Lavrik, "Customary Norms, General Principles of International Environmental Law, and Assisted Migration as a Tool for Biodiversity Adaptation to Climate Change" (2022) 4 *Jus Cogens* 99 – 129.
[990] Joyeeta Gupta and Susanne Schmeier, "Future Proofing the principle of no Significant harm" (2020) 20 *International Environmental Agreements* 731, 736.
[991] *Trail Smelter Case* (n 802).

Canada, emitting pollutants that caused harm to crops and land in Washington State in the US. The IJC ruled that a State is liable for transboundary harm resulting from activities within its borders. This decision emphasised State responsibility for environmental obligations and set a precedent for holding States liable for cross-border pollution and highlighting the principle of State liability for breaches of environmental obligations.

Moving forward, the polluter-pays principle also establishes State environmental liability. As a fundamental concept in environmental law[992] that establishes the responsibility of the party causing environmental damage to bear the costs of such damage, the polluter-pays principle was first introduced on 26 May 1972 by the OECD[993] as an economic principle for allocating the costs of pollution control and later adopted in the 1992 Rio Declaration on Environment and Development as Principle 16.[994] Principle 16 provides that "the polluter should, in principle, bear the cost of pollution." A polluter is "someone engaged in polluting activities through industrial emissions in excess of legally binding stipulated thresholds"[995] or "who directly or indirectly damages the environment or who creates conditions leading to such."[996] Even though, in practice, the focus is on TNCs as polluters, States and individuals are recognised as potential polluters.[997]

So, whenever it is established that the failure of the State to keep to its obligation caused harm to the environment, the State will be liable under this principle. A State can be held liable in several ways, directly or indirectly, under the polluter-pays principle. These include cases where the State is directly causing harm to the environment through State-owned TNCs and where the harm is caused by a TNC, but the State benefits financially from the business activities of the TNC. It is not necessary to prove that the State participates in raising funds for

[992] Although the polluter-pays principle is a fundamental concept of international environmental law, the Permanent Court of Arbitration held that "the Tribunal does not view this principle as being a part of general international law." See PCA, *Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976* (Netherlands v France) (2004) PCA 25 RIAA 267, para. 103

[993] See OECD, *Guiding Principles Concerning International Economic Aspects of Environmental Policies* (1972) C(72) 128. This was abrogated in November 2023 and a new one was introduced in 2024 as OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, OECD/LEGAL/0102.

[994] Marc David Davidson, "How Fairness Principles in the Climate Debate Relate to Theories of Distributive Justice" (2021) 13 *Sustainability* 1, 6.

[995] Priscilla Schwartz, "Principle 16: Polluter-Pays Principle" in Jorge E Viñuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 429.

[996] OECD, *Recommendation on the Implementation of the Polluter-Pays Principle,* C(74)223 (1974), cited in Jean-Frédéric Morin, Jen Allan, and Sikina Jinnah, "The Survival of the Weakest: The Echo of the Rio Summit Principles in Environmental Treaties" (2023) *Environmental Politics* 13.

[997] Schwartz (n 995) 430.

the TNC or that the State owns assets of the TNC before the acts of the TNCs could be attributed to the State, provided the conditions in Articles 5 and 8 of the ARSIWA are met.[998] Under this principle, States can be held liable for environmental damage caused by private parties, especially when the polluter cannot be identified. This allows the State to act "in subrogation" against individual polluters, thereby providing prompt compensation and creating incentives for proper monitoring by local environmental agencies.[999]

4.6. International Investment Law, State Obligations, and Indigenous Peoples' Rights

The CIL protection of foreign investment has existed since time immemorial, particularly with the understanding that an investment within the territory of a State should not be expropriated without fulfilling specific conditions. This can be traced to John Locke's theory on property rights, otherwise called the theory of original appropriation. Holders of property rights have the right to dispose of them according to their desires and to have this right protected by the State.[1000] Lockean philosophy emphasises the natural right to property and the importance of protecting property as a fundamental human right. It also contributes to discussions on liberalism and free trade.[1001] This was eventually given judicial backing in the *Chorzow Factory Case*, where the Permanent Court of International Justice (PCIJ) held that breach of the obligation to protect an investment, which eventually results in expropriation, would give rise to an obligation of reparation.[1002]

However, the evolution of the concept of an international minimum standard (a part of the law of State responsibility) took its place in the international law lexicon during the nineteenth century and early twentieth century when foreign commercial enterprises expanded overseas as well as during the scramble for the domination of the global south by the West.[1003] Indeed, its evolution was closely tied to imperialism or tantamount to "dollar diplomacy."[1004]An important aspect of the foreign investment policy of this era was the assertion by capital-

[998] Schmalenbach (n 851) 70 – 71.
[999] Barbara Luppi, Francesco Parisi, and Shruti Rajagopalan, "The Rise and Fall of the Polluter-Pays Principle in Developing Countries" (2012) 32 *International Review of Law and Economics* 135, 136; Mizan R Khan, "Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change" (2015) 4 *Laws* 645, 638.
[1000] Ugwu (n 114) 264.
[1001] John Morrison, "John Locke and Brexit - What will Happen to the UK's Greatest Ever Export?" (*Institute for Human Rights and Business*, 29 March 2017) <https://www.ihrb.org/focus-areas/trade/john-locke-and-brexit-uk-greatest-ever-export> accessed 17 May 2024.
[1002] *Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ (ser A) No 17.
[1003] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press, 2008) 626 – 627.
[1004] S N Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55(4) *The American Journal of International Law* 863, 865.

exporting countries of their right to use force to safeguard their foreign investments, including in cases of unpaid debts,[1005] an action often referred to as "gunboat diplomacy."[1006] Subsequently, however, the crystallised principle became transposed into the protection of foreign investments. There are some basic principles that run through international investment instruments. These include national treatment, most-favoured-nation treatment, fair and equitable treatment and compensation in the event of expropriation.

The minimal standard of treatment is an international law principle that specifies the minimum level of protection and treatment that foreign persons (aliens) and their property shall receive when on the territory of another country. This idea is frequently related to how foreign investors and their investments are treated in host nations, and it is especially pertinent in the context of international investment law.[1007] It is immaterial that the same treatment is meted out to nationals. In other words, if the same treatment prevails in the host State, foreign investors and investment must be treated better than nationals to accord with the irreducible international minimum standard.[1008] Failure to observe the treatment standard incurs a State responsibility and entitles the investor to seek remedies and compensation through international dispute settlement mechanisms.[1009] One of the regular instances where States fail to observe this principle is in the case of expropriation of investment.

Expropriation entails the compulsory acquisition of alien property or foreign enterprises by the host State. Shaw describes it simply as the taking of property, but he added that there are other actions that could amount to expropriation even though an investor's property was not directly taken.[1010] In carrying out its legitimate obligations under national and international law, a State may implement measures which may be construed as expropriation. To fulfil its obligation to protect the environment and human rights, a State may implement policies and legislation that are unfavourable to an alien investor in what has been described as an indirect expropriation.[1011]

[1005] Luis M Drago, "State Loans in Their Relation to International Policy" (1907) 1 *American Journal of International Law* 691, 692-693.
[1006] Kenneth J Vandevelde, "Reassessing the Hickenlooper Amendment" (1988-1989) 29 *Virginia Journal of International Law* 115, 118.
[1007] Mujeeb Emami, "The Minimum Standard of Treatment in International Investment Law: Interpretation and Evolution" (2021) 24(1) *South East Asia Journal of Contemporary Business, Economics and Law* 75.
[1008] Malcom Shaw (n 1003) 624.
[1009] *V. L. F. H. Neer and P. E. Neer, United States v. Mexico*, Opinion, October 15, 1926, UNRIAA, vol. IV.
[1010] Shaw (n 1003) 629.
[1011] OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law" (2004) 4 OECD Working Papers on International Investment, p 2 <http://dx.doi.org/10.1787/780155872321> accessed 20 October 2023.

4.6.1. Hard Instruments

Most rules guiding international investment law (IIL) are primarily found in multilateral investment treaties (MITs) like the NAFTA[1012] and African Continental Free Trade Area Agreement (AfCFTA)[1013] and in bilateral investment treaties (BITs). These MITs and BITs contain exceptions where a State can expropriate investment property for public policy. Article 1105 of NAFTA, which is on minimum standard of treatment, provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." To this extent, States are not allowed to directly or indirectly expropriate investment except for public policy, on a non-discriminatory basis, and payment of compensation.[1014] The AfCFTA provides for exceptions to non-discrimination and non-restriction to international trade, where a State is to exercise its obligation to provide measures "necessary to protect human, animal or plant life or health."[1015] The AfCFTA is examined in detail in Chapter Seven.

The old generation of BITs embodies the unfair asymmetry between corporations and host States, where investors have so many rights and States' obligations are no more than to be exercised towards the protection of investments. For instance, the Poland - Russian Federation BIT (1992)[1016] does not contain any reference to the obligation of the State parties to protect the environment or human rights. It only contains provisions on the protection of investment and the prohibition of expropriation. This is also similar to the other BITs of that generation, including the Nigeria-United Kingdom BIT (1990).[1017] Fortunately, the new generation of BITs, especially those negotiated by African States, tries to bridge this unfair asymmetry by creating exceptions to expropriation. They do not just include obligations of States to regulate

[1012] NAFTA (n 259). For a detailed analysis of the NAFTA, see Rafał Wordliczek, "From North American Free Trade Agreement to United States–Mexico–Canada Agreement (USMCA): US–Mexico Economic Relations in the Context of US National Security" (2021) 5(54) *Politeja* 293-313.
[1013] AU, *Agreement Establishing the African Continental Free Trade Area* (adopted 21 March 2018 and entered into force 30 May 2019) <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> accessed 03 January 2024.
[1014] NAFTA (n 259) art 1110.
[1015] Protocol to AfCFTA on Trade in Goods, art 28(b).
[1016] See the *Agreement between the Government of the Russian Federation and the Government of the Republic of Poland and the Promotion Mutual Protection of Investments, Poland - Russian Federation BIT* (1992), signed 02 October 1992 <https://edit.wti.org/document/show/bb0288c9-0a39-4d0e-8b05-3aaab34fc59d> accessed 20 May 2024.
[1017] *Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, Nigeria - United Kingdom BIT* (1990), signed 11 December 1990 and entered into force 1 December 1990, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2110/download> accessed 20 May 2024.

investment to protect the environment and human rights; they also provide for instances where investors have human rights and environmental obligations. Some of these BITs are extensively examined in Chapter Five and in Chapter Seven as part of AAIL. Because of the lack of a single international document on investment law and the fact that the few MITs and many BITs do not contain elaborate provisions of obligations of States to human rights and the environment other than the obligation to protect investment, many investment guidelines have been developed to assist States in fulfilling their obligations.

4.6.2. Investment Guidelines

The UN, the Organisation for Economic Development and Cooperation (OECD), and other international bodies have made successive efforts to promote responsible conduct by TNCs and businesses in general. These efforts, although in the form of non-binding regulations, have significantly transformed the obligations of States. Such soft law instruments include the UN Guiding Principles and the UNDRIP, already examined in 4.4.1. Other relevant guidelines include the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct,[1018] and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Tripartite Declaration).[1019] These initiatives are voluntary and, therefore, are not binding sources for States' obligations to protect human rights in business.

The OECD Guidelines for Multinational Enterprises[1020] are more geared towards TNCs' obligations than those of States. Yet, the OECD Guidelines make some provisions on States' obligations, especially those arising from TNCs' responsibility to respect human rights. Chapter IV of the OECD Guidelines provides that "[s]tates have the duty to protect human rights" to underscore that the primacy of human rights protection lies within a State's primary function. As further explained in the Commentary to Chapter IV of the OECD Guidelines, this obligation is built upon the three pillars of "protect, respect, and remedy" of the UN Guiding Principles and other international human rights obligations. An essential aspect of the OECD Guidelines is that the failure of a State to fulfil its obligation to protect human rights is not a reason for TNCs not to fulfil their obligations to respect human rights.[1021] The OECD

[1018] OECD Guidelines (n 29).
[1019] ILO, *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (6th edn, 2022) <https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> accessed 02 January 2024.
[1020] OECD Guidelines (n 29).
[1021] Ibid, para 42.

Guidelines try to underscore that weak legal frameworks in some countries or the unwillingness of some States to protect human rights is not a barrier to TNCs' fulfilment of their obligations. This is crucial, especially for some international human rights instruments that some States are reluctant to ratify, especially regarding Indigenous Peoples.[1022]

While being geared mainly toward the responsibilities of TNCs to respect human rights, the ILO Tripartite Declaration,[1023] reiterates States' primary role in protecting human rights under various international human rights laws.[1024] It also encourages the host and home States to promote good social practice and be prepared to consult with each other regarding initiatives on human rights obligations.[1025] In the next section, this research probes into States' obligations to protect human rights and the environment arising from international investment law.

4.6.3. Jurisprudence of State Obligations in Investment Law

As already pointed out, the new generation of BITs contains exceptions to expropriation. Unfortunately, despite these exceptions where States are allowed to introduce counterbalancing measures to fulfil their obligations to protect human rights and the environment, the International Centre for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), have not progressively interpreted these exceptions. This accounts for objections raised by developing countries because they perceive the ICSID Convention as a tool to jeopardise their sovereignty and impede their obligations to regulate, especially in matters relating to environmental protection and human rights protection.[1026] The denunciation of the ICSID Convention was clearly expressed by developing countries such as Bolivia,[1027] Ecuador,[1028] and Venezuela.[1029] Martini's argument for why the ICSID has not

[1022] Ibid, see para 45, where TNCs are enjoined to pay particular attention to their obligations to marginalised groups like the indigenous peoples.
[1023] The ILO Tripartite Declaration (n 30).
[1024] Ibid, see para 10.
[1025] Ibid, para 12.
[1026] Camille Martini, "Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting" (2017) 50(3) *The International Lawyer* 529.
[1027] ICSID News Releases, "Bolivia Submits a Notice under Article 71 of the ICSID Convention" 16 May 2007 <https://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement3.html> accessed 18 October 2023.
[1028] Martini (n 1026) 530. It is to be noted that after Ecuador denounced the ICSID Convention in 2009, it nonetheless signed up to it in 2021. See ICSID News Releases, "Ecuador Signs the ICSID Convention" 21 June 2021 < https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention> accessed 18 October 2023.
[1029] Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve" (*Investment Treaty News* 13 April 2012) <https://www.iisd.org/itn/en/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/#_ftn1> accessed 18 October 2023.

interpreted widely the exceptions to expropriations based on environmental protection is that IILs are not substitutes for failure to create a "binding conventional framework regulating cross-border activities by [TNCs] and their impact on the environment."[1030]

In *Abengoa v Mexico*,[1031] Mexico's refusal to renew an operating licence due to public concerns about local indigenous rights and health was deemed to be indirect expropriation. The ICSID, in its Award, did not take into account concerns raised by the Indigenous Peoples that they were not consulted before the operating licence was initially granted to the investor. The Otomi Indigenous People were particularly concerned that hazardous waste would seep into the soil and pollute local water sources, that toxic clouds could be transported to them by air currents, and that the plant could be susceptible to earthquakes due to a nearby geological fault.[1032] The implication of this Award is that it neglects the rights of Indigenous Peoples to be consulted and the State's obligation to remedy breach of the rights of Indigenous Peoples. The right to water, already examined in Chapter Three, is a fundamental human right, and States have an obligation to provide potable water to their citizens.[1033] Fortunately, in *Suez and Vivendi Universal S.A. v The Argentine Republic*,[1034] the ICSID recognised that while a State is bound to fulfil its obligations under BITs, it equally owes the same obligation to its citizens to protect their water rights. The tribunal observed that "Argentina's human rights obligations and its investment treaties obligations are not inconsistent, contradictory or mutually exclusive."[1035]

The duty to consult and obtain the consent of Indigenous Peoples as required by the ILO Convention 169 is directly imposed on the State and not on a TNC investor. So, an arbitration tribunal would decline any expropriation because the investor did not obtain the consent of the Indigenous Peoples before embarking on the investment. This was the decision in *Bear Creek Mining v Republic of Peru*,[1036] where Bear Creek's licence to mine the Santa Ana silver mining project located in the Puno region of Peru was revoked by the Peruvian government. The region was home to numerous Aymara Indigenous People who practised a traditional lifestyle centred

[1030] Martini (n 1030) 531.
[1031] ICSID, *Abengoa, S.A. y COFIDES, S.A. v United Mexican States (Abengoa v Mexico)* (ICSID Case No ARB(AF)/09/2).
[1032] George K Foster, "Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More From Investors" (2019) 69 *American University Law Review* 105, 122; Katia Fach Gómez, "ICSID Claim by Spanish Companies Against Mexico over the Center for the Integral Management of Industrial Resources" (2010) 8 *Spain Arbitration Review* 1, 7.
[1033] The Human Right to Water and sanitation (n).
[1034] ICSID, *Suez and Vivendi Universal S.A. v The Argentine Republic* (2010) ARB/97/3.
[1035] Ibid, para 262.
[1036] *Bear Creek Mining Corporation v. Republic of Peru*, Award (ICSID Case No. ARB/14/21) 123 (30 November 2017).

on subsistence farming and herding.[1037] The investor was alleged not to have engaged in sufficient consultation as it only consulted with the Indigenous Peoples but did not obtain their consent. Also, not all the Indigenous groups were consulted. The Peruvian government argued that Bear Creek's recovery of the revoked licence should be precluded because the community's consent was required under the ILO Convention 169, and the investor's consultation procedure was inadequate.[1038] The majority of the arbitration panel rejected this argument and held that the revocation of the licence amounted to expropriation and that the "ILO Convention 169 imposes direct obligations only on States."[1039]

Under CIL, expropriation must be backed with payment of compensation.[1040] This was one of the contentions in the case of *South American Silver v Bolivia*,[1041] where South American Silver Limited, a Canadian mining company, held exploration and mining rights for the Malku Khota silver and indium mining project in Bolivia. The project was situated in a region with significant mineral deposits and home to some indigenous communities. In 2012, the government of Bolivia revoked South American Silver's mining rights and cancelled its contracts, which was motivated by environmental and social concerns raised by the Indigenous Peoples and political opposition to mining activities in the region. While upholding the expropriation claim, the tribunal ruled that the host State could not revoke the investor's mining rights without compensating the investor.[1042] An earlier case of *Santa Elena SA v Republic of Costa Rica*[1043] arrived at a similar conclusion. The ICSID, while ruling on the claim of direct expropriation, noted that "the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference." In other words, it is immaterial that the expropriation was for a public purpose, made when a State fulfils its obligations to protect the environment; compensation should always be paid in any indirect expropriation.

[1037] Foster (n 1032) 130.
[1038] *Bear Creek Mining Corporation* (n 1036) para 560 – 567.
[1039] Ibid, para 664.
[1040] *The Chorzow Factory Case* (n 1002); Karol Wolfke, *Custom in Present International Law* (Zakład Narodowy im Ossolińscy, 1964).
[1041] The Permanent Court of Arbitration, *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (22 November 2018).
[1042] Ibid, paras 654, 657, 796, 938. See also Foster (n 1032) 159.
[1043] *Compania del Desarollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award (17 February 2000).

A parallel jurisprudence, police power, has been developed to the doctrine of sole effect to justify expropriation based on a State's legitimate power to regulate without being liable for compensation. The police power doctrine refers to the principle that governments have the sovereign authority to take certain measures to protect public welfare, safety, health, and the environment without being liable for economic injury. This doctrine recognises that States have the right to enact and enforce laws and regulations for the well-being of their citizens, even if such measures have an impact on foreign investments. This is consistent with the PCIJ's decision in the *Certain German Interests in Polish Upper Silesia*[1044] case, where it was held that a State can interfere in investment for "reasons of public utility, judicial liquidation and similar measures." In *Sedco Inc v National Iranian Oil Co,*[1045] the tribunal Stated that "an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide "regulation" within the accepted police power of States."[1046] The burden of proving that the exercise of police power exceeded the valid exercise of the power lies with the claimant-investor. In *Les Laboratoires Servier v Republic of Poland* (Servier v Poland),[1047] the tribunal held that the regulatory changes introduced by Poland to control some medications did not amount to expropriation and that Poland had acted within its regulatory authority under the police power doctrine. It held that the burden always remains with the claimant-investor to prove that the State acted beyond its police powers.

The decision by the tribunal in the case of *Servier v Poland* should always serve as a model for any case based on expropriation. It is not conceivable that while States are obligated to fulfil their duties to protect the environment and the rights of Indigenous Peoples, they are constantly at risk of being liable for economic injury whenever they exercise their legitimate sovereign authorities. International investment law should not be placed above international human rights obligations because doing so would amount to an indirect approval for States to breach their international human rights obligations. The police power doctrine is in line with the obligation of States to provide remedies whenever any rights of the Indigenous Peoples have been breached. As rightly pointed out by Kałduński while examining the case of *Urbaser v Argentina* thus:

> The State is obliged to act in accordance with international law (including human rights treaties) and its constitutional law. They include […] an obligation to act in

[1044] *Certain German interests in Polish Upper Silesia, Germany v Poland*, Merits, Judgment, (1926) PCIJ Series A no 7, ICGJ 241 (PCIJ 1926), 25th May 1926.
[1045] *Sedco Inc v National Iranian Oil Co* (1985) 9 Iran-US CTR 248.
[1046] Ibid, para 275.
[1047] *Les Laboratoires Servier v Republic of Poland* (Award) UNCITRAL14 February 2012.

> good faith and, sometimes more importantly, a government's constitutional obligation to ensure health and access to water and to take all measures in this regard. The activities taken for such purposes do not constitute a breach of the [fair and equitable treatment…] as they should be considered as accepted by an investor in a contract entered into with a host State. They are part of the legal framework, and an investor has an obligation to respect the rights and powers of the State under contract and national law.[1048]

4.7.Concluding Remarks

This chapter has examined State obligations to respect, protect, and fulfil human rights within the context of business activities. The chapter explored the foundational frameworks, such as the UDHRs, ICCPR, and ICESCR, which delineate the obligations of States in upholding and promoting human rights. Also, the UN Guiding Principles are the foundation of other sources of soft instruments for States' human rights obligations, together with other legally non-binding instruments. Also, apart from the obligation to respect human rights, States' primary duty to protect the environment and their role in combating climate change under various hard law instruments, like the UNFCCC, was examined. International investment law imposes similar obligations. While the Legally Binding Instrument promises to be a comprehensive document of State obligations for business and human rights, it is important that States utilise the human rights provisions in various BITs to fulfil their human rights and environmental obligations.

Although the concepts of responsibility and liability are often looked at as conveying the same meaning, State liability for breach of human rights and environment has grown as a distinct concept. Articles 5 and 8 of the ARSIWA provide for when a State could be liable for acts of third parties, which have been interpreted to include TNCs. While Article 5 talks about the conduct of persons or entities "empowered by the law of that State to exercise elements of the governmental authority", Article 8 is particular about acts of persons or entities acting under the control or direction of a State. This was typified in the *Ogoni case*, where the Nigerian government supplied Shell with military officers who destroyed the homes of the Ogoni people and displaced them from their land. Moreover, these provisions align with various norms of general international law, such as the no-harm and polluter-pays principles. Indigenous Peoples and NGOs are increasingly utilising the positives of climate change litigations to establish States' climate change obligations under the various international climate change laws.

[1048] Marcin Kałduński, *The Protection of Legitimate Expectations in International Investment Law* (Nicolaus Copernicus University Press, 2020) 148.

African States have either signed or ratified most of the instruments analysed in this chapter. Unfortunately, obligations of States arising from international investment law are almost non-existent because of the unfair protection of investment without corresponding responsibilities on investors. The position of the African group at the deliberation of the Draft Binding Legal Instrument, as contained in the Advisory Note, is reflected in the current draft of the document. As examined in the next chapter and in Chapter Seven, the current situation of investment law in Africa imposes the obligation to protect and respect Indigenous Peoples' rights on States and TNCs. Consequently, in the next chapter, this thesis examines corporate responsibilities for human rights, environmental protection, and climate change.

Chapter FIVE

Responsibilities of Transnational Corporations

5.1.Introductory Remarks

This chapter emphasises the specific responsibilities that TNCs have towards human rights and the environment and their increasing expectations toward combating climate change. The responsibilities of TNCs towards human rights and the environment are a growing area in international public law. Usually, such responsibilities are addressed explicitly to States as sovereign entities with the authority to regulate all activities within their territories. However, this regime appears to be changing, albeit slowly, and in most cases, it only confers voluntary responsibilities on TNCs in non-binding legal instruments. Furthermore, these responsibilities are contained in the soft law regime of corporate responsibility. Still, there is an ongoing effort to create an internationally binding instrument to regulate the business activities of TNCs, otherwise called the Legally Binding Instrument.[1049] The investment treaty regime is characterised by its asymmetry—its persistent emphasis on safeguarding investor rights but not responsibilities and only conferring obligations on States. Prior to now, BITs were couched in such a way as to make States the only addresses of human rights obligations, but there is a paradigm shift in recent BITs, where some obligations are placed on TNCs to respect human rights and to carry out their business activities in a manner that considers the environment. This chapter examines these obligations based on two categories – binding and non-binding instruments. Under binding instruments, which constitute hard law, this chapter looks at those responsibilities established in the Rio frameworks and the current attempt at imposing obligations on TNCs under international investment law through BITs. Equally, regarding those arising from non-binding instruments, this chapter examines the responsibilities arising from rules and agreements under special international bodies. Finally, the chapter delves into the possibilities of creating binding responsibilities through the proposed Legally Binding Instrument.

However, before going into these responsibilities, it is essential to underline that two models of TNCs' responsibilities exist – direct and indirect. In international law, a TNC may incur

[1049] The attempts to hold TNCs accountable by creating corporate responsibilities have had a long history, starting as far back as in 1970s when emerging economies advocated for a Code on TNCs and a New International Economic Order (NIEO). The culmination of all these attempts was the adoption of the UN Guiding Principles in 2011. See Radu Mares, "Regulating Transnational Corporations at the United Nations – The Negotiations of a Treaty on Business and Human Rights" (2022) 26(9) *The International Journal of Human Rights* 1522– 1523.

liability for its actions to the degree that it is subject to primary legal obligations (direct responsibility) or has its business activities regulated by States fulfilling their own international legal obligations (indirect responsibility). In other words, an indirect corporate human rights responsibility arises when TNCs are subjected to a State's international obligation to protect human rights or to criminalise some acts.[1050] The main emphasis is on the duty of the government to protect individuals from rights violations committed by external entities like TNCs (or to enforce certain measures on TNCs to promote the fulfilment of rights). According to Bilchitz, the indirect model of corporate responsibility places an obligation on States to ensure that TNCs do not violate the human rights of their citizens while rejecting the idea of any form of obligation on TNCs that flows directly from international human rights instruments.[1051]

On the other hand, Bilchitz pointed out that the direct model of corporate responsibility recognises that international human rights instruments impose direct obligations on TNCs to protect human rights and the environment. This model also argues that even if such obligations are lacking, they should be created by States to facilitate the protection of human rights and the environment. However, the direct model requires recognising that companies are obligated to adhere to human rights provisions, as well as implementing a guidance or procedure to ascertain the scope and character of these obligations.[1052] As discussed in this chapter, most of the sources of TNCs' responsibilities favour the idea of indirect responsibility, including the ongoing Legally Binding Instrument. Fortunately, new generations of BITs contain direct human rights and environmental responsibilities of TNCs by the use of "shall" and other mandatory terms to address these responsibilities. Consequently, this chapter aims to examine the different sources of these responsibilities while highlighting the growing trend to impose more human rights and environmental responsibilities on TNCs.

5.2. Hard Law Instruments

As indicated earlier, most responsibilities regarding human rights and the environment are imposed on TNCs under some legally non-binding instruments. Although there is an ongoing

[1050] See generally Oliver Dörr, "Corporate Responsibility in (Public) International Law" (*Conflict of Laws Net*, 12 May 2020) <https://conflictoflaws.net/2020/corporate-responsibility-in-public-international-law/> accessed 28 December 2023; Nadia Bernaz, "Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty" (2021) 22 *Human Rights Review* 45 – 64.
[1051] David Bilchitz, "Corporate Obligations and a Treaty on Business and Human Rights: A Constitutional Law Model?" in Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, 2017) 186.
[1052] Ibid.

attempt to establish binding TNCs' human rights responsibilities, which is yet to become binding, it will be examined as a binding instrument since the idea behind the document is to establish a binding instrument on business and human rights. This subchapter will also analyse international investment law as a source of corporate responsibility.

5.2.1. International Investment Law

In international law, there is a gap between human rights norms in public international law regarding corporate responsibility for human rights on the one hand and the norms found in international investment law on the second hand.[1053] Furthermore, there are ongoing efforts to incorporate human rights and environmental standards into international investment law to ensure that human rights are adequately protected in the business activities of TNCs.[1054] To this end, therefore, the obligations of TNCs towards the protection of human rights and the environment could also be gathered from international investment law, especially through BITs and other investment agreements. Recently, BITs have served as tools for introducing human obligations of TNCs to bridge the gap between TNCs' human rights violations and the lack of direct obligations under international law. This type of BITs, generally called new generation of BITs (NGBITs), seek not just the protection of investment but also to promote responsible and sustainable investment,[1055] thereby striking a balance between private and public interests.[1056] For instance, the Nigeria–Morocco BIT signed in 2016[1057] incorporates elements of sustainable development and the obligations of investors towards sustainable development, protection of human rights, and the place of local communities in achieving sustainable development.

[1053] Barnali Choudhury, "Investor Obligations for Human Rights" (2020) 35(1-2) *ICSID Review* 82.

[1054] Dmitry V Krasikov, "The Evolving Role of the Human Rights Factor within the State of Necessity Test in Investment Arbitration" (2020) 13(1) *Journal of Politics and Law* 12; Alessandra Arcuri and Francesco Montanaro, "Justice For All? Protecting The Public Interest In Investment Treaties" (2018) 59(8) *Boston College Law Review* 2791, 2823.

[1055] John Beechey, "New Generation of Bilateral Investment Treaties: Consensus or Divergence?" in Arthur W Rovine (ed) *Contemporary Issues in International Arbitration and Mediation* (Martinus Nijhoff Publishers, 2009) 5 – 6.

[1056] Alain-Guy Sipowo, "Accountability of Multinational Corporations for Human Rights Violations in Investment Regimes in Africa" in Yenkong Ngangjoh Hodu and Makane Moïse Mbengue (eds) *African Perspectives in International Investment Law* (Manchester University Press, 2020) 93; Tarcisio Gazzini, "Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties" (*European Journal of International Law blog: Talk!* 2017) <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/> accessed 28 November 2023.

[1057] *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria*, opened for signature 3 December 2016 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> accessed 30 November 2023.

The Nigeria–Morocco BIT recognises the important contribution investment can make in sustainable development, economic growth, and the furtherance of human rights and human development. It seeks "to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the State parties" and to balance "the rights and obligations among the State Parties, the investors, and the investments"[1058] towards human rights and the environment. The treaty imposes the following pre-establishment obligations on the investor as it concerns impact assessment:

> 1. Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host State for such an investment or the laws of the home State for such an investment, whichever is more rigorous in relation to the investment in question.
>
> 2. Investors or the investment shall conduct a social impact assessment of the potential investment.
>
> 3. Investors, their investment and host State authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.[1059]

Also, regarding post-establishment obligations, the Nigeria–Morocco BIT imposes the following responsibilities on the investment:

> 1. Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard
>
> 2. Investments shall uphold human rights in the host State.
>
> 3. Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998
>
> 4. Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host State and/or home State are Parties.[1060]

[1058] Ibid, Preamble.
[1059] Ibid, Art 14 (1-3).
[1060] Ibid, Art 18 (1-4).

In furtherance to these obligations, the Nigeria–Morocco BIT mandates the Investment to establish and maintain local community liaison processes as part of its corporate governance and practices.[1061] This would mean that in communities where there are Indigenous Peoples, the Investment is obligated to liaise with these groups. Additionally, investors are encouraged to observe the standards of responsible practices as contained in the ILO Tripartite Declaration on Multinational Investments and Social Policy and other policies that espouse responsible business practices, like the Sustainable Development Goals of the United Nations.[1062] Another unique attribute of the BIT is that it allows any of the State parties to implement measures that are necessary to ensure that investments within their territories are carried out in such ways that are "sensitive to environmental and social concerns", provided such measures are non-discriminatory.[1063] While commenting on the novelties introduced by this BIT, Inyang opined that the use of "shall" whenever an obligation is imposed on the Investors is an indication of the binding nature of the provisions.[1064] In addition to this, he argues that these obligations indicate a shift towards a more ethically conscious approach to promoting investment. While the Nigeria–Morocco BIT promotes business, it does not prioritise investment over the protection of human rights, environmental sustainability, and the social welfare of the host State.[1065] Unfortunately, as innovative and progressive as this BIT is, it has not been effective in addressing the issue of asymmetry of rights on the investors and obligations of States under international investment agreements. This is the point made by Arcuri and Montanaro when they expressed that although the inclusion of investor obligations in investment treaties is positive, the current reform initiatives are yet to establish efficient methods to enforce these obligations. As a result, the issue of asymmetry remains partially unresolved.[1066]

Other countries have equally tried to incorporate investors' direct obligations towards human rights and environmental protection. The 2019 Dutch Model BIT[1067] contains both mandatory and voluntary clauses for investors' obligations. It provides that "Investors and their investments shall comply with domestic laws and regulations of the host State, including laws

[1061] Ibid, Art 19(1)(b).
[1062] Ibid, art 24 (1 and 2)
[1063] Ibid, art 13(4).
[1064] Philippa Osim Inyang, "The Morocco-Nigeria BIT: An Important contribution to Ensuring the Accountability of TNCs for Their Human Rights Violations?" (2023) 19(2) *European Scientific Journal* 40, 43.
[1065] Ibid.
[1066] Arcuri and Montanaro (n 1054) 2804.
[1067] Netherlands Model Investment Agreement, Agreement on Reciprocal Promotion and Protection of Investments (22 March 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 24 December 2023.

and regulations on human rights, environmental protection and labour laws."[1068] It goes further to subsequently encourage investors to voluntarily adopt international norms of corporate social responsibility, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles, into their internal policies.[1069] Finally, non-compliance with the principles enunciated in the UN Guiding Principles and the OECD Guidelines would be taken into consideration by the tribunal while awarding compensation.[1070] In other words, as pointed out by Bueno, Yilmaz, and Ngeuleu, if tribunals align the reduction of damages with the extent of harm caused by an investor's actions, it could serve as a strong motivation for investors to prevent human rights and environmental damage.[1071] Although the UN Guiding Principles and the OECD Guidelines are part of soft law, they are gradually being hardened by the express mention of their principles in various BITs.

Similarly, the 2019 Brazil-United Arab Emirates BIT[1072] makes it mandatory for investors to strive to achieve the highest level of contribution to the sustainable development of the Host State by incorporating socially responsible principles based on the voluntary principles and standards set out in the OECD Guidelines.[1073] Regarding obligations towards human rights protection, the BIT makes it a voluntary obligation for the investor to endeavour to respect internationally recognised human rights as adopted by the Host State. Unfortunately, the respect for human rights in this regard is only as it affects those involved in the companies' activities.[1074] Moving forward, the Brazil–Ethiopia BIT of 2018 creates direct obligations on investors to comply with the responsible business practice set in the OECD Guidelines, contribute to environmental progress aimed at achieving sustainable development, and respect internationally recognised human rights of those involved in the activities of the investor.[1075]

[1068] Ibid, art 7(1).
[1069] Ibid, art 7(2).
[1070] Ibid, art 23.
[1071] Nicolas Bueno, Anil Yilmaz, and Isidore Ngeuleu, "Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses" (2023) 24 *Journal of World Investment and Trade* 179, 192.
[1072] *Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates*, 15 March 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download> accessed 1 December 2023.
[1073] Ibid, art 15(1).
[1074] Ibid, art 15(2)(b).
[1075] *Agreement Between The Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation* (Brazil-Ethiopia ICF) 11 April 2018, art 14 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5717/download> accessed 02 December 2023. See also *Agreement Between the Government of the Federal Democratic Republic of Ethiopia and The Government of the State of Qatar for the Promotion and Reciprocal Protection of Investments*, 14 November 2017 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5982/download> accessed 02 December 2023, where the investors are obligated to "comply with the labour and environment laws and regulations of the host contracting party", art 14.

Other BITs also refer to the following non-binding instruments as what investors must comply with, either directly or indirectly: OECD Guidelines,[1076] ILO Tripartite Declaration,[1077] and the UN Global Compact.[1078] Although discussed in Chapter Seven, it is worth mentioning here that within the African continent, the Economic Community of West African States (ECOWAS) Supplementary Act on Investment[1079] and the Draft Pan-African Investment Code of 2016[1080] set out, elaborately, the obligations of investors and TNCs towards human rights and environmental protection.

Furthermore, investment arbitral tribunals have given expansive interpretations in this area to hold that corporate human rights obligations exist. In *Urbaser v Argentina*,[1081] the investor, a shareholder in a concessionaire responsible for providing water and sewerage services, initiated an arbitral proceeding against Argentina for the financial losses it suffered in the concessionaire as a result of the emergency measures by the Argentine government, which significantly affected the financial viability of TNCs that operate water management systems. Argentina

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[1076] *Acuerdo Entre La República De Colombia y El Reino De España Para La Promoción Y Protección Recíproca De Inversiones* (Colombia-Spain BIT) 16 September 2021, art 17 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6373/download> accessed 02 December 2023; European Union, *Trade And Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*, Official Journal of the European Union (L 149/10) (EU–UK TCA), 30 April 2021, art 406 (2)(b) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01)> accessed 02 December 2023; *Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership* (Japan–UK CEPA) 23 October 2020, art 16(5) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6046/download> accessed 02 December 2023; *Armenia-EU Comprehensive and Enhanced Partnership Agreement (CEPA)* (Armenia - EU CEPA), 24 November 2017, art 276, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3806/armenia---eu-cepa-2017-> accessed 02 December 2023.

[1077] *Free Trade Agreement Between the European Union and the Republic of Singapore*, (EU-Singapore FTA) 14 November 2019, Official Journal of the European Union (L 294/3) art 12(11)(4) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019A1114(01)&from=EN#page=96> accessed 02 December 2023; *Agreement between the European Union and Japan for an Economic Partnership*, (EU- Japan EP) 27 December 2018, Official Journal of the European Union (L 330) art 16(5) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02018A1227(01)-20220201> accessed 02 December 2023; EU–UK TCA (n 1076) art 406; Japan–UK CEPA (n 1076) art 16(5).

[1078] EU–UK TCA (n 1076) art 406; EU–Singapore FTA (n 1077) art 12(11); Armenia–EU CEPA (n 1076) art 276. For a complete assessment of these BITs and their incorporation of corporate human rights obligations, see Bueno, Yilmaz, and Ngeuleu (n 1071) 192 – 197.

[1079] Economic Community of West African States (ECOWAS) ECOWAS, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, (signed 19 December 2008 and entered into force on 19 January 2009< https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments-2008-> accessed 02 December 2023.

[1080] African Union Economic Affairs Department, *Draft Pan-African Investment Code* (2016) <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf> accessed 02 December 2023.

[1081] *Urbaser SA, Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No ARB/07/26, Award, 8 December 2016 (Urbaser v Argentina).

filed a counterclaim where it argued that the failure of the investor to supply water was a violation of the human right to water. In agreeing with the counterclaim that the investor has violated its obligation to secure the right to water under international law, the ICSID pointed out that it was:

> reluctant to share Claimants' principled position that guaranteeing the human right to water is a duty that may be born [sic] solely by the State, and never borne also by private companies like the Claimants. When extended to human rights in general, this would mean that private parties have no commitment or obligation for compliance in relation to human rights, which are on the State's charge exclusively.

According to Luke, while the decision in *Urbaser v Argentina* did not explicitly address the connections between environmental and human rights law, its inclusive interpretation of human rights suggests that investment tribunals may adopt similarly comprehensive approaches in the future.[1082] In this award, the tribunal cited various international human rights instruments like the UDHR, the ICESCR, and the UN Guiding Principles, indicating that human rights obligations like the right to water can be imposed on TNCs. However, as argued by Schacherer, it is important to note that the award demonstrates that international human rights obligations are largely imposed on States and do not include binding obligations on TNCs. If States desire to impose direct responsibilities on investors, it is crucial to accomplish this by employing clear wording in the BIT, just like in the Nigeria–Morocco BIT.[1083]

As already pointed out in the various BITs, an investor has an obligation to comply with domestic laws on the protection of human rights and the environment. Failure of an investor to comply with such domestic laws voids any investment already embarked on and would ultimately rob an arbitral tribunal of jurisdiction whenever the investor complains of revocation of operational license. This point was made in the case of *Cortec Mining v Kenya*,[1084] where the arbitration was commenced by two English and Walsh companies and their Kenyan subsidiary, invoking the provisions of the BIT between Kenya and the United Kingdom.[1085]

[1082] Elliot Luke, "Environment and Human Rights in an Investment Law Frame" in Kate Miles (ed) *Research Handbook on Environment and Investment Law* (Elgar, 2019) 165.
[1083] Stefanie Schacherer, *International Investment Law and Sustainable Development: Key cases from the 2010s* (International Institute for Sustainable Development, 2018) 26.
[1084] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (Cortec Mining v Kenya), 22 October 2018, (ICSID Case No. ARB/15/29). For a summarised version of the case, see Lorenzo Cotula and James T Gathii, "Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya" (2019) 113 *American Journal of International Law* 574.
[1085] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments*, 13 September 1999 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1795/download> accessed 03 December 2023.

The disputes originated from a mining venture located at Mrima Hill in Kenya, a place that was described as "the world's largest undeveloped niobium and rare earth deposits."[1086] In addition, the region is home to an abundance of biodiversity and sites called kaya that are significant to the Digo people, an indigenous population. It is protected by Kenyan law as a national monument, a forest reserve, and a wildlife reserve.[1087] Under the relevant Kenyan domestic environmental law, investors must conduct a feasibility study, carry out an environmental impact assessment, and develop plans for resettling the Indigenous Peoples who will be affected by the mining activities.[1088] The government argued that failure to fulfil these obligations made the license void *ab initio*, and as such, there was no expropriation.[1089] On the failure of the investors to fulfil their obligations as demanded by Kenyan environmental laws, the arbitral tribunal held that:

> the Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA licence (or approval in any valid form)… concerning the environmental issues involved in the… Mrima Hill, constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.[1090]

Finally, under international investment treaties, human rights and environmental obligations of an investor-TNC are gradually becoming a norm. Even when some BITs do not expressly impose obligations on investors, an arbitral tribunal would likely find that failure to fulfil an obligation under domestic laws amounts to a breach of the investor's obligation, as decided in *Cortec Mining v Kenya*.[1091]

Apart from BITs, which have been negotiated and therefore binding on the parties, States prepare models of BITs in readiness for future negotiations with other States. These are called Model Agreements, as they are templates of pre-drafted documents designed to enhance speed and uniformity by offering a foundation for negotiating particular issues in investment treaties. A look at some of the Model Agreements indicates an increasing desire by States to ensure that TNCs and other investments are imposed with human rights and environmental responsibilities while giving room to attract investors. The Southern African Development Community

[1086] *Cortec Mining v Kenya* (n) para 1.
[1087] Ibid, paras 42 and 43.
[1088] Ibid, paras 112, 116–117, 121.
[1089] Ibid, para 4.
[1090] Ibid, para 365.
[1091] Ibid.

(SADC) Model Bilateral Investment Treaty Template,[1092] in its Preamble, recognises "the important contribution investment can make to the sustainable development… and the furtherance of human rights and human development."[1093] It requires investments to comply with environmental and social impact assessments prior to their establishment. This responsibility also extends to the assessment of the human rights of the persons who are in the areas where the investment would have potential adverse impacts.[1094] Article 15 is explicit in its requirement that TNCs should respect human rights and avoid engaging in activities that breach human rights. To properly achieve this responsibility, TNCs are not to carry out their business activities in a way that is "inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, *whichever obligations are higher*."[1095] In other words, in a situation where there are conflicts between the human rights obligations of States, the golden rule for TNCs is to comply with the norm with higher human rights standards.

The approach in the 2019 Netherlands Model BIT[1096] is to empower an arbitral tribunal to take into cognisance the compliance or non-compliance by TNCs of their human rights and environmental commitments under the UN Guiding Principles, the OECD Guidelines, and other voluntary non-binding instruments in determining the amount of award to be given to an investor-claimant.[1097] This is after it has already imposed on investors the direct obligations to comply with domestic regulations of the host State on human rights and environmental protection in Article 7(1). Duggal and Diamond point out that adopting such an approach under the Netherlands Model BIT provides another incentive for investors to comply with human rights and environmental obligations.[1098] This is so because there are possibilities of being awarded negligible compensation for revocation of a licence if the tribunal finds that such revocation of a licence was a result of non-compliance.

[1092] Southern African Development Community, *SADC Model Bilateral Investment Treaty Template with Commentary* (July 2012) <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 24 December 2023.
[1093] Ibid, p 5.
[1094] Ibid, art 13 (1 and 2).
[1095] Ibid, art 15 (1 and 3).
[1096] Netherlands Model Investment Agreement (n 1067).
[1097] Ibid, art 23.
[1098] Kabir A N Duggal and Nicholas J Diamond, "Model Investment Agreements and Human Rights: What Can We Learn from Recent Efforts?" (2021) *Colombia Journal of Transnational Law* <https://www.jtl.columbia.edu/bulletin-blog/model-investment-agreements-and-human-rights-what-can-we-learn-from-recent-efforts> accessed 24 December 2023.

Similarly, the 2019 Moroccan Model BIT[1099] provides for direct human rights obligations of TNCs and other investments where it requires investors "to manage or operate their investments in compliance with international obligations regarding human and labour rights, responsible business conduct, health and environmental protection, and consistent with climate change mitigation and adaptation objectives."[1100] Just like the Netherlands Model BIT, the Moroccan Model BIT considers violations of human rights and the environment as mitigating factors in awarding compensation in the event that an investment case is filed against the host State. But unlike the Netherlands Model BIT, the Moroccan Model BIT does not contain the obligation of TNCs to carry out an environmental impact assessment. Banerjee and Weber consider this omission as a "notable shortcoming" of the document, especially when compared to other model BITs of its contemporary.[1101]

The Draft Indian Model BIT[1102] would have taken the regime of model BITs to another new level if its final version had retained its initial investor's broad human rights and environmental responsibilities. It provided that the investor shall comply with the laws of the host States in a wide range of areas, including environmental law,[1103] law relating to conservation of natural resources,[1104] and human rights.[1105] It further provided that investors should recognise and respect the traditions and rights of Indigenous Peoples of the host State in their business activities.[1106] Unfortunately, these provisions were abandoned in the final version of the Indian Model BIT,[1107] which now has only a provision requiring enterprises to voluntarily incorporate internationally recognised corporate governance practices that may address issues like environment, human rights, and community relations.[1108] While Duggal and Diamond see this omission in the final draft as a disconnect between an intention to impose strict human rights

[1099] The official document is in French and it can be accessed here: Accord Entre Le Royaume Du Maroc, Pour La Promotion Et La Protection Réciproques Des Investissements (Version juin 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download> accessed 24 December 2023. But an English translation is provided by the Electronic Database of Investment Treaties, Morocco Model BIT (2019) <https://edit.wti.org/document/show/b5908c50-ef94-4902-b71d-12024f285ef8> accessed 24 December 2023.
[1100] Ibid, art 20(4).
[1101] Arpan Banerjee and Simon Weber, "The 2019 Morocco Model BIT: Moving Forwards, Backwards or Roundabout in Circles?"(2021) 36(3) *ICSID Review* 536, 554.
[1102] Draft copy of the Model Text for the Indian Bilateral Investment Treaty <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> accessed 27 December 2023.
[1103] Ibid, art 12(1)(iii).
[1104] Ibid, art 12(1)(iv).
[1105] Ibid, art 12(1)(v).
[1106] Ibid, art 12(2).
[1107] Department of Economic Affairs, Government of India, *Model Text for the Indian Bilateral Investment Treaty* (2016) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 27 December 2023.
[1108] Ibid, art 12.

and environmental responsibilities on TNCs and the final version,[1109] Hodgson and Sharma consider the current version as an attempt by the government to strike a balance between attracting investment and the right of the government to regulate.[1110]

5.2.2. The Legally Binding Instrument and Corporate Human Rights Obligations

As pointed out earlier, even though it would be binding if it is eventually adopted, examining it as a separate source of responsibilities for TNCs is crucial since it is yet to be endorsed. As much as the Legally Binding Instrument primarily addresses States and their human rights and environmental responsibilities, it makes provisions for indirect human rights and environmental responsibilities of TNCs.

Several civil society organisations and experts have advocated for the imposition of direct human rights obligations on companies by the Legally Binding Instrument[1111] since that would reduce "overdependency on individual States to create and enforce norms."[1112] In the Advisory Note,[1113] WGEI advocated for direct obligations on TNCs because it is "the responsibility of business enterprises, as entities whose operations carry major social, economic and environmental impacts, to put in place measures that ensure respect for human rights and to contribute positively to the realisation of the right to development."[1114] They argued further that this requirement is based on the understanding that the absence of these obligations and the corresponding measures may lead to the establishment of a situation where these entities

[1109] Duggal and Diamond (n 1098).
[1110] Matthew Hodgson and Sanya Sharma, "The Aftermath of India's 2016 Model BIT: Safeguarding Present and Future Investments" (2022) 8(1) *National Law School Business Law Review* 1, 2.
[1111] David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge University Press, 2021) 415. It is important to point out that although different civil society organisations and NGOs advocated for a binding legal instrument, the EU initially opposed the idea. See Heidi Hautala and others, "Why is the EU still absent in UN Negotiations on Human Rights rules for Business?" (*European Coalition for Corporate Justice*, 29 October 2021) <https://corporatejustice.org/news/why-is-the-eu-still-absent-in-un-negotiations-on-human-rights-rules-for-business/> accessed 11 May 2024. In December 2023, the European Parliament regrets the initial opposition to the legally binding treaty by pointing out that although "all EU Member States who were then members of the UNHRC voted against the resolution launching the [legally binding instrument]," it now calls on European countries to accept the process and "welcomes the updated draft LBI, published in July 2023." See the EU Committee on Foreign Affairs, *Report on Shaping the EU's Position on the UN Binding Instrument on Business and Human Rights, in Particular on Access to Remedy and the Protection of Victims*, A9-0421/2023, 8 December 2023 <https://www.europarl.europa.eu/doceo/document/A-9-2023-0421_EN.html> accessed 11 May 2024. This followed an earlier resolution adopted by the European Parliament in 2018 reiterating "the importance of the EU and its Member States being actively involved in this intergovernmental process." See European Parliament, *Resolution of 4 October 2018 on the EU's Input to a UN Binding Instrument on Transnational Corporations and Other Business Enterprises with Transnational Characteristics with Respect to Human Rights* (2018/2763(RSP)) <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0382_EN.html> accessed 02 June 2024.
[1112] Surya Deva, "Treaty Tantrums: Past, Present and Future of a Business and Human Rights Treaty" (2022) 40(3) *Netherlands Quarterly of Human Rights* 211, 218.
[1113] Advisory Note (n 847).
[1114] Ibid.

can function without respecting human rights. At a minimum, this necessitates that business firms respect human rights and proactively prevent any human rights violations.[1115]

However, WGEI argues that the African Charter already has a legislative backup for direct obligations on TNCs in Article 27. Article 27(2) provides for the duties of individuals, which requires that individuals must exercise their rights "with due regard to the rights of others." WGEI contends that "if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies."[1116] Moreover, it is important to recognise that TNCs operate through various smaller organisations such as subsidiaries, agencies, and representatives, some of which may be of small or medium size. It is crucial that all of these entities are held responsible for any abuses of human rights. However, it is important to acknowledge that larger organisations may justifiably have more responsibilities due to their significant influence.[1117] In conclusion,

> The WGEI therefore proposes that the Binding Instrument should go further than the very minimum, and also envision promotion and fulfilment of certain human rights obligations by business enterprises. In this regard the adoption of sustainable and ethical business practices should not be voluntary, but should be a binding duty on business enterprises. These obligations on business enterprises should be recognised in the operative section of the Legally Binding Instrument and not only in the Preamble.[1118]

Indeed, it was initially contemplated to impose direct human rights obligations on TNCs, as revealed in the 2017 Elements of the Draft Binding Instrument.[1119] However, several resistances from States and TNCs led to dropping the idea and adopting indirect human rights instead.[1120] As pointed out by Deva, even though this is the current situation in the Legally Binding Instrument, hints of subtle indirect obligations could be gleaned from the current version of the document. In its Preamble, the 2023 version of the Legally Binding Instrument emphasises that:

> business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect internationally

[1115] Ibid.
[1116] Ibid.
[1117] Ibid.
[1118] Ibid.
[1119] Intergovernmental Working Group, *Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 29 August 2017, para 3(2) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 02 December 2023.
[1120] Deva (n 1112) 218.

> recognized human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing human rights abuses or mitigating human rights risks linked to their operations, products or services by their business relationships.[1121]

Additionally, in its Statement of purpose, the Legally Binding Instrument provides that one of its purposes is to "clarify and ensure respect and fulfilment of the human rights responsibilities of business enterprises."[1122] Deva doubts whether there will be a consensus on the human rights obligations of businesses at this stage despite these hints.[1123] This limitation notwithstanding, the Legally Binding Instrument imposes indirect human rights obligations on business enterprises through the obligations of States to implement human rights laws with which TNCs will comply. In other words, TNCs' indirect human rights obligations are thus established:

> State Parties shall adopt appropriate legislative, regulatory, and other measures to:
>
> (a) prevent the involvement of business enterprises in human rights abuse;
> (b) ensure respect by business enterprises for internationally recognized human rights and fundamental freedoms;
> (c) ensure the practice of human rights due diligence by business enterprises; and,
> (d) promote the active and meaningful participation of individuals and groups, such as trade unions, civil society, non-governmental organizations, Indigenous Peoples, and community-based organisations, in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.

The mention of Indigenous Peoples' participation in the "development and implementation of laws policies and other measures to prevent the involvement of business enterprises in human rights abuse" is in line with the right of Indigenous Peoples to participate fully in decision-making in matters that will affect their rights under various legal instruments.[1124] The implication is that the Legally Binding Instrument intends to make Indigenous Peoples take part in the formulation of legal regimes in their various States regarding the human rights obligations of TNCs.

The provisions of this document have been carefully couched in such a way as to avoid the shortcomings of previous attempts at creating a legally binding instrument, especially the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

[1121] The Legally Binding Instrument (n 32) para 12.
[1122] Ibid, art 2(b).
[1123] Deva (n 1112) 218.
[1124] See for instance UNDRIP (n 11) art 18.

with Regard to Human Rights (the Norms).[1125] One of the major shortcomings of the Norms which the Legally Binding Instrument avoids is the primacy of the role given to TNCs over States in the protection of human rights in the Norms.[1126] In the General Obligation of the Norms, TNCs, among other obligations, have the direct responsibility to "protect human rights recognized in international as well as national law, including the rights and interests of Indigenous Peoples and other vulnerable groups."[1127] Miretski and Bachmann argue that the Norms relegated States to the background and the traditional role of States as the sole addresses of the obligation to protect human rights. It required TNCs to enforce human rights obligations on States regardless of whether the States have ratified the human rights instruments that embody these obligations.[1128] Even though the Norms did not entirely displace the State's role in securing human rights, the expectation that TNCs should enforce human rights led to harsh opposition by States, which eventually led to its abandonment in 2005.[1129] So, the Legally Binding Instrument opted for the indirect responsibilities of TNCs, where States are not just recognised as the sole addresses of human rights but are equally given the duty to ensure that TNCs respect human rights. In other words, TNCs fulfil their responsibilities to human rights by complying with the requirements of human rights instruments, both international and national, which States have implemented as part of States' obligations to protect human rights.

5.3.Soft Law Instruments

Over the years, various attempts, as evidenced by various international non-binding instruments, have been made to create human rights obligations for TNCs to respect and fulfil human rights, but unfortunately, most of them failed to achieve their intended objectives. Most of these responsibilities are mainly contained in documents adopted by UN bodies and international organisations.[1130] They reflect the widely evolving claim that businesses have human rights obligations despite ongoing debates on the exact nature of those obligations. For this thesis, these responsibilities will be grouped into four categories: human rights responsibilities, environmental responsibilities, responsibility to combat bribery and other

[1125] UN Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev 2.
[1126] Ugwu (n 307)122; Miretski and Bachmann (n 794) 20.
[1127] The Norms (n 190) General Obligations.
[1128] Ibid, 7 and 21.
[1129] Dmitry Ivanov and Maria Levina, "Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" (2021) VIII(1) *BRICS Law Journal* 135, 141.
[1130] Putu Purwaningsih, "Protection for the Rights and Interests of Local Communities Adversely Affected by Multinational Energy Companies' Activities" (2022) 6(1) *Udayana Journal of Law and Culture* 1, 6.

forms of corruption, and disclosure responsibility. Each of these responsibilities will be examined based on the various non-legally binding instruments.

5.3.1. Human Rights

In this regard, the UN Guiding Principles are perceived as the most "authoritative standard for responsible business"[1131] because the principles have shaped the global standard for responsible business and triggered a process that accelerates the recognition of human rights responsibilities for corporations in law and governance.[1132] The Pillar 2 of the UN Guiding Principles, which is headed "Corporate responsibility to respect human rights", is particularly dedicated to the responsible behaviour expected of TNCs and their obligations to respect. human rights. Principle 11 is explicit on what is expected of TNCs, that is, "[b]usiness enterprises should respect human rights." In other words, they must refrain from violating the human rights of others and must actively confront any negative human rights consequences in which they are involved. The legal nature of this obligation has been the subject of controversy. This stems from the General Principles of the UN Guiding Principles, which makes it clear that the Principles should not be seen "as creating new international law obligations,"[1133] and scholars have wondered if, prior to the endorsement of the Principles, TNCs were seen as having an obligation to respect human rights.[1134] The consensus is that TNCs had such an obligation, especially a "specific subset of *jus cogens* customary international law norms such as piracy, forced labour, slavery, and crimes against humanity that may be classified as international crimes."[1135]

Equally, the Canadian Supreme Court in *Nevsun Resources Ltd v Araya*[1136] ruled that a TNC's breach of its obligations that resulted in "the use of forced labour; torture; slavery; cruel,

[1131] UN Working Group on Business and Human Rights, *Guiding Principles on Business and Human Rights at 10: Taking Stock of the First Decade* (June 2021) UN Doc A/HRC/47/39, p 5 <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf> accessed 04 December 2023; Sara L Seck, "Guiding Principle 11: The Responsibility of Business Enterprises to Respect Human Rights" in Barnali Choudhury (ed) *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar, 2023) 86.

[1132] Zhuolun Li, "Operationalising the UN Guiding Principles on Business and Human Rights through Human Rights Due Diligence: A Critical Assessment of Current States Practices" (2022) 11(4) *Academic Journal of Interdisciplinary Studies* 8, 14.

[1133] UN Guiding Principles (n 28) General Principles.

[1134] Sara L Seck (n 1131) 86.

[1135] Ibid. See also Andrés Felipe López Latorre, "In Defence of Direct Obligations for Businesses Under International Human Rights Law" (2020) 5(1) *Business and Human Rights Journal* 56, 82. Latorre extends this argument to include all norms, and not just norms with special status under international law.

[1136] *Nevsun Resources Ltd v Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle* (2020 Supreme Court of Canada 5).

inhuman or degrading treatment; and crimes against humanity"[1137] was a breach of customary international law. Although there is no general agreement on which norms are *jus cogens,* the use of forced labour, torture,[1138] slavery,[1139] cruel, inhuman or degrading treatment, and crimes against humanity[1140] are often perceived as *jus cogens* or peremptory norms since they are recognised as such by the international community as a whole. They are non-derogable and give rise to *erga omnes* obligation.[1141] Equally, Article 53 of the Vienna Convention on the Law of Treaties[1142] does not give a list of norms that are *jus cogens*. Still, it nevertheless defines such norms as "a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

According to Muchlinski,[1143] the *Nevsun Resources Ltd v Araya* decision was based on the court's intention to further TNCs' compliance with human rights-oriented responsibilities established under various instruments like the UN Guiding Principles. The decision has implications for the future judicialisation of corporate responsibility to respect human rights in global value chains and raises questions about the liability of foreign investors under Canada's common law for breaches of customary international law. Furthermore, while the UN Guiding Principles are voluntary, the judgement of the Canadian Supreme Court creates "a legally binding duty"[1144] for TNCs.

Principle 12 is similarly important as it clarifies the minimum scope of those human rights that TNCs are required to respect. Put differently, Principle 12 provides:

> The responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning

[1137] Ibid, para 4.
[1138] Mingming Hai, "Rethinking the Factors Affecting the Prohibition and Prevention of Torture in China—A Qualitative Comparative Analysis" (2023) 12 *Social Sciences* 1.
[1139] Hui-Chol Pak, Hye-Ryon Son, and Son-Gyong Jong, "Analysis on the Legal Definition of Jus Cogens Provided in Article 53 of the Vienna Convention on the Law of Treaties" (2022) 59(4) *International Studies* 315, 322.
[1140] See generally, Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Edward Elgar Publishing Limited, 2020) 15 – 18 where the author has a list of examples of *jus cogens* norms.
[1141] On how to identify peremptory norms, see William A Schabas, *The Customary International Law of Human Rights* (Oxford Press, 2021) 40 – 101.
[1142] Vienna Convention on the Law of Treaties (n 713).
[1143] Peter Muchlinski, "Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: Nevsun Resources Limited v Araya" (2020) 1(3) *Amicus Curiae* 505 – 531.
[1144] Ibid, 523.

> fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.

The International Bill of Human Rights encompasses the UDHR and the two Covenants which codify the UDHR's norms in treaty form, that is, the ICCPR and the ICESCR. The import is that TNCs are expected to respect those political rights protected in the ICCPR and the economic, social, and cultural rights protected in the ICESCR. The requirement to respect human rights, as expressed in the UDHR and ILO Declaration on Fundamental Principles, is a minimum requirement, and TNCs are at liberty to increase their standard of responsibility. This is especially so where the TNCs' business activities are likely to have an impact on individuals belonging to a specific group, like the Indigenous Peoples.[1145] In this sense, TNCs should adhere to the rules outlined in ILO 169, particularly in situations involving the rights of Indigenous Peoples to resources, land, and consultations. This is particularly important when the State where the TNCs carry out their activities does not recognise these rights of Indigenous Peoples. So, the obligation to respect the rights of Indigenous Peoples is independent of the recognition of States of this obligation to protect these rights. Furthermore, the rights to self-determination, participation, and expression of cultural identity as protected under the ICCPR are to be respected.

Principles 12 and 23 should be read together as they both impose an obligation on TNCs to observe the provisions of international human rights instruments as a means of achieving their responsibility to respect human rights. While Principle 12 specifically mentions the rights protected in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, Principle 23 provides that TNCs should comply with internationally recognised human rights and all applicable laws. This also includes the responsibility to seek to honour norms of internationally recognised human rights when confronted with conflicting requirements and to treat the risk of causing or contributing to human rights violations as a legal compliance issue.[1146] Principle 23 provides instructions for TNCs in three distinct scenarios: when national legislation is inadequate or non-existent when national regulations conflict with international standards, and when TNCs are in danger of being involved in severe human rights violations.[1147]

[1145] UN Guiding Principles (n 28) Commentary to Principle 12.
[1146] Ibid, Principle 23 (a – c).
[1147] Rachel Davis, "The UN Guiding Principles on Business and Human Rights and Conflict Affected Areas: State Obligations and Business Responsibilities" (2012) 94(887) *International Review of the Red Cross* 961, 975 –976.

There is a sense in which Principle 23 provides for conflict of laws for TNCs, especially "when faced with conflicting requirements." Conflict of laws refers to the body of rules or regulations applicable to a case, transaction, or other event that has connections to multiple jurisdictions.[1148] In the case of TNCs, when they operate in States with weak human rights laws, they are required to honour those internationally recognised human rights rather than those existing in the weak States. TNCs are required to adhere to the rules of their host States, but their legal risks mostly stem from the laws of their home country, where the parent firm is located.[1149] By extension, national courts would always rely on the laws that give higher standards of responsibility to TNCs or those laws that best advance human rights protection. It is in this sense that some States have extended their laws beyond their jurisdictions in what is called the extraterritoriality principle as a mechanism of holding TNCs accountable. There is a plethora of cases in this regard. Examples include *Milieudefensie et al. v Royal Dutch Shell plc*,[1150] a Dutch Court held that a Dutch law was applicable regarding the obligation of Royal Dutch Shell to reduce its CO_2 emission worldwide and *Four Nigerian Farmers and Stichting Milieudefensie v Shell*,[1151] where a Dutch Court of Appeal decided to apply the Nigerian laws, instead of Dutch laws, that provide for the duty of care which a TNC owes. A court may decide to establish the responsibility of a TNC beyond what the host and home country provides. In *Nevsun Resources Ltd v Araya*,[1152] the Canadian Supreme Court considered the human rights violations committed by the TNC as a violation of customary international law.

Principle 13 is more practical in its approach as it specifies how TNCs should fulfil their obligation to respect human rights; that is, first, TNCs should avoid causing or contributing to adverse human impact through their business activities, and when the adverse impact occurs, TNCs should endeavour to address it, and second, by seeking to prevent and mitigating the

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[1148] Arash Habibi Lashkari and Melissa Lukings, *Understanding Cybersecurity Law in Data Sovereignty and Digital Governance: An Overview from a Legal Perspective* (Springer, 2022) 85.

[1149] Simon Baughen, "Guiding Principle 23: Legal Compliance Issues of Business Enterprises" in Barnali Choudhury (ed) *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar, 2023) 179.

[1150] *Milieudefensie v Royal Dutch Shell* (n 323). Vido considers this case as an example of ""ecological" side of conflict-of-laws climate change litigation." See Sara De Vido, "The Privatisation of Climate Change Litigation: Current Developments in Confict of Laws" (2023) *Jus Cogens* 1, 2.

[1151] *Four Nigerian Farmers v. Royal Dutch Shell Plc* (n 201). The claimants, a group of six Nigerian farmers, are seeking compensation for environmental and livelihood damage caused by oil leaks from Shell's pipelines in the villages of Oruma, Goi, and Ikot Ada Udo. They allege that Shell is responsible for the damage resulting from a 2005 leak. The claimants assert that Shell breached its duty of care by allowing the leak to occur and failing to respond adequately once it began. They also claim that Shell violated their right to a clean living environment, as guaranteed by the Nigerian Constitution and the African Charter on Human and Peoples' Rights. See ESCR-Net, "Four Nigerian Farmers and Milieudefensie v. Shell" (*ESCR-Net*) <https://www.escr-net.org/caselaw/2022/four-nigerian-farmers-and-milieudefensie-v-shell> accessed 21 May 2024.

[1152] *Nevsun Resources Ltd v Araya* (n 1136).

adverse human rights impacts that are directly linked to them or business entity they have a relationship with. As an expansive principle, this provision covers situations where a TNC does not directly cause human rights violations but yet has the responsibility to respect human rights due to the fact that the envisioned adverse human rights "impact is caused by an entity with which it has a business relationship and is linked to its own operations"[1153] As recognised by Parella, Principle 13 should be read together with Principle 19 because the latter addresses how TNCs should address the scenarios introduced in the former.[1154] For example, if a TNC has directly or indirectly impacted negatively on human rights, it must "take the necessary steps to cease or prevent the impact."[1155]

TNCs have the responsibility to carry out human rights due diligence, which will enable them "to identify, prevent, mitigate and account for how they address their adverse human rights impacts."[1156] This process for human rights due diligence involves "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[1157] To assess the potential human rights risks, TNCs should engage in meaningful consultation with groups and other relevant stakeholders that may be impacted by their business operations.[1158] The Principle links human rights due diligence and environmental and social impact assessments, as confirmed by the Commentary to Principle 18. Furthermore, many national laws have been modelled after this link to mandate human and environmental due diligence for corporations.

For example, in 2017, the French Duty of Vigilance Law became the first law in the world to adopt an overarching legislation in this regard.[1159] According to Bright and da Graça Pires, the legislation aims to enforce Principle 18 by mandating that a vigilance plan must include, among other things, a comprehensive assessment of human rights and environmental risks. This assessment should involve identifying, analysing, and prioritising these risks. Additionally, the vigilance plan should outline procedures for regularly evaluating the risks associated with the activities of subsidiaries, subcontractors, or suppliers with whom the company has an

[1153] Ibid, Principle 13.
[1154] Kishanthi Parella, "Guiding Principle 13: Responsibility of the Business Sector" in Barnali Choudhury (ed) *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar, 2023) 102.
[1155] UN Guiding Principles (n 28) Commentary to Principle 19.
[1156] Ibid, Principle 17.
[1157] Ibid.
[1158] Ibid, Principle 18(a).
[1159] Cited in Claire Bright and Céline da Graça Pires, "Guiding Principle 18: Human Rights Impact Assessments" in Barnali Choudhury (ed) *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar, 2023) 143.

established business relationship. Germany and Norway followed suit in 2021 with the adoption of the German Act on Corporate Due Diligence Obligations in Supply Chains[1160] and the Norwegian Act relating to transparency regarding supply chains, the duty to know and due diligence,[1161] respectively.

Finally, apart from States, regional bodies have come up with attempts at linking human rights and environmental due diligence. For instance, the European Commission's Proposed Directive on Corporate Sustainability Due Diligence (EU CSDD)[1162] equally embodies this link between human rights and environmental due diligence and the "obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts that they caused, contributed to or are directly linked to, with respect to their own operations, and those of their subsidiaries, and the operations carried out by entities in their value chain with whom the company has a business relationship."[1163] The EU CSDD has a high chance to apply extraterritorially, including in Africa, because it will apply to EU parent companies and their subsidiaries outside of the EU and non-EU companies with subsidiaries in the EU that meet a certain threshold.[1164] In its extraterritorial applicability, the EU CSDD will impact on Indigenous Peoples in Africa considering the definition of "vulnerable stakeholders." In other words, vulnerable stakeholders "means affected stakeholders that find themselves in marginalised situations and situations of vulnerability, due to specific contexts or intersecting factors, including among others … Indigenous Peoples…."[1165]

The UN Guiding Principles also impose other responsibilities on TNCs regarding their duty to respect human rights. These include the responsibility to have policies and processes regarding their commitment to respect human rights, a human rights due diligence process, and a remediation process to address negative human rights impacts.[1166] In addition, TNCs are required to integrate their findings on their human rights and environmental impact assessment

[1160] German Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettengesetz) (16 July 2021) <https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains> accessed 06 December 2023.
[1161] Norwegian Act Relating To Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act) LOV-2021-06-18-99 (entered into force I July 2022) <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> accessed 06 December 2023.
[1162] The recent amendment as of the time of writing this thesis was done in June 2023. See Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)) (A9-0184/2023) I June 2023 <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html> accessed 06 December 2023.
[1163] Ibid, Article 1(1)(a).
[1164] Ibid, art 2.
[1165] Ibid, art 3.
[1166] UN Guiding Principles (n 28) Principle 15.

across relevant internal processes.[1167] Going further, they have the responsibility to track the effectiveness of their response[1168] and to communicate this effectively when affected stakeholders raise concerns.[1169] Additionally, TNCs have the responsibility to cooperate in the remediation of adverse human rights impacts they caused or have contributed to.[1170]

It is important to point out that TNCs' responsibility "to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure."[1171] Based on this, the Working Group on Business and Human Rights recently published a report addressing investors, environmental, social and governance approaches and human rights[1172] as part of their mandate. The Working Group on Business and Human Rights reported that the responsibility to respect human rights resides in all enterprises, notwithstanding their size, volume of assets, or structure.[1173] Furthermore, the report defines right holders as "all those who have these rights, including groups such as Indigenous Peoples."[1174] Investors/TNCs can achieve this responsibility by adopting and publishing their policy commitments to respect human rights[1175] and undertaking "human rights due diligence for their actual and potential human rights impacts."[1176] The due diligence is not just about impact on human rights human rights but should encompass possible adverse impact on environmental and climate change harm.[1177]

Following the above, the 2023 version of the OECD Guidelines for Multinational Enterprises[1178] is another veritable soft law instrument that establishes the responsibilities of TNCs and the behaviour expected of them regarding human rights and the environment. The OECD Guidelines are a set of recommendations by OECD member governments for

[1167] Ibid, Principle 19.
[1168] Ibid, Principle 20.
[1169] Ibid, Principle 21.
[1170] Ibid, Principle 22.
[1171] Ibid, Principle 14.
[1172] Human Rights Council, "Investors, Environmental, Social and Governance Approaches and Human Rights," a report of the Working Group on the Issue Of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/56/55, 02 May 2024. <https://documents.un.org/doc/undoc/gen/g24/070/76/pdf/g2407076.pdf?token=wrjH8wNXhwmC5De2YW&fe=true> accessed 02 June 2024.
[1173] Ibid, para 48. See also UN Human Rights Officer of the High Commissioner, *The Corporate Responsibility To Respect Human Rights: An Interpretive Guide* (01 June 2012) [Q 14] <https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf>accessed 02 June 2024.
[1174] Ibid.
[1175] Ibid, para 52.
[1176] Ibid, para 53.
[1177] Ibid.
[1178] OECD Guidelines (n 29).

multinational enterprises, encouraging them to adhere to these guidelines in all their operations. The responsibility of multinational enterprises in identifying, preventing, and mitigating negative impacts associated with their business activities has been underscored as an expectation outlined in the OECD Guidelines.[1179] They provide different guidelines in areas like human rights, disclosure, environment, and combating corruption and mandate Adherents to establish the NCPs in their States to monitor compliance with the guidelines. Chapter II is on the general policies, which, among others, encourage TNCs to contribute to advancing the economy, environment, and society to attain sustainable development, respect the internationally recognised human rights of those affected by their activities, and carry out risk-based due diligence to prevent causing or contributing to adverse impacts. Similarly, TNCs are to prevent or mitigate adverse impacts even when those impacts are not directly attributable to them but nonetheless linked to a business relation. Also, TNCs are required to engage meaningfully with relevant stakeholders or their representatives as part of due diligence and to ensure that their views on any activities that may significantly impact them are considered.[1180]

In the Commentary to Chapter II, relevant stakeholders are described "as persons or groups, or their legitimate representatives, who have rights or interests related to the matters covered by the Guidelines that are or could be affected by adverse impacts associated with the enterprise's operations, products or services."[1181] Although there is no express mention of Indigenous Peoples in this definition, a wide reading of the Commentary indicates that Indigenous Peoples are to be considered as relevant stakeholders for the purposes of the responsibility of TNCs to engage and consult. This is because, in the Commentary, the importance of engagement is more pronounced where the business activities involve "the intensive use of land or water, which could significantly affect *local communities*." Furthermore, considering the definition of relevant stakeholders in other instruments, it points to the fact that Indigenous Peoples form part of this term. For instance, in the proposed EU CSDD, the term is even broadened to include "affected stakeholders" and "vulnerable stakeholders", and it defines "vulnerable stakeholders" as "affected stakeholders that find themselves in marginalised situations and situations of vulnerability, due to specific contexts or intersecting factors, including among others, …Indigenous Peoples…."[1182]

[1179] Aziza Mayar, "The NCP Procedure of the OECD Guidelines: Monitoring and RBC Improvement during the Follow-Up Step" (2022) 1 *Erasmus Law Review* 1, 3.
[1180] OECD (n) Chapter II (A)(1 – 14).
[1181] Ibid, para 28.
[1182] Proposed EU CSDD (n 1162) Amendment 122 to Article 3.

The OECD Guidelines, while reiterating that the duty to protect human rights is the sole responsibility of States, recognise the responsibility of TNCs to respect human rights within the framework of internationally recognised human rights and the human rights obligations of States. To achieve this responsibility, further actions should be taken by TNCs in this regard, including (1) TNCs should refrain from violating the human rights of others and should take responsibility for addressing any adverse impacts on human rights in which they are involved, (2) TNCs should ensure that their actions do not result in or contribute to adverse impacts on human rights, and take appropriate measures to rectify such consequences if they do arise, (3) TNCs should actively pursue methods to prevent or mitigate negative human rights impacts directly associated with their activities, products, or services, even if they are not directly responsible for causing those impacts, (4) TNCs should publicly demonstrate a policy commitment to respect human rights, (5) TNCs should carry out human rights due diligence, and (6) TNCs should provide or cooperate in the remediation of adverse human rights impacts which have caused or contributed to.[1183]

The Commentary to Chapter IV points out that there are a plethora of internationally recognised human rights, and depending on the nature of the business a TNC engages in, it may consider additional standards. This is especially so when its business activities will have particular impacts on specific groups like Indigenous Peoples. Based on this, the Commentary recognises the UNDRIP as part of the internationally recognised human rights, especially because of its protection of the rights of Indigenous Peoples to free, prior and informed consent.[1184]

Another important document on corporate responsibility is the ILO Tripartite Declaration on Multinational Investments and Social Policy (ILO Tripartite Declaration) of 2022,[1185] which also has provisions on the human rights responsibilities of TNCs. In its tripartism of realising the relationship among governments, workers, and employers, the ILO Tripartite Declaration is addressed to State members of the ILO, employers, and workers. Although the primary aim of the ILO Tripartite Declaration is to promote and support the positive impact that TNCs can have on economic and social development, as well as the achievement of decent work opportunities for everyone,[1186] it equally reiterates human rights responsibilities of TNCs established in various international instruments. In its General Policies, the ILO Tripartite

[1183] Ibid, Chapter IV.
[1184] Ibid, Commentary to Chapter IV.
[1185] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (6th edn, ILO Publications 2022).
[1186] Ibid, para 2.

Declaration requires TNCs to respect the sovereignty of the States where they operate by obeying national laws and respecting international standards like UDHR and its Covenants.[1187] In addition, TNCs are required to fulfil their responsibilities under non-legally binding instruments like the corporate responsibility to respect human rights under the UN Guiding Principles, together with their role in providing access to remedy. It emphasises what corporate responsibility to respect human rights entails under the UN Guiding Principles, which include avoiding causing or contributing to adverse human rights impacts through their business activities and seeking to prevent or mitigate such adverse impacts directly linked to them or their business relations.[1188] In this regard, the ILO Tripartite Declaration reflects all the human rights responsibilities of TNCs as contained in the UN Guiding Principles, *mutatis mutandis*. Regarding access to remedy, the ILO Tripartite Declaration requires that TNCs should utilise their influence in order to promote effective measures for addressing violations of internationally recognised human rights by their business partners.[1189]

Finally, the United Nations Global Compact (UN Global Compact)[1190] makes elaborate guidelines for corporate responsibilities. The UN Global Compact is a voluntary agreement established by the United Nations to encourage businesses and firms worldwide to embrace sustainable and socially responsible practices and provide updates on their progress. It is the world's largest voluntary corporate responsibility initiative, involving more than 12,000 companies[1191] committed to integrating their business activities and strategies with ten universally accepted principles in the areas of human rights, labour, environment, and anti-corruption.[1192] It mirrors some of the responsibilities already established in other instruments and makes references to them.

The human rights responsibilities of TNCs are divided into two principles. In the two principles regarding human rights, the UN Global Compact refers to many human rights instruments like the International Bill of Human Rights and the core ILO Conventions, but more importantly, to the UN Guiding Principles. To underscore the relationship between it and the UN Guiding Principles, the Global Compact and the OHCHR released a joint Statement in 2011, updated

[1187] Ibid, para 8.
[1188] Ibid, para 10 (a and c)
[1189] Ibid, para 65.
[1190] United Nations Global Compact, *The Ten Principles of the UN Global Compact* <https://unglobalcompact.org/what-is-gc/mission/principles> accessed 10 December 2023.
[1191] Matteo Podrecca, Marco Sartor, and Guido Nassimbeni, "United Nations Global Compact: Where are we going?" (2021) 18(5) *Social Responsibility Journal* 984.
[1192] Guido Orzes and others, "The Impact of the United Nations Global Compact on Firm Performance: A Longitudinal Analysis" (2020) 227 *International Journal of Production Economics* 1, 2.

in 2014, which explains that the "Guiding Principles provide further conceptual and operational clarity for the two human rights principles championed by the Global Compact."[1193]

Principle 1 expressly States that "businesses should support and respect the protection of internationally proclaimed human rights." Respecting human rights entails that businesses must exercise due diligence to prevent any violations of human rights ("do no harm") and take responsibility for any negative impacts on human rights that they may be involved in. The "do no harm" requires TNCs to pay special attention to the rights of vulnerable groups like Indigenous Peoples. The importance of respecting human rights is that not doing so poses some risks to TNCs and other businesses, like the possibility of having their licenses revoked, numerous cases in courts and other tribunals by investors and affected stakeholders, and reputational damage.

Principle 2 requires TNCs to "make sure that they are not complicit in human rights abuses." While Principle 1 expects TNCs to support and respect human rights, Principle 2 expects that while TNCs are fulfilling Principle 1, they should avoid being complicit in violating human rights. For this principle, complicity refers to the involvement in human rights abuse caused by another entity, whether a company, government, individual, or group. This is especially pronounced in countries with weak government institutions with frequent reports of human rights abuses. There are two elements to complicity in human rights - an act or omission committed by a TNC or an individual representing it which supports or enables another TNC to engage in a human rights violation and the TNC's awareness and knowledge of the potential help it provides by its actions or omission. This provides a *mens rea* requirement in proving the complicity of a TNC in human rights violations, which, apart from being a daunting onus to prove,[1194] excludes *dolus eventualis*,[1195] where a TNC should have foreseen that its business activities have the possibility of making it complicit in human rights abuse[1196] and other lower

[1193] UN Global Compact and Office of the High Commissioner for Human Rights, *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments* (July 2011 and updated June 2014) page 2 <https://unglobalcompact.org/library/1461> accessed 10 December 2023.
[1194] JJ Child and Adrian Hunt, "Beyond the Present-Fault Paradigm: Expanding Mens rea Definitions in the General Part" (2022) 42(2) *Oxford Journal of Legal Studies* 438–467; Alif Kharismadohan, "Mens Rea and State Loses on Corruption Cases: An Analysis of Corruption Court Judgment of Semarang" (2020) 1(1*) Journal of Law and Legal Reform* 61 – 76.
[1195] Danuta Palarczyk, "Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment" (2023) 34 *Criminal Law Forum* 147, 165.
[1196] For a proper understanding of *dolus eventualis*, see Boyane Tshehla, "Distinguishing between Dolus Directus and Dolus Eventualis: Ngobeni v the State (1041/2017) ZASCA 127 (27 September 2018)" (2021) 34(1) *South African Journal of Criminal Justice* 128 – 136.

thresholds like recklessness. So, for victims of corporate complicity in human rights abuse, Principle 2 might be a difficult requirement to establish.

The UN Global Compact recognises three contexts where accusations of complicity in human rights abuse may arise. First is direct complicity, which is when a TNC knowingly supplies goods or services that will be used to facilitate human rights abuse. Second, beneficial complicity arises when TNC benefits from human rights violations, even though it might not have caused the violation. Lastly, silent complicity arises when a company remains silent or inactive in the face of ongoing or systematic human rights violations. To avoid these, TNCs and other businesses are required to have an effective human rights policy and constantly conduct appropriate human rights due diligence.

5.3.2. Environmental Responsibilities

Agenda 21 provides that "business and industry, including transnational corporations, can play a major role in reducing impacts on resource use and the environment"[1197] and to utilise natural resources efficiently.[1198] TNCs should make annual reports of their environmental records as well as on their use of energy and natural resources and adopt and provide progress reports on the application of codes of conduct that advocate for best environmental practices.[1199] Where TNCs and other businesses are part of a trade union, the trade union should encourage its members to implement initiatives aimed at enhancing environmental awareness and accountability in order to improve environmental performance based on internationally recognised practices.[1200] Also, the Rio Declaration States that businesses have the responsibility to ensure that activities within their own operations do not cause harm to the environment.[1201] It is to be noted that the Rio Declaration and Agenda 21 form the basis of some of the principles under the UN Global Compact discussed later in this subchapter.

Furthermore, the OECD Guidelines equally make elaborate provisions regarding the environmental responsibilities of TNCs in Chapter VI. It starts with an expectation for TNCs to ensure that they conduct their activities in a way that takes due account of the need to protect the environment according to various norms of environmental protection under international

[1197] Rio Declaration (n 544), para 30.2.
[1198] Ibid, para 30.6.
[1199] Ibid, para 30.10(a – b).
[1200] Ibid, para 30.14
[1201] Ravi Raj Atrey, *Exploring Corporate Social Responsibility: Fundamentals and Implementation* (2nd edn, Studera Press, 2020) 98; T Yang and others, *Comparative and Global Environmental Law and Policy* (ASPEN Publishing, 2019) 186.

agreements. It recognises the different ways TNCs can be involved in adverse environmental impacts – climate change, biodiversity loss, degradation of land, marine and freshwater ecosystems, deforestation, air, water and soil pollution, and mismanagement of waste, including hazardous substances.[1202] To combat these adverse environmental impacts, TNCs have the responsibility to establish and maintain a system of environmental management, adequately engage with relevant stakeholders affected by a TNC's adverse environmental impacts, ensure measures are in place to prevent, mitigate, and control any potential environmental and health risks that may arise from their operations. TNCs are to contribute to the advancement of responsible and economically effective public policy through collaborative partnerships and initiatives aimed at promoting environmental awareness and protection.[1203]

In the OECD Guidelines, the environmental responsibilities of TNCs are drawn from different sources, such as the Rio Declaration, Agenda 21, and the United Nations 2030 Agenda for Sustainable Development, and are consistent with the UNFCCC, the Paris Agreement, and the CBD.[1204] The implication is that the aim of OECD Guidelines is not to reinterpret any existing instruments or establish new commitments or precedents for governments on their environmental obligations but to provide recommendations on how the precautionary approach should be implemented by TNCs.[1205] In addition, there is a link between environmental protection and the responsibility of TNCs to reduce the impact of climate change. In other words, TNCs play a crucial role in making significant contributions to achieving a climate-resilient economy and reaching internationally agreed goals on climate change mitigation and adaptation. This is essential for achieving net-zero greenhouse gas emissions.[1206] This involves the formulation and implementation of science-based policies, strategies, and transition plans on climate change mitigation and adaptation. It also includes the adoption, implementation, monitoring, and reporting of short-, medium-, and long-term mitigation targets.[1207]

TNCs have environmental responsibilities in the UN Global Compact[1208] under three principles primarily drawn from the Rio Declaration and its Agenda 21. Principle 7 States that "businesses should support a precautionary approach to environmental challenges", which entails the methodical implementation of evaluating, managing, and communicating risks. When there is

[1202] Ibid, Chapeau to Chapter VI.
[1203] Ibid, Chapter VI (1 – 7).
[1204] Ibid, para 66.
[1205] Ibid, para 75.
[1206] Ibid, para 76.
[1207] Ibid, para 77.
[1208] UN Global Compact (n 31).

a reasonable suspicion of harm, decision-makers need to exercise caution and consider the degree of uncertainty that arises from scientific evaluation. This is an offshoot of Principle 15 of the 1992 Rio Declaration, which States that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Principle 8 requires TNCs to "undertake initiatives to promote greater environmental responsibility", which is based on Chapter 30 of Agenda 21, which expects TCs to increase self-regulation in all elements of business planning and decision-making. To achieve this responsibility, there are parameters to guide any TNC, encompassing the inclusion of sustainability in its vision, policies, and strategies. They should consider implementing voluntary charters, codes of conduct, and practice within the organisation and collaborating with sectoral and international initiatives to achieve responsible environmental performance. For stakeholders who are affected by the adverse impacts of their business activities on the environment, TNCs are required to have a transparent and unbiased dialogue with them.

Finally, on environmental responsibility, Principle 9 requires that "businesses should encourage the development and diffusion of environmentally friendly technologies", as first provided in Agenda 21. By implementing environmentally friendly technologies, a company can significantly reduce its reliance on raw materials, resulting in improved efficiency and less risk of causing environmental pollution. The range of environmentally sound technologies encompasses cleaner production processes, pollution prevention technologies, as well as end-of-pipe and monitoring technologies. Adopting such technologies will go a long way in reducing the likelihood of litigations involving TNCs and their breach of environmental regulations. In the case of *Okpabi v Royal Dutch Shell Plc*,[1209] one of the allegations was that Shell Nigeria, a subsidiary of Royal Dutch Shell, failed to maintain its pipelines, which caused oil to spill, thereby causing "widespread environmental damage, including serious water and ground contamination."[1210]

5.3.3. Corporate Responsibility to Combat Bribery and Corruption

This section is particularly important in the context of Africa because, as seen in 2.4, there is always a high tendency for TNCs that operate in Africa to engage in acts of corruption and for the African political class to be disposed to receive bribes. In the OECD Guidelines, TNCs

[1209] *Okpabi v Royal Dutch Shell Plc* (n 204).
[1210] Ibid, para 4.

have a role in combating bribes and other forms of corruption. It is imperative for enterprises to refrain from engaging in any form of bribery or corruption by not "offering, promising or giving of any undue pecuniary or other advantage to public officials… or entities with which an enterprise has a business relationship…. Likewise, enterprises should not request, agree to or accept any undue pecuniary or other advantage from public officials… or entities with which an enterprise has a business relationship."[1211] This also extends to their subsidiaries or agents. They should also develop mechanisms for detecting, preventing, and addressing bribery and other forms of corruption, which must include a system of financial and accounting procedures and provide a register for a list of conflicts of interest that the enterprise may have.[1212] TNCs should also avoid making unlawful contributions to candidates for public office, political parties, or affiliated organisations.[1213]

Like in the OECD Guidelines, the UN Global Compact places a responsibility on TNCs and other businesses to "work against corruption in all its forms, including extortion and bribery." In other words, they are expected to take proactive measures to develop policies and concrete programmes to tackle corruption internally and within their supply chains. This responsibility has a legal basis in the provisions of the UN Convention Against Corruption.[1214] According to Transparency International, corruption is "the abuse of entrusted power for private gain."[1215] TNCs should combat corruption because it damages corporate reputation and creates a lack of confidence and trust among investors and stakeholders. This is especially true in countries with weak institutions where government officials get easily compromised.

The responsibility regarding combating bribes and other forms of corruption is particularly relevant, especially for weak economies where TNCs take advantage of weak public institutions to offer and take bribes for approval of licences or permits or any other form of approval from the government. In *Cortec Mining v Kenya,*[1216] the government of Kenya revoked a mining license to a company incorporated in the UK and its subsidiary in Kenya on the basis that the purported license was improperly obtained by corrupt means. Even though the arbitral tribunal dismissed the allegations of bribery and corruption because of "the vague

[1211] OECD Guidelines (n 29) Chapter VII (1).
[1212] Ibid, Chapter VII (2).
[1213] Ibid, Chapter VII (7).
[1214] UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422 (entered into force 14 December 2005).
[1215] Transparency International, "What is Corruption" <https://www.transparency.org/en/what-is-corruption#:~:text=We%20define%20corruption%20as%20the%20abuse%20of%20entrusted%20power%20for%20private%20gain> accessed 10 December 2023.
[1216] *Cortec Mining v Kenya* (n 1084).

terms in which the allegation of corruption was made, and the lack of evidence given in support," it nonetheless held that the purported environmental impact assessment license was issued by someone who did not have the authority to do so.[1217] So, while the allegation of corruption was dismissed because no evidence was adduced to support it, the tribunal did not foreclose the possibility that the purported license issued by an unauthorised person was issued after receiving bribes as alleged by the government.

5.3.4. Disclosure Responsibility

Regarding responsibility for disclosure, Chapter III of the OECD Guidelines stipulates that TNCs should disclose information relating to their sustainability plans. The OECD Guidelines encompass an additional set of disclosure recommendations about responsible business practices, which involve the enterprise's actual or potential adverse impacts on people, the environment, and society and the corresponding methods for conducting due diligence.[1218] For disclosure to satisfy the requirements of the OECD Guidelines, it must be "regular, timely, reliable, clear, complete, accurate and comparable information in sufficient detail on all material matters."[1219] It must relate to many areas of the TNCs' business operations, like its policies on sustainability, foreseeable risks,[1220] and potential or identified risks in the business activities of the TNC.[1221] It is important to note that while the OECD Guidelines encourage disclosure, they do not prescribe specific reporting formats or detailed requirements. The expectation is for companies to adopt a comprehensive and transparent approach to disclosure based on the nature of their business and the potential impacts on various stakeholders. The OECD Guidelines highlight the importance of TNCs addressing and disclosing information about the impact of their operations throughout the supply chain. This includes addressing and disclosing human rights and environmental issues within the business structure.[1222]

The UN Guiding Principles also require this form of disclosure by TNCs but express the responsibility in a different tone in the following manner:

> In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts

[1217] Ibid, para 154.
[1218] OECD Guidelines (n 29) Chapter III and the Commentary to Chapter III.
[1219] Ibid, Chapter III (1).
[1220] Ibid, Chapter III (2).
[1221] Ibid, Chapter III (3)(d).
[1222] Ibid, para 32.

> should report formally on how they address them. In all instances, communications should:
>
> (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
>
> (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
>
> (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.[1223]

Commenting on Principle 21, Rühmkorf referred to it as "nonfinancial information disclosure",[1224] which currently pervades corporate requirements globally. The Commentary to Guiding Principle 21 highlights the importance of companies communicating their commitment to human rights. This not only promotes transparency and accountability but also reassures both affected individuals and stakeholders. The Commentary further highlights the importance of conducting independent verification of human rights reporting to enhance its substance and credibility.

One weakness of Principle 21, as identified by Rühmkorf, is that TNCs are to disclose their human rights impacts when concerns are raised by affected stakeholders,[1225] and not regularly and timely. This becomes even more of a concern when the affected stakeholders, such as Indigenous Peoples, do not have enough resources to raise complaints or when the process of raising complaints is obscured by the TNCs, thereby making it difficult for affected stakeholders to raise concerns. Furthermore, where it is difficult to identify when a violation has occurred, especially environmental pollution that requires some scientific experiment to identify, indigenous communities may not have the financial capacity to carry out such scientific experiments. Although in para (a) of Principle 21, TNCs are required to make such disclosures frequently, it is still conditional upon the TNCs' commercial confidentiality under para (c). Principle 21 of the UN Guiding Principles can be contrasted with the OECD Guidelines' requirement on disclosure, which should be "regular, timely, reliable, clear, complete, accurate and comparable information in sufficient detail on all material matters."

[1223] UN Guiding Principles (n 28) Principle 21.
[1224] Andreas Rühmkorf, "Guiding Principle 21: Communication Of Human Rights Impacts" in Barnali Choudhury (ed) *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar, 2023) 164.
[1225] Ibid, 165.

5.4.Redress Options

There are few international redress options for individuals who have suffered the violation of their rights by TNCs and investors. This is mainly because international law, as typified in international investment law, is State-centric; most complaints of rights violations do not have an international mechanism for addressing them. Rather, State mechanisms have been used for such redress. Most of the BITs and MITs make reference to the submission of cases concerning an investment between the contracting party and a national or company of the other contracting party to the ICSID,[1226] UNCITRAL,[1227] and other forms of arbitration. Unfortunately, these provisions cover investor-State dispute settlement (ISDS) and do not provide for the possibility of victims of an investor's human rights violations to institute an action. This means that the ICSID procedural rules in ISDS "are not adequately suited to human rights adjudication" even though "experience has shown that human rights issues often play a role of some kind in investment disputes."[1228] Similarly, a tribunal can grant reduced damages or compensation to an investor in a proceeding for claims arising from expropriation by a State if the expropriation was triggered by noncompliance with human rights and environmental standards, especially as contained in the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. [1229] This means that when human rights are violated by investors, States have the responsibility to invoke the contents of the BITs.

Flowing from the above, alleged violations of environmental and human rights standards by investors have resulted in counterclaims by States in arbitrations initiated by foreign investors, over which tribunals have assumed jurisdiction.[1230] Part III of the UN Guiding Principles

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[1226] See for instance Nigeria – United Kingdom BIT (n 1017) art 8(1); *Treaty Between the Federal Republic of Germany and the Federal Republic of Nigeria concerning the Encouragement and Reciprocal Protection of Investments* (Germany - Nigeria BIT (2000)), signed on 28 March 2000, entered into force on 20 September 2007 [art 11(2)] <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1729/germany---nigeria-bit-2000-> accessed 27 May 2024.

[1227] Poland - Russian Federation BIT (1992) (n) art 10, *Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic* (Czech Republic - Netherlands BIT (1991)), signed on 29 April 1991, entered into force on 01 October 1992 <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1212/czech-republic---netherlands-bit-1991-> accessed 27 May 2024.

[1228] Anne van Aaken and others, "The Human Rights Remedy Gap in ISDS – The Potential of the Hague Rules on Business and Human Rights Arbitration," *a paper prepared for the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) Forty-sixth session, Side Event Academic Forum*, 11th October 2023 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/academic_forum_hague_rules_business_and_human_rights_arbitration_-_paper_and_ppt_at_46th_session.pdf> accessed 27 May 2024.

[1229] See for instance, Netherlands Model Investment Agreement (n 1067) art 23.

[1230] James Langley and Catherine Gilfedder, "Human Rights in Investment Treaty Disputes – What's on the Horizon?" (*Denton*, 3 November 2020) <https://www.dentons.com/en/insights/articles/2020/november/3/human-rights-in-investment-treaty-disputes> accessed 28 May 2024; *Urbaser v Argentina* (n 1081); *Bear Creek Mining*

provides for access to remedy "through judicial, administrative, legislative or other appropriate means" as part of State responsibility.[1231] The OECD Guidelines for Multinational Enterprises expect TNCs to "[p]rovide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts."[1232] Access to remedy is couched as one of the rights of Indigenous Peoples in the UNDRIP thus, "Indigenous Peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights."[1233]

Remedies may include apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (either criminal or administrative, such as fines). Additionally, remedies can involve preventing further harm through measures like injunctions or guarantees of non-repetition.[1234] There are three operational principles regarding State responsibility to provide access to remedy. Firstly, the State-based judicial mechanisms that requires State to "take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."[1235] Secondly, State-based non-judicial grievance mechanisms, which involves State providing "effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse."[1236] These remedies may be mediation-based, adjudicative, or follow other culturally appropriate and rights-compatible processes, or a combination of these methods. The approach depends on the issues at hand, any public interest involved, and the potential needs of the parties.[1237] Finally, non-State-based grievance mechanisms that requires States to "consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms."[1238] In this

Corporation v Peru (n 1036); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, 2006.
[1231] UN Guiding Principles (n 28) Principle 25.
[1232] OECD Guidelines (n 29) Chapter IV (6).
[1233] UNDRIP (n 11) art 40.
[1234] UN Guiding Principles (n 28) Commentary to Principle 25.
[1235] Ibid, Principle 26.
[1236] Ibid, Principle 27.
[1237] Ibid, Commentary to Principle 27.
[1238] Ibid, Principle 28.

category, although they are non-judicial, they may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes.[1239]

One drawback to these provisions is that they are contained in legally non-binding instruments and do not create binding obligations on States and TNCs. However, some States have rather utilised domestic measures contained in hard instruments to provide access to remedy to victims of human rights violations committed by TNCs with links to the State. Two widely used methods by Indigenous Peoples are the US Alien Tort Statute litigation (ATS) and foreign direct liability litigation (FDL) in European national courts. The ATS, a provision of the US Judiciary Act of 1789,[1240] grants US federal courts the authority to hear civil lawsuits brought by foreign nationals for torts committed in violation of international law or a treaty which the US is a party to. This jurisdiction is triggered by three elements: a foreign claimant, action arising from violation of torts, and the tort violated must be in breach of a US convention or the law of nations.[1241] Given its wide jurisdiction to allow foreign claimants to sue TNCs with a nexus to the US, many Indigenous Peoples have utilised this mechanism to access remedies for human rights and environmental standards violations by TNCs.

Although some of the ATS cases involving Indigenous Peoples were settled out of court or dismissed for want of proper nexus of the claim to the US, the ATS has been "established the possibility to use the ATS as a mechanism for the enforcement of rights of Indigenous Peoples against [T]NCs in instances where the home State did not provide any judicial redress mechanism due to the complicity of its government."[1242] In *Doe v Unocal*,[1243] the Karen and Mon ethnic minorities in Myanmar through Earths International, filed an ATS lawsuit against Unocal, an oil corporation, for numerous abuses such as forced labour, forced relocation of Indigenous People from their ancestral homes, rape, and other violations. These abuses were allegedly committed using Myanmar's army as a proxy during the construction of the Yadana gas pipeline project.[1244] Before proceeding to trial, Unocal reached an agreement to compensate

[1239] Ibid, Commentary to Principle 28.
[1240] Judiciary Act of 1789, ch 20, § 9(b), 1 Stat 73,77 <https://www.archives.gov/milestone-documents/federal-judiciary-act#:~:text=Be%20it%20enacted%20by%20the,seat%20of%20government%20two%20sessions%2C> accessed 02 June 2024. The ATS is also called the Alien Tort Claims Act (ATCA).
[1241] Ugwu (n 307) (Adam) 140; Sascha-Dominik Bachmann, "Terrorism Litigation as Deterrence under International Law - from Protecting Human Rights to Countering Hybrid Threats" (2011) 87 *Amicus Curiae* 22, 23.
[1242] Bachmann and Ugwu (n 89) 580.
[1243] *Doe I. v Unocal Corp*oration, 395 F 3d 932, 942-43 (9th Cir 2002).
[1244] Bachmann and Ugwu (n 89) 580.

the plaintiffs in a significant settlement, effectively resolving the matter in both State and federal court.[1245]

Also, in *Maria Aguinda and Others v Texaco*[1246] and *Jota v Texaco Inc*,[1247] the Indigenous Peoples of the Ecuadorian Amazon and "certain residents of Peru, who live downstream from Ecuador's Oriente region," sought remedies for "alleged environmental and personal injuries arising out of Texaco's oil exploration and extraction operations in the Oriente region between 1964 and 1992."[1248] The cases were dismissed on the grounds of *forum non conveniens*, but the protracted legal battle led to the international "scrutiny of the 'ugly' side of [T]NC and State collusion regarding pollution and environmental delicts."[1249] The ATS jurisdiction also resulted in an out-of-court settlement for some of the Ogoni victims of human rights abuses and environmental degradation by Royal Dutch Petroleum and its subsidiary in Nigeria, Shell Petroleum Development Company. In the case of *Wiwa v Royal Dutch Petroleum Co*,[1250] the claimants argued that Royal Dutch Petroleum, incorporated in the Netherlands, and Shell Transport and Trading Co, incorporated in the UK, committed multiple acts of human rights violations and ecological damage in Ogoniland through their Nigerian subsidiary, the Shell Petroleum Development Company (SPDC). The case claimed that the defendants were involved in the killing of the Ogoni human rights campaigner Saro-Wiwa, as well as the destruction of the environment. Before adjudicating the matter, SPDC chose to settle out of court for a total of $15.5 million in 2009, regarded as "one of the largest payouts agreed by a multinational corporation charged with human rights violations."[1251]

The relevance of this US system in providing remedies for Indigenous Peoples for the violation of their rights has been whittled down. In *Kiobel v Royal Dutch Petroleum Co*,[1252] the US Supreme Court held that the applicability of the ATS to foreign TNCs is only possible when the presumption against extraterritoriality of law is rebutted and its relevance is limited to cases where the act committed concerns and touches the US with "with sufficient force."[1253] The

[1245] Earths International, "Doe v. Unocal" (*Earths International*) <https://earthrights.org/case/doe-v-unocal/> accessed 28 May 2024.
[1246] *Aguinda v Texaco Incorporation*, 303 F.3d 470 (2d Cir. 2002).
[1247] *Jota v Texaco Inc*, 157 F.3d 153 (2d Cir. 1998).
[1248] *Aguinda v Texaco* (n 1246) 473.
[1249] Bachmann and Ugwu (n 89) 581.
[1250] *Wiwa v. Royal Dutch Petroleum* Co., 226 F.3d 88 (2d Cir. 2000).
[1251] Ed Pilkington, "Shell Pays out $15.5m over Saro-Wiwa Killing" (*The Guardian*, 9 June 2009) <https://www.theguardian.com/world/2009/jun/08/nigeria-usa> accessed 28 May 2024.
[1252] *Kiobel v Royal Dutch Petroleum* (n 321).
[1253] Ibid, 1669.

same reasoning was arrived at by the US Supreme Court in *Nestlé USA, Inc v Doe*,[1254] where the alleged violation – the aiding and abetting of child slavery in Côte d'Ivoire by Nestlé USA for buying cocoa from producers that engaged child slave labourers from Mali, was held not to have been sufficient to trigger the jurisdiction of the ATS. The justification for this was that all the alleged violations happened outside of the US and that the "mere corporate presence" of a TNC in the US was insufficient to establish extraterritorial connection between the US and Côte d'Ivoire or Mali.

In Europe, FDL cases have become rampant, making it possible for non-European-resident victims of human rights and environmental violations to access remedies in European national courts. FDL is simply defined as "legal claims filed in the domestic courts of foreign countries, against corporate entities, with the expectation of obtaining monetary compensation as a remedy."[1255] The success of FDL cases lies in establishing a link between a parent company based in Europe and its subsidiary situated outside of Europe. In *Chandler v Cape*,[1256] the England and Wales Court of Appeal (EWCA) established facts that must exist before a European-based parent company can be held accountable for acts of its subsidiaries outside of Europe. In other words,

> the parent and subsidiary businesses are substantially identical; the parent has, or should have, superior knowledge in the particular industry; the subsidiary's system of work is unsafe, as the parent company knew or should have known; and the parent knew or should have anticipated that the subsidiary or its employees would rely on the parent's superior knowledge for protection.[1257]

Indigenous Peoples, especially those from Africa, have utilised this mechanism to access remedies. In *Okpabi and others v Shell*,[1258] the Ogale and Bille communities in Ogoni land sued Shell in the UK for the oil spillage that occurred on their land and rivers due to inadequate pipeline maintenance and poor spill response. Furthermore, it was argued that Shell was responsible for upholding the common law duty of care, as it had substantial control and authority over its Nigerian subsidiary. This included establishing, supervising, and enforcing

[1254] *Nestlé USA, Inc v Doe*, 593 US ___ (2021).
[1255] Ugwu (n 843) 403; Lucas Roorda, "Jurisdiction in Foreign Direct Liability Cases in Europe" (2019) 113 *Proceedings of the ASIL Annual Meeting* 161.
[1256] *Chandler v Cape* [2012] EWCA Civ 525.
[1257] Ibid, para 80.
[1258] *Okpabi v Royal Dutch Shell* (n 204).

comprehensive health, safety, and environmental regulations and guidelines throughout the organisation.[1259] In other words,

> the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not, in fact, do so. In such circumstances, its very omission may constitute the abdication of responsibility which it has publicly undertaken.[1260]

The Supreme Court concluded that, given the degree of control and de facto management, it was at least arguable that the parent company had a duty of care to the Nigerian citizens who claimed environmental damage and human rights abuses by Shell's Nigerian subsidiary. In another case, *Four Nigerian Farmers and Stichting Milieudefensie v Shell*,[1261] with facts similar to *Okpabi and others v Shell*, a Dutch Court of Appeal applied the FDL as a mechanism for seeking remedies for human rights and environmental violations victims. The Dutch Court of Appeal concluded that SPDC was strictly liable for the harm caused by the leaks and had demonstrated negligence in its initial reaction to those incidents. It further ordered Shell to compensate the farmers for the damage caused by the leakage and its failure to install a leak detection system (LDS). As a result, the Court ordered Shell to equip the pipelines with LDSs within one year of the ruling. Additionally, the Court imposed a daily penalty of €100,000 on the parties for each day they fail to comply with the order.[1262]

5.5.Monitoring Corporate Responsibility Through the National Contact Points

The UN Guiding Principles emphasise the need to use and enhance current mechanisms and highlight the OECD Guidelines' National Contact Points (NCPs) as a specific instance of a well-established grievance process that has the potential to offer effective redress.[1263] As an innovative mechanism established by the OECD Guidelines, the NCPs were created to further the effectiveness of the OECD Guidelines and to monitor the compliance of TNCs to their corporate responsibilities. The OECD Council mandates that countries adhering to the Guidelines establish NCPs with a dual role of promoting the implementation of the Guidelines and serving as a grievance mechanism.[1264] Although the OECD Guidelines are legally non-

[1259] Ibid, para 7.
[1260] Ibid, para 148.
[1261] *Four Nigerian Farmers and Stichting Milieudefensie v Shell* (n 201).
[1262] See ESCR-Net, "Four Nigerian Farmers and Milieudefensie v. Shell" (*ESCR-Net*) <https://www.escr-net.org/caselaw/2022/four-nigerian-farmers-and-milieudefensie-v-shell> accessed 28 May 2024.
[1263] UN Guiding Principles (n 28) Commentary to Principle 25.
[1264] Christine Kaufmann, "Responsible Business in a Digital World – What's International Law Got to Do With It?" (2021) 81 *Heidelberg Journal of International Law* 781, 790.

binding, the decisions of the OECD Council are binding on countries adhering to the guidelines,[1265] implying that countries adhering to the OECD Guidelines have a legal obligation to establish the NCPs in their various countries. With the NCPs, Kaufmann pointed out that the "OECD Guidelines are currently the only international comprehensive standard on responsible business conduct with a State-based, non-judicial remedy mechanism."[1266]

As of December 2023, there are 38 OECD countries and 13 more non-OECD countries that have adhered to the OECD Guidelines. No African country is among the 38 OECD countries, but out of the 13 non-OECD countries, there are 3 African countries – Egypt, Morocco, and Tunisia.[1267] South Africa is one of the key partners of the OECD. Key partners actively engage in policy discussions within OECD bodies, contribute to regular OECD surveys, and have their data included in statistical databases.[1268] This notwithstanding, the OECD Guidelines have been incorporated into many BITs in Africa by reference, as examined earlier in this chapter. Although the OECD Guidelines are addressed to countries adhering to them and are legally non-binding,[1269] the territorial jurisdiction of the NCPs is wide and covers cases of TNCs headquartered (1) in the NCP's country and operating in it, (2) in any other country and operating in the country of the NCP, (3) in the NCP's country and operating in any other country.[1270]

The effectiveness of the NCPs in providing remedies for victims of corporate violation of human rights has been questioned. In 2021, the OECD Watch published a report that expressly argued that the "expectations [the OECD Guidelines] give for the NCP complaint mechanism are too low, leading to an ineffective, unpredictable system for remediating corporate impacts."[1271] For Indigenous Peoples, the NCP has not always been effective in holding TNCs accountable for human rights and environmental violations, as its findings have not always been implemented. In *Complaint from Survival International against Vedanta Resources*

[1265] Ibid; see also OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, adopted on 27 June 2000, OECD/LEGAL/0307.
[1266] Kaufmann (n 1264) 792 – 793.
[1267] OECD, "About the OECD Guidelines for Multinational Enterprises" <https://mneguidelines.oecd.org/about/> accessed 08 December 2023.
[1268] OECD, "Our Global Reach" <https://www.oecd.org/about/members-and-partners/> accessed 08 December 2023.
[1269] Marian G Ingrams, "The 2023 Update of the OECD Guidelines sets Stronger Standards for Companies but Weak Expectations for Governments – High and Lowlights from the New Text" (2023) *Business and Human Rights Journal* 1, 2.
[1270] Christine Kaufmann (n 1264) 795. See also OECD, *National Contact Points for Responsible Business Conduct Providing Access to Remedy: 20 Years and the Road Ahead* (OECD 2020) 19.
[1271] OECD Watch, "Get Fit: Closing gaps in the OECD Guidelines to make them fit for purpose" (*OECD Watch* June 2021) <https://www.oecdwatch.org/wp-content/uploads/sites/8/2021/06/OECD-Watch-Get-Fit-Closing-gaps-in-the-OECD-Guidelines-to-make-them-fit-for-purpose-1.pdf> accessed 09 December 2023.

plc,[1272] the UK NCP established in 2009 that the TNC failed to develop a sufficient and timely consultation mechanism to fully involve the Dongria Kondh, an indigenous community directly impacted by the environmental and health and safety consequences of its proposed bauxite mine construction in the Niyamgiri Hills, Orissa, India. Vedanta failed to consider the potential impacts of the mine's construction on the rights and freedoms of the Dongria Kondh community. Additionally, it did not adequately weigh these potential impacts against the company's goals and objectives according to the provisions of the OECD Guidelines. For these reasons, it was decided that Vedanta failed to uphold the rights and freedoms of the Dongria Kondh in line with India's obligations under different international human rights agreements.

The UK NCP recommended that Vedanta should effectively and immediately engage and consult with the Indigenous group and respect the outcome of the consultation regarding the construction of the mine,[1273] and to "include a human and indigenous rights impact assessment in its project management process."[1274] Unfortunately, Vedanta was found not to have implemented these recommendations, prompting the UK NCP to issue a follow-up Statement in Survival International against Vedanta Resources plc.[1275] In its follow-up Statement, it only noted the disagreement as to whether Vedanta had complied with its recommendations. Although a follow-up can be useful for monitoring a TNC's compliance with the NCP's recommendations, it does not cover instances where the TNC fails to comply or when there is a disagreement regarding compliance.[1276]

The limit of the effectiveness of the NCP is also reflected in *Obelle Concern Citizens (OCC) v Shell Nigeria*,[1277] where the Dutch NCP issued a Statement which indicted Shell Nigeria, a subsidiary of Royal Dutch Shell, for failing to demonstrate that its grievance mechanism was

[1272] UK National Contact Point for the OECD Guidelines for Multinational Enterprises, *Complaint from Survival International against Vedanta Resources plc* <http://www.berr.gov.uk/files/file53117.doc> accessed 09 December 2023.
[1273] Ibid, para 73.
[1274] Ibid, para 75.
[1275] UK National Contact Point for the OECD Guidelines for Multinational Enterprises, *Complaint from Survival International against Vedanta Resources plc (Follow-up Statement)* UK NCP (12 March 2010) <https://www.oecdwatch.org/complaint/survival-international-vs-vedanta-resources-plc/ > accessed 09 December 2023.
[1276] Patrick Simon Perillo, "The Role of the OECD Guidelines for Multinational Enterprises and the National Contact Points in Shaping the Future of Corporate Accountability" (2022) 24 *International Community Law Review* 36, 51.
[1277] Dutch National Contact point (NCP) for the OECD Guidelines for Multinational Enterprises, *Obelle Concern Citizens (OCC) v Shell Petroleum Development Company of Nigeria Limited (SPDC) and Royal Dutch Shell (RDS)*, Final Statement, 27 February 2020 <https://www.oecdguidelines.nl/notifications/documents/publication/2020/02/27/final-Statement-obelle-concern-citizens-vs.-spdc-and-royal-dutch-shell> accessed 08 December 2023.

consistent with the OECD Guidelines and the UN Guiding Principles. The facts are that OCC, an Indigenous People's group in Nigeria, submitted a specific instance to the Dutch NCP where they alleged that Shell Nigeria engaged in adverse impacts resulting from a gas fire eruption. The leakage negatively impacted farmland and the environment, and the alleged impacts continue to have an effect today. In its 2020 Statement, the Dutch NCP recommended that Shell Nigeria be more transparent regarding its grievance mechanism. In addition, Royal Dutch Shell was recommended to utilise its influence to develop the Shell Nigeria grievance mechanism and guarantee adherence to the OECD Guidelines and UN Guiding Principles.[1278]

Unfortunately, neither Shell Nigeria nor Royal Dutch Shell abided with the recommendation, prompting the Dutch NCP to issue a follow-up Statement in December 2022.[1279] In this latter Statement, the Dutch NCP determined that due to the non-response from the parent company, the parent company has failed to leverage its influence to ensure that its subsidiary had a grievance system that meets the requirements and expectations outlined in the OECD Guidelines and UN Guiding Principles. It equally emphasised the significance of an operational-level grievance mechanism that operates efficiently. It further expressed dissatisfaction at the TNCs for not being able to show any real advancement in relation to the NCP's recommendations regarding the problems brought up in the particular case.[1280]

Ingrams has this to say concerning the ineffectiveness of the NCPs: "More critically, the complaint process has been largely toothless, with governments and NCPs refusing to adopt both essential carrots and sticks to encourage meaningful engagement and outcomes."[1281] She further argues that due to limited resources, lack of internal authority, ineffective outreach practices, and low visibility among government counterparts and stakeholders, they have not been able to achieve widespread awareness of the Guidelines or ensure that company practices align with their standards.[1282] Notwithstanding the possible concerns raised by the NCPs'

[1278] Ibid, 8.
[1279] Dutch National Contact point (NCP) for the OECD Guidelines for Multinational Enterprises, *Evaluation of the Final Statement regarding the Specific Instance Obelle Concern Citizens vs The Shell Petroleum Development Company of Nigeria Limited (SPDC) and Royal Dutch Shell*, 16 December 2022 <https://www.oecdguidelines.nl/notifications/documents/publication/2022/12/16/the-evaluation-of-the-final-Statement-regarding-the-notification-submitted-by-obelle-concern-citizens-regarding-the-shell-petroleum-development-company-of-nigeria-limited-and-royal-dutch-shell> accessed 08 December 2023.
[1280] Ibid, 5.
[1281] Ingrams (n 1269) 6.
[1282] Ibid.

ineffectiveness, it should be appreciated for its efforts in monitoring TNCs' observance of their responsibilities in the OECD Guidelines.[1283]

5.6.Sustainable Development Goals: The Meeting Point of State and Transnational Corporation Obligations

The 2030 Agenda for Sustainable Development,[1284] unanimously endorsed by all Member States of the United Nations in 2015, offers a collective strategy for achieving peace and prosperity for humankind and the environment, both presently and in the future. The core of this initiative consists of the seventeen Sustainable Development Goals (SDGs) and 169 targets that aim to eradicate poverty, protect the planet, and ensure prosperity for all by 2030.[1285] Put differently, the SDGs are a set of global objectives established by the UN in 2015 to address various environmental, social, and economic challenges and to promote sustainable development worldwide. Sustainable development aims to balance economic goals with the need to protect the environment. As decided by the ICJ in the *Gabcikovo-Nagymaros Project (Hungary v Slovakia),*[1286] "this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[1287]

It is a product of previously existing development agendas, and it incorporates ideas behind the "Stockholm Declaration,[1288] the Brundtland Report,[1289] the 1992 Rio Declaration, and the Millennium Development Goals (MDGs)[1290] of the year 2000."[1291] The seventeen SDGs are (1) no poverty, (2) zero hunger, (3) good health and well-being, (4) quality education, (5)gender equality, (6) clean water and sanitation, (7) affordable and clean energy, (8) decent work and economic growth, (9) industry, innovation, and infrastructure, (10) reduced inequality, (11) sustainable cities and communities, (12) responsible consumption and production, (13) climate

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[1283] Some writers have actually pointed out NCPs' usefulness in advancing human rights despite its limitations. See Kinnari Bhatt and Gamze Erdem Türkelli, "OECD National Contact Points as Sites of Effective Remedy: New Expressions of the Role and Rule of Law within Market Globalization?" (2021) 6(3) *Business Human Rights Journal* 423 – 448; Domenico Carolei, "Accountability beyond Corporations: The Applicability of the OECD Guidelines for Multinational Enterprises to Non-profit Organisations" (2022) 13(1) *Nonprofit Policy Forum* 31, 32.

[1284] United Nations General Assembly, "The 2030 Agenda for Sustainable Development," Resolution A/RES/70/1 (2015) <https://sdgs.un.org/2030agenda> accessed 06 January 2024.

[1285] David Mayer-Foulkes, Edson Serván-Mori, and Gustavo Nigenda, "The Sustainable Development Goals and Technological Capacity" (2021) 45 *Rev Panam Salud Publica* 1.

[1286] ICJ, *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep, p 7.

[1287] Ibid, para 140.

[1288] *Stockholm Declaration* (n 949).

[1289] World Commission on Environment and Development (WCED), *Our Common Future, from One Earth to One World* 1987, annexed to UNGA doc A/42/427 (the "Brundtland Report").

[1290] UN General Assembly, *United Nations Millennium Declaration* 18 September 2000, A/RES/55/2.

[1291] Nojeem Amodu, "Attaining the Sustainable Development Goals in Africa: The New CSR for Multinational Corporations" (2020) 11(1) *The Journal of Sustainable Development Law and Policy* 86, 87.

action, (14) life below water, (15) life on land, (16) peace, justice, and strong institutions, and (17) partnerships for the goals.[1292]

The SDGs and the ICESCR share a common objective, which is the "coordinated efforts to lift everyone out of poverty and ensure that no one is left behind."[1293] This was reconfirmed by the CESCR in its 2019 Statement,[1294] which underscores that:

> The concept of leaving no one behind in the 2030 Agenda is in its essence a commitment by States to prioritise the needs of the most disadvantaged and marginalised in realising the Sustainable Development Goals. Similarly, the Covenant requires State parties to protect and realise the rights of those left behind by poverty, socioeconomic and cultural exclusion and marginalisation.[1295]

The CESCR arrived at this by observing that the ICESCR is a fundamental pillar of the 2030 Agenda as the SDGs enshrine the protection of some of the rights in the ICESCR.[1296] Some of the ICESCR rights that underpin the SDGs, as pointed out by CESCR, especially as they relate to the rights of Indigenous Peoples and environmental protection, include "…the right to social security[1297](Goals 1–3, 5 and 10); the protection of and assistance to the family[1298] (Goals 3 and 5); the right of everyone to an adequate standard of living, including adequate food, clothing, housing and water[1299] (Goals 1–2, 6–7 and 11–16); …the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[1300] (Goals 3 and 6)…the right of everyone to take part in cultural life[1301] (Goal 16 and relevant targets in other Goals 12); and the right of everyone to enjoy the benefits of scientific progress and its applications[1302] (Goals 9–10)."[1303]

The SDGs acknowledge the essential requirement for cooperation and collaboration among governments, the private sector, and civil society to accomplish the goals. In this way, TNCs

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[1292] UN Department of Economic and Social Affairs, "The 17 Goals" <https://sdgs.un.org/goals> accessed 06 January 2024.
[1293] Amodu (n 1291) 98.
[1294] CESCR, *The Pledge to Leave no one Behind: The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development* (The Pledge to Leave no one Behind), 5 April 2019, E/C.12/2019/1 <https://sustainabledevelopment.un.org/content/documents/21780E_C.12_2019_1_edited.pdf> accessed 06 January 2024.
[1295] Ibid, para 6.
[1296] Ibid, para 4.
[1297] ICESCR (n 14) art 9.
[1298] Ibid, art 10.
[1299] Ibid, art 11.
[1300] Ibid, art 12.
[1301] Ibid, art 15(1)(a).
[1302] Ibid, art 15 (1)(b).
[1303] The Pledge to Leave no one Behind (n 1294) para 5.

are increasingly being called upon to contribute to the realisation of the SDGs, with a focus on corporate social responsibility (CSR) and sustainable business practices.[1304] This is in addition to the obligations of States to realise the SDGs. One can, therefore, conclude that the SDGs are points where States' obligations to human rights and the environment meet corporate responsibility to human rights and the environment. The SDGs are an interplay of the different roles of the States and TNCs, in addition to other stakeholders, towards achieving some common goals. So, at this point, it is pertinent to consider, firstly, SDGs as contained in some BITs. In this sense, BITs are links between States' and TNCs' responsibilities. Secondly, CSR will be evaluated as a tool for sustainable business practices and a means of achieving the protection of the rights of Indigenous Peoples.

5.6.1. Sustainable Development as Contained in Bilateral Investment Treaties

As pointed out earlier in this chapter, older versions of BITs are mainly geared towards the protection of the investors and their investment without any form of responsibility. They equally give investors who are not parties to the BITs the right to institute a matter at an investment tribunal without a similar corresponding right to individuals or Indigenous Peoples who may suffer harm caused by investors. As equally mentioned earlier, there is a paradigm shift in the new generation of BITs as they do not just aim at protecting investors but impose on them some responsibilities, as examined already. As confirmed by the study of the Human Rights Council's Mechanism on the Right to Development in 2023,[1305] these new BITs address sustainable development "by highlighting the right of States to regulate or by imposing duties on foreign investors."[1306]

Some examples abound. However, as observed by Kriebaum, references to sustainable developments in these BITs are primarily found in their preambles, thereby raising some questions as to their enforceability.[1307] Nevertheless, Article 31(2) of the Vienna Convention on the Law of Treaties'[1308] provision gives the understanding that preambles and annexes to treaties shall serve interpretative purposes for such treaties. It provides that "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes." So, notwithstanding that reference to sustainable development in BIT

[1304] Amodu (n 1291) 89.
[1305] Human Rights Council, Expert Mechanism on the Right to Development, *Right to development in International Investment Law*, 9 March 2023, A/HRC/EMRTD/7/CRP 2 (Human Rights Council Study).
[1306] Ibid, para 12.
[1307] Ursula Kriebaum, "International Investment Law" in Siobhan McInerney-Lankford and Robert McCorquodale (eds) *The Roles of International Law in Development* (Oxford University Press, 2023) 307.
[1308] *Vienna Convention on the Law of Treaties* (n 713).

is found in the preamble while interpreting any provision of the BIT, recourse must be had on the preamble to discover the true intention of the document. The Burkina Faso-Canada BIT[1309] embodies this type of BIT. The Preamble is lifted verbatim:

> UNDERSTANDING that investment is a form of sustainable development that meets present needs without compromising the ability of future generations to meet their own needs and that it is critical for the future development of national and global economies as well as for the pursuit of national and global objectives for sustainable development;
>
> RECOGNISING that the promotion and the protection of investments of investors of one Party in the territory of the other Party help stimulate mutually beneficial business activity, develop economic cooperation between the two countries and promote sustainable development.

Other BITs have gone beyond the preambles to make references to sustainable development in their various articles. The Nigeria –Morocco BIT does not just contain references to sustainable development in its preamble, it is embedded in some articles of the BIT. In its preamble, three fundamental introductions are made – (1) that the parties recognise the vital contribution investment can make in the sustainable development of both parties, (2) that the parties seek to promote and encourage investment opportunities that enhance sustainability development, and (3) that the parties understand that "sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept."[1310]

In its definitional article, the Nigeria –Morocco BIT defines investment as "an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State …together with the asset of the enterprise which contributes to *sustainable development* of that Party…."[1311] It is not farfetched why it included sustainable

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[1309] *Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments* (Burkina Faso - Canada BIT (2015)) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3557/burkina-faso---canada-bit-2015- > accessed 06 January 2024. Other BITs that are similarly worded and without references to sustainable development in any of the articles apart from on their preambles are: *Agreement between the Government of the State of Israel and the Government of the United Arab Emirates on the Promotion and Protection of Investments* (Israel-UAE BIT (2020)) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download> accessed 06 January 2024; *Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria* (Austria-Nigeria BIT (2013)) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2972/download> accessed 06 January 2024; *Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments* (Iran-Slovakia BIT (2016)) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3601/download> accessed 07 January 2024.

[1310] Nigeria –Morocco BIT (n 1057) Preamble.

[1311] Ibid, art 1(3). Emphasis mine.

development in the definition of investment. The Salini test, established in the case of *Salini v Morocco*,[1312] requires that for an investment to qualify as an investment under Article 25(1) of the International Centre for Settlement of Investment Disputes (ICSID) Convention,[1313] it must satisfy four criteria. These criteria include (1) a contribution, (2) a certain duration, (3) a risk, and (4) a contribution to the economic development of the host State.[1314] Without these requirements, the jurisdiction of the ICSID cannot be triggered as per the Salini test.

Another unique provision of the Nigeria –Morocco BIT is the provision on the right of a State to regulate investment in accordance with CIL and other general principles of international law to "ensure that development in its territory is consistent with the goals and principles of sustainable development."[1315] More importantly, this regulatory right of the State should be understood as embodying a balance between the rights and obligations of both the State and the investor.[1316] Another BIT in this regard is the Iran-Slovakia BIT (2016).[1317] Article 10(2) provides that a State shall ensure that its environmental laws are up to date with regard to sustainable development policies. It goes further to impose a responsibility on investors and their investments to aim to make the greatest possible positive impact on the sustainable development of the host State and local community by engaging in suitable levels of socially responsible practices.[1318]

The European Union-Singapore Free Trade Agreement[1319] is unique as it contains broad and extensive references to sustainability and refers to many international instruments, both hard and soft, where obligations and responsibilities of States and TNCs are made regarding sustainability. It requires States to " recognise that it is their aim to strengthen their trade relations and cooperation in ways that promote sustainable development."[1320] It also imposes an obligation on States not to lower labour or environmental standards with the intention of

[1312] *Salini Costruttori S.p.A. and Italstrade S.p.A v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001 (*Salini v Morocco*).
[1313] International Centre for Settlement of Investment Disputes [ICSID], *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention). Article 25(1) provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment".
[1314] *Salini v Morocco* (n 1314) para 52.
[1315] Nigeria –Morocco BIT (n 1057) art 23(1).
[1316] Ibid, art 23(2).
[1317] Iran - Slovakia BIT (2016) (n 1309).
[1318] Ibid, art 10(3).
[1319] European Union, *Free Trade Agreement Between the European Union and the Republic of Singapore* (2019) Official Journal of the European Union, L 294/3. <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreements/texts-agreements_en> accessed 07 January 2024.
[1320] Ibid, art 12.1(4).

attracting foreign investment.[1321] As a way of achieving sustainable development in trade, States reaffirm their commitment to reach their ultimate objectives in various environmental and climate change laws like the UNFCCC, the Paris Agreement, and other multilateral agreements.[1322] Most importantly, the European Union-Singapore Free Trade Agreement recognises the place of international cooperation of parties with other States in addressing "environmental aspects of trade and sustainable development under the United Nations Environment Programme and under multilateral environmental agreements."[1323]

5.6.2. Sustainable Development as Expressed in Corporate Social Responsibility

CSR is a concept that has gained significant attention since its introduction by Bowen in 1953, and according to the Commission of the European Communities, it refers to the integration of social and environmental concerns into a company's business operations and interactions with its stakeholders on a voluntary basis. [1324] It encompasses economic, ethical, and philanthropic responsibilities, emphasising that businesses should not solely focus on maximising profits for shareholders but also consider the interests of society at large. Yet, the strategic aspects of CSR have also been highlighted, indicating that it is not just about philanthropy but also, as identified by Ślęzak, about creating value for both stakeholders and the enterprise itself.[1325] The European Commission simply defines CSR as "the responsibility of enterprises for their impacts on society."[1326] To achieve CSR, TNCs

> should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of maximising the creation of shared value for their owners/shareholders and civil society at large and identifying, preventing and mitigating possible adverse impacts.[1327]

Gordon, Pohl, and Bouchard, in their OECD study survey on sustainable development and investment treaty, used responsible business conduct (RBC) in place of CSR. While giving

[1321] Ibid, art 12.1(3).
[1322] Ibid, art 12.6(3).
[1323] Ibid, art 12.10(b).
[1324] Cited in Lutz Preuss, "Corporate Social Responsibility" in Samuel O Idowu and others (eds) *Encyclopedia of Corporate Social Responsibility* (Springer, 2013) 579.
[1325] Mikołaj Ślęzak, "From Traditional to Strategic CSR: Systematic Literature Review" (2020) 7(1) *Journal of Corporate Responsibility and Leadership* 39, 44.
[1326] European Commission, *Corporate Social Responsibility: A New Definition, a New Agenda for Action* (2011) (MEMO/11/732, MEMO/11/734 and MEMO/11/735) <http://europa.eu/rapid/press-release_MEMO-11-730_en.htm> accessed 07 January 2024.
[1327] Ibid.

examples of RBC in BITs, they refer to BITs that mention CSR.[1328] Technically, OECD defined RBC as "(a) making a positive contribution to economic, environmental and social progress with a view to achieving sustainable development and (b) avoiding and addressing adverse impacts related to an enterprise's direct and indirect operations, products or services."[1329] So, in this section, RBC, as identified by the EU Internal Market, Industry, Entrepreneurship and SMEs, is viewed as an alternative term to CSR.[1330]

International investment law now incorporates the idea of CSR through references to CSR or sustainable business practices in some BITs, especially the new generation of BITs. These BITs achieved this by referring to the OECD Guidelines and UN Guiding Principles, which the Human Rights Council describes as "the principal sources for international consideration of corporate social responsibility.[1331] The China - Switzerland FTA (2013), in its Preamble, provides that the parties acknowledge "the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognised guidelines and principles in this respect."[1332] Other BITs that make reference to CSR in their have been recognised.[1333]

Also, in Canada-Benin BIT (2013), a substantive provision is made regarding CSR in Article 16, which is titled "Corporate Social Responsibility." The provision is comprehensively couched to cover aspects of CSR required of TNCs. Thus, "[e]ach [State] should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies … These principles address issues such as labour, the environment, human

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[1328] Kathryn Gordon, Joachim Pohl, and Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" 2014 (*OECD Working Papers on International Investment* 2014/01) <https://www.oecd.org/daf/inv/investment-policy/WP-2014_01.pdf> accessed 07 January 2024.

[1329] Cited in EU Internal Market, Industry, Entrepreneurship and SMEs, Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress (2019) (page 6) <https://ec.europa.eu/docsroom/documents/34963> accessed 07 January 2024.

[1330] Ibid.

[1331] Human Rights Council Study (n 1305) para 37.

[1332] *Free Trade Agreement between the Swiss Confederation and the People's Republic of China* (China - Switzerland FTA (2013)) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2751/download> accessed 07 January 2024.

[1333] See *Agreement between the Swiss Confederation and the Republic of Kosovo on the Promotion and Reciprocal Protection of Investments* (Switzerland-Kosovo BIT (2011)); <https://edit.wti.org/document/show/61d0fb4f-b764-4a4a-b6f0-0bf37f5e1783> accessed 08 January 2024; *Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments* (Canada-Peru FTA (2006)) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download> accessed 07 January 2024.

rights, community relations and anti-corruption."[1334] Article 4 provides that as part of a State's obligations, a State is required to ensure that its promotion and protection of investment is consistent with the provision of the BITs on CSR. Similarly, Article 24 of the Nigeria – Morocco BIT 2016 is headed corporate social responsibility and requires that apart from other existing obligations of investors, they also have the responsibility to strive to make contributions to the sustainable development of the host State by engaging in responsible practices, especially as espoused in the ILO Tripartite Declaration. Equally, investors are to apply the highest standard of CSR by constantly increasing their CSR if new standards are developed.[1335]

From the above analysis, it can be seen that CSR is TNCs' pursuit of sustainable development. So, sustainability is incorporated into the CSR agenda by TNCs.[1336] CSR fosters sustainable business practices and promotes collaborative relationships between TNCs and stakeholders like Indigenous Peoples, ultimately strengthening sustainable competitive advantages. Scholars have tried to link CSR and the fulfilment of the rights of Indigenous Peoples. For instance, Long[1337] argues that the incorporation of CSR in TNCs' agenda could lead to the reconciliation of Canadian Indigenous Peoples, especially if Indigenous Peoples are involved in resource extractive processes. He concluded that ensuring the conservation of the natural environment and the preservation of a cultural lifestyle deeply rooted in the land and water are crucial for achieving long-term sustainability and promoting the well-being of both individuals and society.[1338] Other activities that TNCs carry out as part of their CSR and in relation to Indigenous Peoples include incorporating indigenous values as part of CSR,[1339] providing opportunities for education as part of the right to education,[1340] funding sports activities,[1341] and other initiatives that advance their rights.

[1334] *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments* (Benin - Canada BIT (2013)) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/438/download> accessed 07 January 2024.
[1335] Nigeria –Morocco BIT 2016 (n 1057) art 24 (3).
[1336] Amodu (n 1291) 90.
[1337] Brad S Long, "CSR and Reconciliation with Indigenous Peoples in Canada" (2019) 8(1) *Critical Perspectives on International Business* 1 – 13.
[1338]Ibid, 13.
[1339] Annika Schneider, Grant Samkin, and Elizabeth Pitu, "Incorporating Indigenous Values in Corporate Social Responsibility Reports" (2012) 10(2) *Journal of New Business Ideas and Trends* 19-38.
[1340] Alessandro Connor Crocetti and others, "The Commercial Determinants of Indigenous Health and Well-Being: A Systematic Scoping Review" (2022) 7 *BMJ Global Health* 1, 4.
[1341] Steven Latino and others, "Extractives Companies' Social Media Portrayals of Their Funding of Sport for Development in Indigenous Communities in Canada and Australia" (2022) 10(6) *Communication and Sport* 1188–1209.

5.7.Concluding Remarks

This chapter has highlighted the sources of corporate responsibilities in four aspects: respecting human rights, the environment, disclosure obligation, and responsibility to prevent bribery and corruption. Furthermore, it examined the importance of corporate due diligence, transparency, and accountability in mitigating adverse human rights impacts associated with business activities, as captured extensively in the UN Guiding Principles, the OECD Guidelines, and the UN Global Compact. Subsequently, it looked at the emergence of non-judicial mechanisms like the NCPs, which provide avenues for affected individuals and communities to seek remedies for human rights violations linked to corporate operations. It is yet to be seen how effective the NCPs are in addressing corporate human rights and environmental abuse since the decisions of the NCPs are not legally enforceable.

Although the responsibilities of TNCs are provided for in legally non-binding instruments, there is a growing trend in the way new BITs are drafted to incorporate the responsibilities of TNCs to include corporate human rights and environmental responsibilities, thereby serving as sources of legally binding instruments for corporate human rights and environmental responsibilities. The BITs show the extent to which investment law can protect human rights and the environment. For instance, in investment law, States can exercise police power to enact and enforce laws and regulations for the protection of the health, safety, welfare, and morals of its citizens without being liable to compensation. Even though States are to provide compensation for direct expropriation under international investment law, it can be argued that since older versions of BITs did not provide for corporate human rights and environmental responsibilities, such a requirement for compensation was created and justified. Interpreted in this way, it is possible that there will be a paradigm shift in the requirement for compensation where a State expropriates an investment that fails to fulfil the corporate human rights and environmental obligations contained in the newer versions of BITs.

Also, the SDGs serve as a meeting point for the obligations of States and responsibilities of TNCs as references to sustainability in various BITs do not only acknowledge States' duty to regulate investments to align with the SDGs but also require TNCs to carry out their business operations in accordance with the SDGs and to reflect sustainable development in their CSR. BITs are important tools as they provide not just the obligations of States and TNCs to human rights and the environment but also requirements on responsible business conduct.

Access to remedy is limited under investment law as any violation of human rights or environmental standards by an investor is usually presented to an arbitral tribunal by the State as a counterclaim. The effect of this is that the compensation sought by investors will be reduced for noncompliance with human rights and environmental standards. The provisions of the UNDRIP and the UN Guiding Principles are non-binding and so do not give room for strict requirements for access to remedy. Fortunately, national courts have evolved mechanisms that allow victims, including Indigenous Peoples, to sue for violations committed abroad. For instance, the US ATS was utilised by some Ogoni people to obtain remedies for the violations committed by Shell in Nigeria, although they were settled out of court. Unfortunately, the US Supreme Court recently limited the applicability of this mechanism, making it almost impossible for victims and Indigenous Peoples in Africa to access remedies via ATS litigation. However, FDL cases are springing up in national courts in European States. FDL was used by some villagers in Ogoni land to establish the negligence of Shell in Nigeria.

Finally, considering that States have an obligation under customary international law to protect human rights, and TNCs have a responsibility to respect human rights, it should be understood that any intervention by the State in any investment to fulfil this requirement should be justified and not subject to compensation. In Part Three of this thesis, Africa's approaches to the various issues will be examined to project Africa's contributions to these issues.

PART THREE

AFRICA'S MODEL LAWS AND THEIR SPECIFICS

Chapter SIX: Indigenous Peoples and the Specificity of Africa's Human Rights Regime

Chapter SEVEN: Africa's Environmental Law and Investment Law Regimes

Chapter SIX

Indigenous Peoples and the Specificity of Africa's Human Rights Regime

6.1.Introductory Remarks

This chapter explores various laws on human rights in Africa, focusing on the rights of Indigenous Peoples and the obligations of States to protect these rights. The human rights legal regimes exhibit distinct characteristics that make them effective if properly implemented and as model laws in protecting the different dimensions of Indigenous Peoples' rights and the obligations of States to human rights. The study and development of these distinct characteristics are reflected in the AAIL movement. As discussed in this chapter and in chapter seven, AAIL is not merely responsive to the gap in international law but inherently unique and specific to Africa as it takes into consideration the continent's historical and cultural experiences. For instance, the right to development, which was first given legal recognition in the African Charter,[1342] reflects the realisation in Africa that some of the African developmental challenges were caused by non-African entities.[1343] Innovative developments can be observed in Africa's human rights system. The African Charter is the first and only regional agreement allowing a review body to interpret the right to a healthy environment.[1344] Also, many policies point to the unique characteristics of Indigenous Peoples in Africa and the need for the protection of their rights.

The African system has safeguarding mechanisms for enforcing these human rights. The African Commission as a quasi-judicial body and the African Court as a judicial organ have interpreted the African Charter and other human rights instruments as protecting the rights of Indigenous Peoples. This distinctiveness is also revealed in soft law instruments like the various guidelines by the African Commission. So, this chapter looks at the AAIL as a concept that runs through this chapter and chapter seven. The chapter further focuses exclusively on addressing the unique human rights systems in Africa by highlighting the obligations of States,

[1342] Surya P Subedi, "Declaration on the Right to Development" (2021) United Nations Audiovisual Library of International Law <https://legal.un.org/avl/ha/drd/drd.html> accessed 29 May 2024; Konstantinos D Magliveras, "A Comparative Examination of the African and South Pacific Radioactive Waste Management Regimes" (2022) 1(1) *American Yearbook of International Law* 370, 375.

[1343] Basil Ugochukwu, "When the T(W)AIL wags Global Environmental Governance" in Frans Viljoen, Humphrey Sipalla, and Foluso Adegalu (eds) *African Approaches to International Law: Essays in Honour of Kéba Mbaye* (Pretoria University Law Press, 2022) 239, 249.

[1344] UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* A/HRC/37/59, 24 January 2018 [para 11]; Ginger Hervey, "The Right to a Healthy Environment in West Africa: How a Progressive Ruling Should be Expanded upon and Better Implemented" (2023) 55 *International Law and Politics* 51, 54.

the rights of Indigenous Peoples, and some of the decisions of both the African Court and the African Commission.

6.2.Specific Sources of Human Rights Law

Human rights law in Africa is derived from various sources that contribute to the protection and promotion of human rights across the continent. These sources can be grouped into two – hard and soft instruments.

6.2.1. Hard Instruments

This section is further divided into two – the law and the safeguard. The law section examines the primary AU human rights that provide a framework for the protection of the rights of Indigenous Peoples in Africa. However, it is pertinent to point out that there is no standalone instrument on the rights of Indigenous Peoples like the UNDRIP. Nevertheless, the existing AU human rights instruments set out principles and guidelines for AU member States to follow in ensuring the rights of Indigenous Peoples are respected and upheld. The second segment of this section is on the safeguarding measures put in place for the practical application of the rights provided for in human rights documents. These safeguarding measures include a quasi-judicial body called the African Commission and a judicialised body known as the African Court. Apart from discussing these bodies' structure, an attempt is made to examine some of their major decisions on the rights of Indigenous Peoples in Africa.

6.2.1.1. Fundamental Legislation

The African human rights system has its foundation in the African Charter and plays a crucial role in shaping the legal landscape concerning human rights in Africa. Adopted in 1981, the African Charter emphasises civil and political rights and incorporates economic, social, and cultural rights, reflecting a comprehensive approach to human rights protection under the auspices of the AU.[1345] Furthermore, it has been instrumental in shaping the African human rights system and has contributed to the international human rights discourse over the past four decades.[1346] According to Jegede, the "wide ratification [of the African Charter] makes it the most effective at the regional level as a standard of assessing the protection of Indigenous Peoples' land rights."[1347] In addition to the African Charter, the various protocols to the charter,

[1345] Eghosa Osa Ekhator, "The impact of the African Charter on Human and Peoples' Rights on Domestic Law: A Case Study of Nigeria" (2015) 41(2) *Commonwealth Law Bulletin* 253, 254.
[1346] Obiora C Okafor and Godwin EK Dzah, "The African Human Rights System as 'norm leader': Three Case Studies" (2021) 21 *African Human Rights Law Journal* 669, 670.
[1347] Ademola Oluborode Jegede, *The Climate Change Regulatory Framework and Indigenous Peoples' Lands in Africa: Human Rights Implications* (Pretoria University Law Press, 2016) 20.

the AU, and its constituent organs comprising a quasi-judicial body called the African Commission and a judicialised forum known as the African Court all work together to maintain the human rights system in Africa.[1348]

Before going into the domain of the novelty of the African human rights system, it is pertinent to look at some of the rights essential to Indigenous Peoples and point out that these rights are civil and political, socio-economic and cultural, individual and collective rights.[1349] These rights are also found in other human rights regimes and instruments on the protection of Indigenous Peoples' rights, like the UNDRIP. First, individual rights include the right not to be discriminated against in the enjoyment of the rights in the charter,[1350] equality before the law,[1351] right to life,[1352] right to the dignity inherent in a human being,[1353] right to religion,[1354] and the right to receive information.[1355] Other individual rights include the right to political participation,[1356] property rights,[1357] and the right to cultural participation.[1358] On the other hand, the African Charter makes elaborate provisions on collective rights, which makes it the only regional human rights system to recognise collective rights explicitly. Some of these rights are the equality of all peoples,[1359] the inalienable right to self-determination by all peoples,[1360] all peoples' right to dispose of their wealth and natural resources,[1361] the right to development, which includes economic, social and cultural developments,[1362] and the right to a general satisfactory environment favourable to all peoples' development.[1363] As observed in Chapter Three, most Indigenous Peoples' rights are collective rights, which they enjoy as community members with common historical experience. Most of the cases on these collective rights before the African Commission and the African Court were initiated by Indigenous Peoples, as analysed later in this chapter.

[1348] Okafor and Dzah (n 1346) 675.
[1349] Ekhator (n 1345) 254.
[1350] African Charter (n 82) art 2.
[1351] Ibid, art 3.
[1352] Ibid, art 4.
[1353] Ibid, art 5.
[1354] Ibid, art 8.
[1355] Ibid, art 9.
[1356] Ibid, art 13.
[1357] Ibid, art 14.
[1358] Ibid, art 17(2).
[1359] Ibid, art 19.
[1360] Ibid, art 20.
[1361] Ibid, art 21.
[1362] Ibid, art 22.
[1363] Ibid, art 24.

The African Charter also obligates States to adopt legislative or other measures to give effect to all the rights enshrined in the charter.[1364] Furthermore, States "have the duty to promote and ensure … the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights, as well as corresponding obligations and duties, are understood."[1365] Apart from the duties imposed on States, the charter innovatively imposes some duties on citizens, which, as discussed later in this chapter, has been argued and supported by case law, imposes those duties on TNCs. These duties include the duty of an individual to exercise their rights "with due regard to the rights of others, collective security, morality and common interest" and the duty to strengthen positive African cultural values and promote society's moral well-being.[1366] Equally, an individual has the duty to maintain healthy relationships with other members of society to safeguard and reinforce mutual respect and tolerance.[1367] It is important to note that, unlike most international human rights documents, the African Charter does not contain a derogation clause. Hence, any restrictions on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or exceptional circumstances. In other words, States are not allowed to implement measures that would derogate their human rights obligations under the African Charter.[1368] As examined in greater detail in Chapter Seven, this serves as one of the distinctive characteristics of the human rights system in Africa.

Another human rights instrument in Africa that is relevant to Indigenous Peoples is the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[1369] In 2009, the Kampala Convention became the first international treaty adopted at a regional level that protects internally displaced persons. For Indigenous Peoples, this convention is particularly important because they are always victims of displacement, either due to government policies over their lands, activities of TNCs, or natural disasters. In the cases of *Ogoni*, *Ogiek* and *Endorois*, the respective Indigenous Peoples alleged that they were forcefully displaced from their ancestral lands. Although the Kampala Convention does not mention Indigenous Peoples, a reading of its provisions would reveal that Indigenous Peoples are protected, especially when the experiences of Indigenous Peoples

[1364] Ibid, art 1.
[1365] Ibid, art 25.
[1366] Ibid, art 29(7).
[1367] Ibid, art 28.
[1368] Brenda K Kombo, "A Missed Opportunity? Derogation and the African Court case of APDF and IHRDA v Mali" (2020) 20(2) *African Human Rights Law Journal* 756 – 776.
[1369] AU, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Kampala Convention), 23 October 2009

involve displacement and relocation. In a 2022 report by the United Nations High Commissioner for Refugees (UNHCR) and other agencies, it was discovered that development-based evictions, primarily caused by large-scale infrastructure projects, extractive projects, and environmental conservation, are causing displacement, particularly disproportionately affecting Indigenous Peoples, leading to land loss and loss of access to livelihoods, cultural and religious sites or shrines.[1370]

The Kampala Convention defines internally displaced persons as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of … situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border."[1371] Internal displacement, on the other hand, "means the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognised State borders."[1372] It sets to achieve five objectives, including providing measures to "prevent or mitigate prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions."[1373] Furthermore, it has the objective of establishing a legal framework for the prevention of internal displacement in addition to protecting and assisting internally displaced persons in Africa.[1374] It equally defines the obligations, responsibilities, and roles of States, non-State actors and other relevant actors concerning the prevention of internal displacement and protection of, and assistance to, internally displaced persons.[1375]

The States' obligations include the obligation to "refrain from, prohibit and prevent arbitrary displacement of populations"[1376] and prevent political, social, cultural, and economic exclusion and marginalisation that may lead to the displacement of populations or individuals due to their social identity, religion, or political opinion.[1377] Equally important, especially as it relates to the protection of the rights of Indigenous Peoples, apart from that States have the obligation to ensure the protection of the human rights of displaced persons[1378] in accordance with

[1370] The United Nations High Commissioner for Refugees (UNHCR), *Protecting Internally Displaced Persons: A Handbook for National Human Rights Institutions* (*UNHCR*, 28 March 2022) [10] <https://www.unhcr.org/fr-fr/en/media/handbook-internal-displacement-national-human-rights-institutions> accessed 14 March 2024.
[1371] Kampala Convention (n 1369) art I (k).
[1372] Ibid, art I (l).
[1373] Ibid, art II (b).
[1374] Ibid, art II (c).
[1375] Ibid, art II (d – e).
[1376] Ibid, art III (1)(a).
[1377] Ibid, art III (1)(b).
[1378] Ibid, art III (1)(d).

international law,[1379] States have the obligation to ensure the accountability of non-State actors like TNCs for acts of arbitrary displacement or complicity in such acts.[1380] Similarly, States' human rights obligations under the Kampala Convention extend to ensuring the "accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement."[1381] Non-State actors in this provision should be understood to include TNCs, especially when the definition of non-State actors under the Kampala Convention is considered. It defines non-State actors as "private actors who are not public officials of the State … whose acts cannot be officially attributed to the State."[1382] To adequately achieve these obligations, States are required to additionally incorporate these obligations into domestic legislation, designate an authority responsible for protecting and assisting internally displaced persons, adopt other strategies and policies on internal displacement at national and local levels, provide necessary funds for protection and assistance, and incorporate other principles contained in the convention geared towards negotiations and agreements to find sustainable solutions to the problem of internal displacement.[1383]

The Kampala Convention further reiterated the right of all persons to be protected against arbitrary displacement.[1384] It further highlights eight categories of arbitrary displacement under Article IV, including the following that are considered most relevant to Indigenous Peoples:

> a) Displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population;
> …
> d) Displacement caused by generalised violence or violations of human rights;
> e) Displacement as a result of harmful practices;
> f) Forced evacuations in cases of natural or human-made disasters or other causes if the evacuations are not required by the safety and health of those affected;
> …
> h) Displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.

Specifically, for Indigenous Peoples, especially regarding their relationship with their ancestral lands, the Kampala Convention provides that States Parties shall endeavour to protect

[1379] Ibid, art III (1)(e).
[1380] Ibid, art III (1)(h).
[1381] Ibid, art III (1)(i).
[1382] Ibid, art I (n).
[1383] Ibid, art III (2).
[1384] Ibid, art IV (4).

communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests.[1385] The Convention is more relaxed regarding displacement caused by developmental projects. It requires States to, as much as possible, "prevent displacement caused by projects carried out by public or private actors."[1386] Furthermore, States Parties must ensure that relevant stakeholders thoroughly investigate viable alternatives, providing comprehensive information and consulting with individuals whom projects may displace.[1387] They are obligated to carry out an environmental impact assessment of any proposed development project before undertaking such a project.[1388] These obligations are similar to those imposed on States by the UNDRIP, a soft law. So, the Kampala Convention has succeeded in hardening some of the obligations of States under the UNDRIP.

The Kampala Convention was negotiated to ensure its successful implementation. Therefore, monitoring and compliance measures are incorporated into the convention to achieve this objective. Article 8 assigns a significant responsibility to the AU in assisting State Parties in meeting their duties outlined in the Kampala Convention.[1389] It creates the Conference of State Parties (CSP) to convene regularly under the facilitation of the AU to monitor its implementation.[1390] In 2017, the CSP convened for the first time in Zimbabwe and adopted the Harare Plan of Action[1391] to implement the Convention.[1392] The provisions of this Convention do not affect the right to lodge a complaint with the African Commission or the African Court by those who have been displaced.[1393] However, the Kampala Convention provides for compensation to persons affected by displacement in the form of "effective remedies."[1394] States Parties must create an effective legal structure to offer fair and equitable compensation and other types of restitution, as necessary, to internally displaced persons for any harm suffered due to displacement while adhering to international norms. Finally, a State Party is

[1385] Ibid, art IV (5).
[1386] Ibid, art X (1).
[1387] Ibid, art X (2).
[1388] Ibid, art X (3).
[1389] Ibid, art XIV (1).
[1390] Ibid, art XIV (3).
[1391] AU - Directorate of Information and Communication, *Plan of Action for the Implementation of the Kampala Convention adopted by Conference of States Parties*, Press Release Nº 051/2017 <https://au.int/sites/default/files/pressreleases/32341-pr-pr_051_-_kampala_convention.pdf> accessed 15 March 2024.
[1392] Chaloka Beyani, "A View from inside the Kitchen of the Kampala Convention: The Modernisation of the International Legal Regime for the Protection of Internally Displaced Persons" (2020) 17 *LSE Law, Society and Economy Working Papers* 1, 15.
[1393] Ibid, art XX (3).
[1394] Kampala Convention (n 1369) art XII (1).

liable to compensate internally displaced persons for harm incurred if it fails to protect and assist internally displaced persons during natural disasters.[1395]

The 1968 African Convention on the Conservation of Nature and Natural Resources (the Algiers Convention)[1396] and its 2003 Revised Version (the Revised Convention on Nature)[1397] serve as sources of human rights instruments in Africa. Although they are primarily environmental protection laws, the African Court in 2023 held in the seminal case of *Ligue Ivoirienne Des Droits De L'homme (LIDHO) and Others v Republic of Côte d'Ivoire* (the LIDHO case)[1398] that in addition to being sources of environmental law instruments, the Algiers Convention and the Revised Convention on Nature (jointly referred to as the African Conservation Conventions) establish human rights and impose an obligation on States to protect these human rights. One of the objections raised to the jurisdiction of the African Court by the Republic of Côte d'Ivoire was that the African Court has jurisdiction to interpret only human rights instruments and that since the case was anchored principally on the African Conservation Conventions, the court was not competent to hear the case.[1399] In rejecting this argument, the court held that "the Algiers Convention is indeed, in its relevant provisions, a human rights instrument."[1400]

The relevant human rights provisions of the African Conservation Conventions are mostly geared to collective rights. Article II of the Algiers Convention, which is on the fundamental principle of the convention, enjoins States to take every necessary measure for conservation "in accordance with scientific principles and with due regard to the best interests of the people." Elaborately, Article III of the Revised Convention on Nature provides objective principles that must guide States in implementing the provisions of the convention. In other words, the Parties shall be guided by the following:

> 1. the right of all peoples to a satisfactory environment favourable to their development;

[1395] Ibid, art XII (2 – 3).
[1396] AU, *African Convention on the Conservation of Nature and Natural Resources* (Algiers Convention) (adopted 15 September 1968, entered into force 16 June 1969) <https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources> accessed 02 April 2024.
[1397] AU, *Revised African Convention on the Conservation of Nature and Natural Resources (Revised Convention on Nature)*, 11 July 2003 (entered into force 23 July 2016) (Assembly/AU/Dec.9 (II) - Doc EX/CL/50 (III)), OXIO 615.
[1398] African Court on Human and Peoples' Rights, *Ligue Ivoirienne Des Droits De L'homme (LIDHO) and Others v Republic of Côte d'Ivoire (the LIDHO case)* Application No 041/2016, Judgement 5 September 2023 [2023] AfCHPR 21.
[1399] Ibid, para 29.
[1400] Ibid, para 40.

> 2. the duty of States, individually and collectively, to ensure the enjoyment of the right to development;
>
> 3. the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner.

The African Court interpreted the above provisions as establishing human rights. In addition, Article XVII recognises the rights of local communities and Indigenous knowledge. This means that States must ensure that "traditional rights and intellectual property rights of local communities" are respected while putting conservatory measures in place.[1401] States must also recognise and obtain the prior informed consent of the concerned communities before accessing and using Indigenous knowledge.[1402]

Other African Union human rights instruments that could be invoked to protect the rights of Indigenous Peoples include the African Charter on the Rights and Welfare of the Child (Charter on the Rights of the Child)[1403] and the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women's Rights).[1404] Although these instruments do not address Indigenous Peoples directly, a broad and purposive interpretation of them reveals that Indigenous Peoples are also protected. For instance, the Charter on the Rights of the Child is a significant charter that aims to advance and safeguard children's rights. Without a doubt, as pointed out by Braun and Mulvagh, the rights and freedoms apply equally to both Indigenous and non-Indigenous children.[1405] The Charter on the Rights of the Child explicitly prohibits any form of racial or ethnic discrimination[1406] and additionally includes provisions that safeguard the child's cultural identity.[1407]

This position by Braun and Mulvagh is further buttressed by the decision of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)[1408] in *IHRDA and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v the*

[1401] Revised Convention on Nature (n 1397) art XVIl (1).
[1402] Ibid, art XVIl (2).
[1403] AU, *African Charter on the Rights and Welfare of the Child*, (Charter on the Rights of the Child) CAB/LEG/24.9/49 (adopted in 11 July 1990 and entered into force on 29 November 1999) 1990.
[1404] AU, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, (Protocol on Women's Rights) 11 July 2003.
[1405] Treva Braun and Lucy Mulvagh, *The African Human Rights System: A Guide for Indigenous Peoples* (the Forest Peoples Programme, 2008) 14.
[1406] Charter on the Rights of the Child (n 1403) arts 3 and 26.
[1407] Ibid, arts 9, 11(2), 12, 13, 17(2)(c)(ii), and 25(3).
[1408] The ACERWC was established pursuant to art 32 of the Charter on the Rights of the Child "to promote and protect the rights and welfare of the child."

Government of Kenya.[1409] In this Communication, the ACERWC considered as discriminatory the difficulty the children of the Nubian people go through in Kenya before acquiring Kenyan citizenship. The Nubians in Kenya are the descendants of the people from the Nuba mountains, which are located in present-day central Sudan. During the early 1900s, when Sudan was under British colonialism, the Nubian people were forcefully recruited into the colonial British army. After being demobilised, it is claimed that despite their plea to be sent back to Sudan, the colonial authority declined and compelled them to stay in Kenya.[1410] Unfortunately, they were not granted British citizenship and were regarded as aliens by subsequent Kenyan governments after the independence of Kenya.[1411] The ACERWC interpreted the act as a "denial of nationality to children of Nubian descent by the Government of Kenya" and, therefore, discriminatory and in violation of Article 3 of the Charter on the Rights of the Child and other international human rights instruments.[1412]

Furthermore, Braun and Mulvagh make a case for the Protocol on Women's Rights as an instrument for the protection of the rights of Indigenous Peoples in Africa. While citing the work of Banda and Chinkin,[1413] Braun and Mulvagh argue that Indigenous women globally experience numerous human rights violations on various fronts. They face discrimination both as members of Indigenous communities compared to dominant societal sectors and as women compared to men, both within and beyond their Indigenous communities.[1414] However, the only mention of "Indigenous" in the Protocol on Women's Rights is in Article 18(2)(c), which states that "States Parties shall take all appropriate measures to protect and enable the development of women's indigenous knowledge systems." In addition, States have an obligation to ensure that poor women are protected, "including women from marginalised

[1409] Communication No 002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v the Government of Kenya*, ACERWC, 22 March 2011.
[1410] Ibid, para 2.
[1411] Ibid, para 3.
[1412] Ibid, para 58.
[1413] Fareda Banda and Christine Chinkin, *Gender, Minorities and Indigenous Peoples* (Minority Rights Group International, 2004). For more recent publications on the discrimination of Indigenous women, see Lindsey Jaber and others, "Indigenous Women's Experiences of Lateral Violence: A Systematic Literature Review" (2023) 24(3) *Trauma, Violence, and Abuse* 1763–1776; Laura Navarro-Mantas and Luana Marques-Garcia Ozemela, "Violence Against the Indigenous Women: Methodological and Ethical Recommendations for Research" (2021) 36(13–14) *Journal of Interpersonal Violence* NP7298–NP7318; Annie Benjamin and Elizabeth D Gillette, "Violence Against Indigenous Women in the United States: A Policy Analysis" (2021) 19(1) *Columbia Social Work Review* 158-173; Rosemary Nagy, "Combatting Violence Against Indigenous Women" in Anastasia Powell, Nicola Henry, and Asher Flynn (eds) *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, 2015) 182–199.
[1414] Braun and Mulvagh (n 1405) 19.

population groups," by making the "environment suitable to their condition and their special physical, economic and social needs."[1415]

6.2.1.2.The Safeguarding Measures

Here, the jurisprudence of the African Commission and the African Court on the rights of Indigenous Peoples in Africa are explored, respectively.

1. African Commission on Human and Peoples' Rights

As part of safeguarding measures, the African Charter establishes the African Commission with the mandate "to promote human and peoples' rights and ensure their protection in Africa."[1416]

The African Commission[1417] has the function of promoting Human and Peoples' Rights through the collection of documents and engaging in "studies and researches on African problems in the field of human and peoples' rights" and "giv[ing[its views or mak[ing] recommendations to Governments."[1418] In addition, the commission is empowered "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations."[1419] The above functions can be achieved through the commission's cooperation with other "institutions concerned with the promotion and protection of human and peoples' rights," both in Africa and internationally.[1420] Similarly, the African Commission is mandated to "ensure the protection of human and peoples' rights under conditions laid down [in the] Charter."[1421] At the request of a State party, the AU, or any other African organisation recognised by the AU, the African Commission is to interpret the provisions of the African

[1415] Protocol on Women's Rights (n 1404) art 24(a).
[1416] African Charter (n 82) art 30.
[1417] The African Commission was founded in 1987 after the African Charter came into force in 1986. Its main office is located in Banjul, The Gambia. According to Article 31(1) of the African Charter, the African Commission comprises "eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience." The Commissioners are chosen by States parties to the African Charter and appointed by the AU Assembly of Heads of State and Government. However, they are obligated to serve in their individual capacity on a part-time basis. This has necessitated questions as to the independence of the commission on the basis that some of them are diplomatic representatives and, so, are "subservient to the primary political class of the AU, the Assembly of Heads of State and Government." See Manisuli Ssenyonjo, "The African Commission and Court on Human and Peoples' Rights" in Gerd Oberleitner (ed) *International Human Rights Institutions, Tribunals, and Courts* (Springer, 2018) 480, 482.
[1418] African Charter (n 82) art 45(1)(a).
[1419] Ibid, art 45(1)(b).
[1420] Ibid, art 45(1)(c).
[1421] Ibid, art 45(2).

Charter.[1422] Finally, occasionally, the commission is required to perform any other task entrusted to it by the Assembly of Heads of State and Government.[1423]

The African Commission has exercised most of these functions, but its impact has been more pronounced in its protection-based attributions brought via communications. In this context, the Charter anticipates the two categories of communications. The first is State communications, also known as inter-State complaints, where a State party reasonably believes that another State party is in violation of the African Charter.[1424] Since the African Commission was founded, this type of communication has rarely been used, except once[1425] in the case of *Democratic Republic of Congo v Burundi, Rwanda and Uganda*.[1426] The rarity of inter-State complaints is not peculiar to the African Commission because, as pointed out by Ssenyonjo, "similar procedures for inter-State complaints under United Nations human rights treaty bodies have never been used."[1427] The second category of communication is called "other communications" or, as referred to by Rodríguez, individual communications. This involves other communications besides those submitted by the State, which are submitted to the Secretary of the African Commission by any natural or legal person,[1428] usually directed against the States and their institutions or to the AU.[1429] The African Commission has elaborately and inclusively interpreted the status of those with the legal standing to file communications, including NGOs, a group of individuals, and individuals in their own capacity or on behalf of other victims. This was the conclusion of the commission in the case of *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*,[1430] where it held that

> the African Commission has, through its practice and jurisprudence, adopted a generous access to its Complaint Procedure. It has adopted the *actio popularis* principle, allowing everyone the legal interest and capacity to file a Communication, for its consideration. For this purpose, non-victim individuals, groups and NGOs constantly submit Communications to the African Commission. More so, the African Commission, has […] encouraged the submission of

[1422] Ibid, art 45(3).
[1423] Ibid, art 45(4).
[1424] Ibid, see arts 47 – 59.
[1425] Juan Bautista Cartes Rodríguez, "The African Regional Human and Peoples' Rights System: 40 years of Progress and Challenges" (2021) 18(3) *Revista de Direito Internacional* 232, 241; Ssenyonjo (n 1417) 482.
[1426] African Commission, Communication 227/99, *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, (29 May 2003) 25.
[1427] Ssenyonjo (n 1417) 482.
[1428] See African Charter (n 82) arts 55 – 57; African Commission, *Rules of Procedure of the African Commission on Human and Peoples' Rights*, adopted by the African Commission on Human and Peoples' Rights during its 27th Extra-Ordinary Session held in Banjul (The Gambia) from 19 February to 04 March, 2020 [rule 115(1)].
[1429] African Charter (n 82) art 56(3).
[1430] Communication 277/03, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (African Commission on Human and Peoples' Rights, 12 October 2013).

> Communications on behalf of victims of human rights violations, especially those who are unable to represent themselves.[1431]

On this basis, various actions brought about by Indigenous Peoples in their own capacity or in representative capacity by NGOs were determined. As examined later, most of the cases instituted by Indigenous Peoples were done by NGOs. For instance, in *Ogoni case*,[1432] the African Commission thanked "the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA) on behalf of the Ogoni people in Nigeria."[1433]

In *Ogoni case*, the complaint was that the Nigerian military government actively participated in oil production through the Nigerian National Petroleum Company (NNPC), a company owned by the Nigerian government, which holds the majority stake in a consortium with Shell Petroleum Development Corporation (SPDC). It claims that these activities have led to environmental deterioration and health issues due to the pollution of the Ogoni People's surroundings.[1434] Furthermore, the communication alleged that the companies exploited oil reserves in Ogoniland without considering the Ogoni people's health or environment, causing toxic waste in the environment and polluting sources of drinking water in violation of international standards, leading to health impacts such as skin infections, respiratory ailments, cancers, and reproductive issues.[1435] While the military should be under the control of the government, the allegation was that "the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies," ultimately leading to "ruthless military operations."[1436] Other allegations include the denial of information on the danger of oil operations, the non-involvement of the people in the developmental decision-making process, the refusal by the government to conduct an environmental impact assessment, failure to consult with the people to obtain their consent, the displacement of the Ogoni people from their homes and lands due to the military operations, and the poisoning of the soil and water upon which Ogoni farming and fishing depended thereby denying them the right to access food.[1437]

[1431] Ibid, para 76.
[1432] *Ogoni Case* (n 554).
[1433] Ibid, para 49.
[1434] Ibid, para 1.
[1435] Ibid, para 2.
[1436] Ibid, para 3.
[1437] Ibid, paras 4 – 9.

These allegations directly violated international human rights law, especially the provisions of the African Charter, like Article 2 on the right not to be discriminated against, Article 4 on the right to life, Article 14 on the right to property and Article 16 on the right to health. Other provisions of the African Charter alleged to have been violated include the right to family and cultural life,[1438] the right of all peoples to dispose of their wealth and natural resources freely,[1439] and the peoples' "right to a general satisfactory environment favourable to their development."[1440] After ruling on the admissibility of the communication based on the requirement that the Complainants must have exhausted all available local remedies as a *conditio sine qua non* to the jurisdiction of the African Commission,[1441] the African Commission addressed the four cardinal levels of obligations for a State that undertakes to adhere to a human rights regime. These levels of obligation are the obligation to respect, protect, promote, and fulfil these rights.[1442]

The African Commission, while referencing Drzewicki,[1443] held that the obligation to respect, which it regards as the primary level, requires that the State refrain from intervening in the exercise of all fundamental rights; it must show respect for right-holders, their freedoms, autonomy, resources, and ability to act freely. In terms of socio-economic rights, this implies that the government is required to respect the unrestricted use of resources owned or available to individuals, either individually or in any association with others, such as a household or family, for the fulfilment of rights-related needs. Regarding a collective group, it is essential to show respect for the resources that belong to the group, as the group relies on these resources to satisfy its needs.[1444]

It further held that at the secondary level, it is the responsibility of the State to protect the rights of individuals by enacting laws and providing effective remedies to address any violations committed by other entities. The State is obligated to implement steps that protect rights holders from any political, economic, or social interferences. Protection typically involves establishing and sustaining a conducive environment or structure through the successful implementation of laws and regulations, enabling persons to exercise their rights and freedoms

[1438] African Charter (n 82) art 18(1).
[1439] Ibid, art 21.
[1440] Ibid, art 24.
[1441] *Ogoni Case* (n 554) para 35 – 42.
[1442] Ibid, para 44.
[1443] Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Raija Hanski and Markku Suksi (eds) *An Introduction to the International Protection of Human Rights: A Textbook* (2nd edn, Institute for Human Rights, Åbo Akademi University, 1999) 31.
[1444] *Ogoni Case* (n 554) para 45.

freely. This is closely connected to the State's tertiary duty to promote the enjoyment of all human rights. The government should ensure that individuals can freely exercise their rights and freedoms. This can be achieved through measures such as fostering tolerance, boosting awareness, and even constructing necessary infrastructures.[1445] The last level of obligation demands that the State fulfil the rights and freedoms it willingly accepts under the different human rights frameworks. The State has a positive expectation of actively pursuing the fulfilment of rights through its machinery. This is closely connected to the obligation to promote. It could involve directly providing essential basic needs, such as food or resources that can be utilised for food, such as direct food assistance or social security.[1446]

The African Commission, while ruling on the right to a healthy environment, referred to Article 12 of the ICESCR on States' obligation to take steps to improve all aspects of environmental and industrial hygiene. The commission observed that:

> The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[1447]

The decision equally underscores the relationship between the right to enjoy the best attainable state of physical and mental health in Article 16(1) of the African Charter and the right to a healthy environment. This relationship exists because the two rights obligate States to refrain from directly threatening the health of their people and the environment.[1448] This obligation extends to permitting experts to monitor threatened environments scientifically and requiring an environmental and social impact assessment before any significant industrial development is embarked upon.[1449]

Another interesting aspect of the decision is the interpretation of Article 21 of the African Charter on the rights of all peoples to "freely dispose of their wealth and natural resources" and the obligation of States to protect this right. The African Commission traced the history of this provision to the effect of colonialism, where "the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves,

[1445] Ibid, para 46.
[1446] Ibid, para 47.
[1447] Ibid, para 52.
[1448] Ibid.
[1449] Ibid, para 53.

depriving them of their birthright and alienating them from the land."[1450] It noted that the legacy of colonial exploitation has left Africa's valuable resources and its people susceptible to continued foreign exploitation. The drafters of the Charter clearly intended to underscore the continent's painful history and re-establish cooperative economic development as a central pillar of African society.[1451] It, therefore, observed that the Nigerian government failed in its obligation to monitor oil exploration in Ogoniland; neither did the government involve them in the decision-making that affected their development. Without mincing words, the African Commission pointed out that "the destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21."[1452] It relied on decisions from other jurisdictions like the *Velàsquez Rodrígeuz v Honduras*[1453] from the Inter-American Court of Human Rights and the case of *X and Y v Netherlands*[1454] from the European Court of Human Rights to establish that when a State allows private persons to operate in its territory, in clear violation of human rights, it would amount to a violation of the State's obligation to protect human rights of its citizens.[1455] Ironically, in the case of Nigeria, the government did not just allow a private entity to violate human rights but actively facilitated the violation of these rights.[1456]

Moving forward, the African Commission noted that even though the right to adequate housing is not explicitly Stated in the African Charter, the right is embedded in the right to property in Article 14, the right to right to enjoy the best attainable State of mental and physical health in Article 16, and the right to family in Article 18(1) of the charter. This is because property, health, and family life are adversely affected when housing is destroyed. "It is thus noted that the combined effect of Articles 14, 16, and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated."[1457] This right to adequate housing encompasses the right to protection against forced evictions. As of the time this decision was made, the Kampala Convention had not been negotiated and adopted otherwise, the Complainants, in this case, would have relied on it to argue that they were forcefully

[1450] Ibid, para 56.
[1451] Ibid.
[1452] Ibid, art 55.
[1453] Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras*, Merits, IACHR Series C No 4, [1988] IACHR 1.
[1454] European Court of Human Rights, *X and Y v Netherlands*, Judgment (Merits and Just Satisfaction), Case No 16/1983/72/110, App No 8978/80 (A/91), [1985] ECHR 4.
[1455] *Ogoni Case* (n 554) para 57.
[1456] Ibid, para 58.
[1457] Ibid, para 60.

displaced and removed from their lands. This notwithstanding, the African Commission relied on general comments by the CESCR to establish that the right to adequate housing already existed and conceptualised under international law. In the CESCR General Comment 7[1458] and General Comment No. 4,[1459] both on the right to adequate housing, the CESCR points out that removing people from their homes against their will violates Article 11(1) of the ICESCR. Based on this, the African Commission found that the Nigerian government violated its obligation to protect the Ogoni people's collective right to adequate housing.[1460]

Similar findings were made by the African Commission regarding the right to food, which the Ogoni people alleged was violated by the Nigerian government. This right, the commission noted, is implicitly protected under the right to life,[1461] the right to health,[1462] and the right to economic, social and cultural development.[1463] The African Commission held that the right to food is inherently connected to the dignity of human beings. It is thus crucial for the enjoyment and realisation of other rights like health, education, employment, and political participation. Nigeria is obligated by the African Charter and international law to protect and strengthen existing food sources and guarantee that all individuals have adequate access to food. To uphold the minimum core of the right to food, it is imperative for the Nigerian Government to refrain from damaging or polluting food sources while also addressing the responsibility to enhance food production and provide access to food. It should prohibit private entities from causing harm or pollution to food supplies and should not hinder people's efforts to provide sustenance for themselves.[1464]

In concluding its ruling, it wrapped up the cardinal principle that underpins the human rights system in Africa when it observed that "clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa."[1465] The commission did not examine the meaning of "peoples" used in the African Charter and, by extension, Indigenous Peoples because it was not an issue in the Communication submitted to it, and the Nigerian government did not contest the Ogoni as "peoples" qualified to enjoy those collective rights provided for in the African Charter. This notwithstanding, the African

[1458] CESCR, *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, E/1998/22, 20 May 1997.
[1459] CESCR, General Comment No. 4 (n 634).
[1460] *Ogoni Case* (n 554) para 63.
[1461] The African Charter (n 82) art 4.
[1462] Ibid, art 16.
[1463] Ibid, art 22.
[1464] *Ogoni Case* (n 554) para 65.
[1465] Ibid, para 68.

Commission has had the opportunity to clarify this either in its previous or subsequent rulings despite the fact that the African Charter does not define "peoples" who are entitled to these collective rights.

However, scholars have suggested that the omission of the definition of the term in the African Charter was deliberate to allow for a flexible interpretation of the term by judicial bodies by either expanding the meaning or restricting it where necessary.[1466] It was meant to inspire a natural evolution of the phrase through flexible interpretation in line with the pursuit of restricted or moderate communitarianism in Africa. In this regard, the African Commission has defined and applied "peoples" differently depending on many factors, including self-identification by a group as a people. For instance, in *Mgwanga Gunme v Cameroon*,[1467] the African Commission opined that "such a group may also identify itself as a people, by virtue of their consciousness that they are a people."[1468] It further described "peoples" in the context of articles 19 – 24 of the African Charter by characterising them thus:

> [i]n the context of the African Charter, the notion of "people" is closely related to collective rights. Collective rights enumerated under articles 19-24 of the Charter can be exercised by a people bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.[1469]

The commission further referred to its work on Indigenous Peoples in Africa, Report of the Working Group of Experts on Indigenous Populations/Communities,[1470] where it pointed out that a strict definition of Indigenous Peoples in Africa was not necessary and desirable but to give a general characteristics that can help to identify a group that qualifies as Indigenous People.[1471] In the final analysis of the concept of people, the African Commission, while recognising that "the people of Southern Cameroon" qualify as a people under the African Charter, concluded that "they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook." In addition, "more importantly, they identify themselves as a people with a separate and distinct identity.

[1466] Okafor and Dzah (n 1346) 678; Abdulqawi A Yusuf, "The Progressive Development of Peoples' Rights in the African Charter and in the Case Law of the African Commission on Human and Peoples' Rights" in Ana Filipa Vrdoljak and Federico Lenzerini (eds) *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing, 2014) 41.
[1467] *Mgwanga Gunme v Cameroon* (n 84).
[1468] Ibid, para 170.
[1469] Ibid, para 171.
[1470] Report of the Working Group of Experts on Indigenous Populations/Communities (n 68).
[1471] Ibid, 87; *Mgwanga Gunme v Cameroon* (n 84) para 174.

Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it."[1472]

Although the African Commission did not think it was justifiable for the people of Southern Cameroon to be granted secession in the form of self-determination under Article 20 of the African Charter, it has suggested the possibility of internal self-determination. In the case of the *Sudan Human Rights Organisation v Sudan*,[1473] the African Commission observed that the right to self-determination is a right that a group can only enjoy, not just against external abuses but also against internal abuses within a sovereign State. This was in response to the argument that self-determination exists only when a group suffers from external aggression, colonisation, or oppression. In this case, the African Commission affirmed that the Fur, Zaghawa, and Masalit Indigenous Peoples of Sudan, who have suffered atrocities at the hands of the Arabic Janjaweed militia, qualify as "peoples" within the provisions of the African Charter. It held further that:

> [t]here is a school of thought, however, which believes that the "right of the people" in Africa can be asserted only vis-a-vis external aggression, oppression or colonisation. The Commission holds a different view, that the African Charter was enacted by African States to protect human and peoples' rights of the African peoples against both external and internal abuse.[1474]

In further developing the concept of Indigenous Peoples, the African Commission regretted the attempt by some African States to deny the existence of Indigenous Peoples in their territories "because of its tragic history of racial and ethnic bigotry by the dominant racial groups during the colonial and apartheid rule."[1475] Some States believe that recognising the concept in Africa may not achieve the unification of the African peoples for which the AU was established. It was for this reason that the African Commission had to articulate the rights of Indigenous Peoples and communities in Africa.[1476]

The *Centre for Minority Rights Development & Others v Kenya (Endorois case)*[1477] gave the African Commission ample opportunity to articulate the rights of Indigenous Peoples in the African Charter and other international human rights instruments like the UNDRIP. The decision did not just shed light on the evolving landscape of Indigenous Peoples' rights in

[1472] *Mgwanga Gunme v Cameroon* (n 84) para 179.
[1473] *Sudan Human Rights v Sudan* (n 81).
[1474] Ibid, para 222.
[1475] Ibid, para 221.
[1476] Ibid.
[1477] *Endorois case* (n 86).

Africa; it marked a pragmatic shift towards acknowledging and safeguarding these rights. This decision stemmed from the case where the Endorois community, an Indigenous group in Kenya, challenged their forced eviction from their ancestral lands by the Kenyan government. The Indigenous group also alleged that they were not compensated for the loss of their property, the disruption of their pastoral lifestyle of the community, the breach of the community's right to development, and violations of their right to practise their religion and culture.[1478] They have traditionally been in occupation of the "Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya" and consider their removal from these places, without consultation and adequate compensation, as a violation of their rights in the African Charter and other international human rights instruments on the protection of the rights of Indigenous Peoples.[1479]

After the independence of Kenya in 1963, the British Crown's claim to the Endorois land was passed to the local council authorities, which held the land in trust on behalf of the Endorois community, who remained on the land and continued to hold, use and enjoy it. They continued to enjoy customary rights over the region until 1973, when the government gazetted the land, thereby dispossessing the Endorois community of their customary rights over the land.[1480] The land in question, in addition to serving as a living place, serves other purposes to the Endorois people. The Complainants assert that the area surrounding Lake Bogoria is characterised by fertile soil, offering verdant grazing grounds and therapeutic salt deposits that contribute to the rearing of healthy livestock. Furthermore, Lake Bogoria holds a central role in the religious and traditional rituals of the Endorois people. The community's historical prayer sites, locations for circumcision rituals, and other cultural festivities are situated in the vicinity of Lake Bogoria.[1481]

The sites were utilised regularly, weekly or monthly, for minor local celebrations. Additionally, they were used annually for cultural festivities that involved Endorois people from the entire region. The Endorois believe that the spirits of all deceased Endorois dwell in the Lake, regardless of their burial location, and annual celebrations occur there for the dead. Additionally, the Endorois believe that the Monchongoi forest holds significant cultural and

[1478] Ibid, para 1.
[1479] Ibid, para 2.
[1480] Ibid, para 5.
[1481] Ibid, para 6.

historical importance as it is regarded as the ancestral birthplace of the Endorois people and the initial settlement of their community.[1482]

While asking for restitution and compensation, they alleged that their various rights protected in the African Charter have been violated, like the right to religion,[1483] the right to property,[1484] the right to cultural life,[1485] the right of all persons to dispose of their wealth and natural resources freely,[1486] and the right to development, especially economic, social, and cultural development.[1487] Before deciding on merit, the allegations of the Endorois and the response of the Kenyan government, the African Commission first answered the contention of the Kenyan government that the Endorois people did not qualify as distinct people and Indigenous People for the purposes of enjoying collective rights under the African Charter. It referred to the Report of the Working Group of Experts on Indigenous Populations/Communities.[1488] It out that even though the concepts of Indigenous Peoples and "peoples" remained political and ambiguous, it is necessary to appreciate the fact that the relationship between Indigenous Peoples and other dominant groups varies from country to country.[1489] It, therefore, noted that a reference to the term "Indigenous" in Africa is "not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities."[1490] While accepting the Endorois people as Indigenous Peoples, the African Commission did not include elements of "pre-invasion" and "pre-colonial" in its recognition of which group qualifies as Indigenous because in Africa, "validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims."[1491] It succinctly observed that for a people to be so identified, it must have the following:

> a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of Indigenous Peoples recognise the linkages

[1482] Ibid, para 6.
[1483] The African Charter (n 82) art 8.
[1484] Ibid, art 14.
[1485] Ibid, art 17(2).
[1486] Ibid, art 21.
[1487] Ibid, art 22.
[1488] Report of the Working Group of Experts on Indigenous Populations/Communities (n 68).
[1489] *Endorois case* (n 86) para 147.
[1490] Ibid, para 148.
[1491] Ibid, para 154.

> between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.[1492]

On resolving the question of the violation of the right to religion, the African Commission agreed that the "Endorois spiritual beliefs and ceremonial practices constitute a religion under the African Charter"[1493] and that "denying the Endorois access to the Lake is a restriction on their freedom to practice their religion, a restriction not necessitated by any significant public security interest or other justification" like "economic development or ecological protection."[1494] Moreover, while drawing inspiration from the decisions of other regional courts like the ECtHR in the case of *Doğan and Others v Turkey*[1495] and the IActHR cases of the *Mayagna (Sumo) Awas Tingni v Nicaragua*[1496] and the *Saramaka case*,[1497] the African Commission was of the view that property rights should not be solely determined by the provisions of national law but by other international instruments like the ILO Convention 169 especially when the property claim is in relation to an Indigenous group.[1498] In its final analysis of the right to property, the African Commission made an elaborate guideline on possession and the right of Indigenous Peoples to property:

> In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by Indigenous People has the equivalent effect as that of a State-granted full property title; (2) traditional possession entitles Indigenous People to demand official recognition and registration of property title; (3) the members of Indigenous Peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of Indigenous Peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.[1499]

[1492] Ibid, para 151.
[1493] Ibid, para 168.
[1494] Ibid, para 173.
[1495] *Doğan and Others v Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004).
[1496] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua, Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, reparations and costs, IACHR Series C No 79, [2001] IACHR 9, IHRL 1462 (IACHR 2001), 31st August 2001, Inter-American Court of Human Rights [IACtHR].
[1497] *Saramaka Case* (n 89).
[1498] *Endorois case* (n 86) para 199.
[1499] Ibid, para 209.

Regarding consultation, the standard is particularly rigorous in support of Indigenous Peoples, as it mandates obtaining their consent. Neglecting the duties to consult, seek consent, or provide compensation ultimately leads to a breach of the property right.[1500] Even in the extreme case that a limitation on the property right becomes inevitable, especially while issuing concessions and permits, the State must carry out three tests/safeguards to ensure that such restrictions do not amount to denial of the survival of Indigenous People. In stating these tests, the commission referred again to the *Saramaka case*. These tests/safeguards include that the State must:

a. "ensure the effective participation of the members of the … people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within […] territory;"
b. "guarantee that the [Indigenous People] will receive a reasonable benefit from any such plan within their territory;"
c. "ensure that no concession will be issued within [their] territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the [Indigenous] community have with their territory, which in turn ensures their survival as [Indigenous] people."[1501]

In this particular instance, the African Commission contends that the Endorois people were not afforded effective participation, nor did the community receive any fair benefits. Additionally, there was a lack of prior assessment of environmental and social impacts. The absence of these essential components of the 'test' constitutes a breach of Article 14 on property rights, as stipulated in the African Charter. The failure to ensure effective participation and provide a reasonable portion of the profits or alternative forms of adequate compensation further constitutes a violation of the right to development.[1502] However, the African Commission observed that the money the Kenyan government claimed to have given to the Endorois people was "relocation assistance" and did not amount to compensation for the loss of their land. The African Commission referred to the UNDRIP in holding that compensation must be prompt

[1500] Ibid, para 226.
[1501] Ibid, para 227.
[1502] Ibid, para 228.

and full.[1503] This also amounted to a denial of the right of the Endorois people to dispose of their resources freely under Article 21 of the African Charter.[1504]

It also found that the Kenyan government violated the right to culture of the Endorois people under Article 17(2-3) of the African Charter. The State's action of forcing the Endorois community to reside in semi-arid regions without access to crucial resources such as medicinal salt licks for the health of their livestock poses a significant danger to the traditional pastoralist lifestyle of the Endorois. This action is perceived as denying the core essence of the Endorois' cultural rights, essentially rendering those rights effectively meaningless. Consequently, the African Charter found that the State is deemed to have contravened Article 17(2 and 3) of the African Charter.[1505] The State was equally found to have failed to fulfil its obligation to protect the right to development of the Endorois because "the failure to provide adequate compensation and benefits or provide suitable land for grazing indicates that the … State did not adequately provide for the Endorois in the development process."[1506] Finally, the African Commission made some recommendations. For instance, it recommended that the Kenyan government should restitute Endorois ancestral land, pay adequate compensation, allow the community unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle, and pay royalties to the community from existing economic activities.[1507]

Although Inman and others noted that the Kenyan government has not directly implemented the decision in the Endorois case, they nonetheless contend that it has indirectly implemented some of the recommendations through the 2010 Constitution[1508] and the 2012 Land Act.[1509] Ndlovu and Nwauche express the same opinion as they argue that the aftermath of the decision has led to increased recognition of Indigenous Peoples' right to free, prior and informed consent as could be "gleaned in several Kenyan constitutional, statutory and policy provisions."[1510] Equally, "the judiciary has weighed in with some interpretations of the various elements of

[1503] Ibid, para 232.
[1504] Ibid, para 268.
[1505] Ibid, para 251.
[1506] Ibid, para 298.
[1507] Ibid, Recommendations.
[1508] The Constitution of Kenya (n 350).
[1509] Land Act of Kenya, No 6 of 2012 <http://www.parliament.go.ke/sites/default/files/2017-05/LandAct2012.pdf> accessed 23 March 2024. See also Derek Inman and others, "The (un)willingness to Implement the Recommendations of the African Commission on Human and Peoples' Rights: Revisiting the Endorois and the Mamboleo Decisions (2018) 2 *African Human Rights Yearbook* 400, 417.
[1510] Nqobizitha Ndlovu and Enyinna S Nwauche, "Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and Ogiek" (2022) 66(2) *Journal of African Law* 201, 215.

FPIC."[1511] Article 260 of the 2010 Constitution of Kenya defines a "marginalised community" to include, among other groups, "an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy." It further guarantees the right to religion as an individual or as a community and the right to participate in cultural activities and benefit from any use of a community's cultural heritage and indigenous seeds and plants.[1512] Furthermore, while it imposes an obligation on State agents and organs to address the needs of marginalised communities,[1513] it provides that there shall be prompt, full, and just compensation for any property that is compulsorily acquired for public interest by the government.[1514] On land rights, it recognises that "community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest."[1515] It recognises ancestral lands and lands traditionally occupied by hunter-gatherer communities as part of community land.[1516] Innovatively, it recognises "the right to a clean and healthy environment,"[1517] which can be enforced by instituting an action in court seeking an order to prevent or stop harm to the environment and to provide compensation to victims of environmental violations.[1518] So, ultimately, the African Commission's decision in the *Endorois case* has positively impacted the rights of Indigenous Peoples in Kenya and Africa.

2. African Court on Human and Peoples' Rights

Another safeguarding measure established for the judicial role on the provisions of the African Charter is the African Court on Human and Peoples' Rights (African Court), created by Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).[1519] It is a significant judicial body within the AU responsible for safeguarding human rights across the continent, and as Daly and Wiebusch contend, the court represents a crucial advancement in the international human rights protection framework in Africa.[1520] Wasiński, while examining the relationship between the African Court and African national authorities, described the court "as a progeny of both international society and a special context of post-colonial legacy on the

[1511] Ibid.
[1512] The Constitution of Kenya (n 350) art 11.
[1513] Ibid, arts 21(3) and 56.
[1514] Ibid, art 40(3)(b)(i).
[1515] Ibid, art 63(1).
[1516] Ibid, art 63(2)(d)(ii).
[1517] Ibid, art 42(1).
[1518] Ibid, art 70.
[1519] AU, *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998.
[1520] Tom Gerald Daly and Micha Wiebusch, "The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court" (2018) 14(2) *International Journal of Law in Context* 294, 298.

African continent inclining States to advance full control over their interest."[1521] Despite being a relatively young court, the African Court has made notable progress in its jurisprudential activities, with its mandate focusing on upholding human rights standards and ensuring compliance with the African Charter.[1522]

The jurisdiction of the court is so broad as it extends to all cases and disputes concerning the African Charter, the African Court Protocol, and "any other relevant Human Rights instrument ratified by the States concerned."[1523] Because of this, Daly and Wiebusch argue that the implication of this is that the court has the jurisdiction to interpret other international human rights instruments like the ICCPR and ICESCR and other African regional human rights instruments, which has the potential to expand the court's jurisdiction continuously.[1524] For Reventlow and Curling, this is "a unique feature [of the African Court] compared to other regional human rights courts [like the ECtHR and IACtHR], which in their contentious jurisdiction—as opposed to the courts' advisory competence—are limited to the human rights treaties whose implementation they were established to oversee."[1525] As seen later, this approach was used by the court in the *Ogiek Judgement on Merits* to interpret other universal human rights instruments on the rights of Indigenous Peoples as a means to incorporate those human rights principles that do not contradict the African Charter. Rodríguez States that "the Court adopted a protectionist jurisprudence, thereby overcoming the shortcomings of the African Charter."[1526] On the other hand, the Court's powers and responsibilities are set out in the African Court Protocol, which States that the Court's mandate complements the protective mandate of the African Commission.[1527] Apart from its binding decisions in contentious cases, which essentially distinguish it from the African Commission, the African Court has the jurisdiction to give advisory opinions at the request of a Member State, the AU, any of its organs, or any African organisation recognised by the AU.[1528] The court's advisory jurisdiction

[1521] Marek Wasiński, "The Optional Declarations Regime as a Lawful Tool to Develop the Jurisprudential Interaction Between the African Court on Human and Peoples' Rights and the National Authorities" (2017) 105(8) *Studia Prawno-ekonomiczne* 125, 143.
[1522] Trésor Muhindo Makunya, "Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and Lessons" (2021) 21 *African Human Rights Law Journal* 1230 – 1264.
[1523] African Court Protocol (n 1519) arts 3 and 7.
[1524] Daly and Wiebusch (n 1520) 300.
[1525] Yakaré-Oulé (Nani) Jansen Reventlow and Rosa Curling, "The Unique Jurisdiction of the African Court on Human and People's Rights: Protection of Human Rights Beyond the African Charter" (2019) 33 *Emory International Law Review* 203, 204.
[1526] Rodríguez (n 1425) 247.
[1527] African Court Protocol (n 1519) art 2.
[1528] Ibid, art 4.

allows it to provide legal opinions on matters within its material jurisdiction, contributing to the development of human rights law in Africa.[1529]

Although access to the African Court is usually through cases filed by the African Commission, State parties, or African Intergovernmental Organisations,[1530] in certain circumstances, the African Court can allow NGOs with observer status before the African Commission and individuals to institute cases directly.[1531] This circumstance arises only when a State party makes a declaration accepting the competence of the Court to receive petitions directly from individuals or NGOs, which must be made by the State at the time of ratifying the African Court Protocol or afterwards.[1532] The court equally has the jurisdiction to make appropriate orders to remedy the violation of human rights, which may include the payment of fair compensation or reparation.[1533] In the case of a continuing violation or cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the court can make some provisional measures to stop the violation pending the determination of the case on merit.[1534] An order is considered an appropriate remedy when it is "adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered."[1535] Additional remedies that the Court may provide, according to Ssenyonjo, drawing from the practices of other human rights bodies, encompass rehabilitation (such as medical and psychological support as well as other social services), orders for investigations and prosecutions of human rights violators in conflict or post-conflict situations, and the imposition of institutional reforms, the repeal of discriminatory laws, and the enactment of legislation that ensures appropriate penalties and guarantees against recurrence.[1536]

As mentioned earlier, the court's decisions on contentious issues are binding, requiring that States "comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."[1537] The court issued its first judgement

[1529] Ali Saçar, "Can the Rome Statute of the International Criminal Court be Considered as the Relevant Human Rights Instrument in the Context of the Advisory Jurisdiction of the African Court on Human and Peoples' Rights?" (2020) 69 *Annales de la Faculté de Droit d'Istanbul* 277.
[1530] African Court Protocol (n 1519) art 5(1).
[1531] Ibid, art 5(3).
[1532] Ibid, art 34(6).
[1533] Ibid, art 27(1).
[1534] Ibid, art 27(2).
[1535] Ssenyonjo (n 1417) 499; Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation No. 33 on Women's Access to Justice, UN Doc. CEDAW/C/GC/33, 3 August 2015 [para 19(b)].
[1536] Ssenyonjo (n 1417) 499.
[1537] African Court Protocol (n 1519) art 30.

on merits in *Tanganyika Law Society v Tanzania*[1538] in 2013, where the court held that the citizens have the right to participate, directly or through their elected representatives in the government of their country as guaranteed under Article 13 of the African Charter and the relevant articles of the ICCPR. Although this judgement did not mention Indigenous Peoples, it can be interpreted as endorsing the right of Indigenous Peoples to participate in politics. Four years later, in 2017, the African Court made its first judgement in a case that was entirely concerned with the rights of Indigenous Peoples.

In the *Ogiek Judgement on Merits*,[1539] a complaint submitted by the African Commission pursuant to Article 5 (1) of the African Court Protocol, the court gave its judgment on merits in 2017 and, subsequently, its award of reparations in 2022,[1540] for the situation of the Ogiek people in Kenya. In this section, the 2017 judgment on merits would be referred to as the Ogiek Judgement on Merits, while the 2022 judgment on reparations would be referred to as the Ogiek Judgment on Reparations. In this case, the African Commission, on behalf of the Ogiek people, posits that the Ogiek people are an Indigenous and minority ethnic community in Kenya comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest Complex, a land mass of about 400,000 hectares.[1541] For many years, the Ogiek have continuously faced arbitrary forced removals by the government from their ancestral territory in the Mau Forest, starting from the colonial era. In October 2009, the Kenya Forestry Service issued a notice mandating the eviction of the Ogiek, residing in the Mau Forest, giving them a 30-day ultimatum to vacate the area[1542] on the grounds that the forest was a reserved water catchment zone and part of government land under Section 4 of the Kenyan Government Land Act.[1543] The government took this measure without considering the important relationship between the Ogiek and Mau Forest. For the people, the forest is part of their survival, and they are expected to be involved in any decision concerning the land, which the government failed to do.

Consequently, the applicant argued that the Kenyan government failed to observe its obligation under Article 1 of the African Charter on the duty of a State to recognise and protect the rights enshrined in the charter. The Applicant equally argued that the State violated many of the rights

[1538] *In the Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre v Tanzania and Mtikila v Tanzania*, No 009/2011 & 011/2011, Judgment, AfrCtHPR, (14 June 2013).
[1539] *Ogiek Judgement on Merits* (n 168).
[1540] *2022 Ogiek Judgement on Reparations* (n 613).
[1541] Ogiek Judgement on Merits (n 168) para 6.
[1542] Ibid, para 7.
[1543] Ibid, para 8.

of the Ogiek people, among which included the right to religion under Article 8, the right to property as enshrined in Article 14 and the right to participate in cultural life as protected in Article 17(2 and 3). Further allegations of violations were peoples' right to dispose of their wealth and natural resources without interference, as protected in Article 21, and the right of all peoples to their economic, social and cultural development in Article 22.[1544] They therefore, prayed the court to make the following orders against the State to (1) "halt the eviction from the East Mau Forest and refrain from harassing, intimidating or interfering with the community's traditional livelihoods," (2) "recognise the Ogieks' historic land, and issue it with legal title …to revise its laws to accommodate communal ownership of property," and (3) "pay compensation to the Ogiek Community for all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and culture."[1545]

The court started off by analysing if the Ogiek people qualified as an Indigenous group since most of the allegations were hinged on whether or not Ogieks constitute an Indigenous population. It relied on the African Commission's Advisory Opinion on the UNDRIP, which rejected the idea of incorporating elements like "first inhabitant," "first nation," "pre-invasion," and "pre-conquest" into the characterisation of Indigenous Peoples.[1546] The African Court, although referred to the definition of Indigenous Peoples given by Cobo, which incorporates elements of pre-invasion and pre-conquest, did not determine if these criteria applied to Indigenous Peoples in Africa.[1547] It nonetheless concluded that based on various criteria for identifying Indigenous Peoples, the Ogiek people qualified as an Indigenous group.[1548] Expectedly, the reference by the African Court to Cobo's definition, without clarifying if those criteria applied to Indigenous Peoples in Africa, has been criticised. According to Rösch, referring to such a definition, which has already been rejected by the African Working Group on Indigenous Populations/ Communities, created an ambiguity as it is an outdated definition within the jurisprudence of Indigenousness in Africa.[1549]

[1544] Ibid, para 10.
[1545] Ibid, para 41.
[1546] African Commission's Advisory Opinion on the UNDRIP (n 71) para 13.
[1547] *Ogiek Judgement on Merits* (n 168) para 106.
[1548] Ibid, para 112.
[1549] Ricarda Rösch, "Indigenousness and Peoples' Rights in the African human Rights System: Situating the Ogiek Judgement of the African Court on Human and Peoples' Rights" (2017) 50(3) *Verfassung in Recht Und Übersee* 242 – 258.

The court expanded on the concept of property rights through its interpretation of Article 14 of the African Charter together with Article 26 of the UNDRIP on the right of Indigenous Peoples to property. Although under the African Charter, the right to property is conceptualised and grouped as an individual right, it is a right which applies to groups and communities like Indigenous Peoples.[1550] In its classical definition, the right to property often encompasses three elements: the right to utilise the object in question (*usus*), the right to benefit from its fruit (*fructus*), and the right to transfer or dispose of the object (*abusus*). When read in the light of Article 26(2) of the UNDRIP, which provides that "Indigenous Peoples have the right to own, use, develop and control the lands, territories and resources that they possess," the right to property of Indigenous Peoples in Africa "on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilisation of land."[1551] In conclusion, it observed that the Ogiek people "have the right to occupy their ancestral lands, as well as use and enjoy the said lands."[1552] This reasoning is also extended to the right of all peoples to freely dispose of their wealth and natural resources enshrined in Article 21 because in so far as the property right has been violated, the violation of the right to dispose of wealth and natural resources freely is a natural consequence.[1553]

On the right to religion, the court contented that in Indigenous societies like that of the Ogiek's, the right to worship and participate in religious rituals depends largely on access to land and the natural environment because "the practice and profession of religion are usually inextricably linked with land and the environment" for Indigenous Peoples.[1554] The implication is that any impediment to access to land and the natural environment is a direct violation of the right to worship. For the Ogiek people, the Mau Forest serves as a spiritual home, a burial place according to the traditions of the Ogiek people, and a place where spiritual trees are grown. Unfortunately, due to the eviction issued to them, they were no longer able to perform these religious acts. The argument by the State that the burial practice of the Ogiek was a threat to public health as it did not follow the provisions of the Kenyan Public Health Act was rejected

[1550] *Ogiek Judgement on Merits* (n 168) para 125.
[1551] Ibid, para 127.
[1552] Ibid, para 128.
[1553] Ibid, para 201.
[1554] Ibid, para 164.

because the government could have engaged in sensitisation and other methods that would not impede on the right to religion.[1555] On this, the court concluded thus:

> given the link between indigenous populations and their land for purposes of practising their religion, the evictions of the Ogieks from the Mau Forest rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogieks. The Court, therefore, finds that the Respondent is in violation of Article 8 of the Charter.[1556]

The court also settled the argument on the violation of the right to cultural life in favour of the Ogiek people. The right to cultural life, as provided for in Article 17 (2 and 3), can be expressed both as an individual and collective right. As an individual right, it ensures the protection of an individual's participation in the cultural life of their community. On the other hand, as a collective right, it imposes an obligation on States to promote and protect the traditional values of the community.[1557] Cultural preservation is particularly significant when considering indigenous populations. Indigenous populations frequently experience the impact of economic operations conducted by dominant groups and large-scale developmental initiatives. Indigenous populations, due to their clear vulnerability resulting from factors such as their population size or traditional lifestyle, have frequently been targeted and subjected to deliberate policies of exclusion, exploitation, forced assimilation, discrimination, and other forms of persecution. As a result, some indigenous groups have faced the extinction of their cultural distinctiveness and continuity as a distinct group.[1558]

Based on the available data, the Court acknowledged that the Ogiek people have a unique way of life that revolves around and relies on the Mau Forest Complex. The Ogiek people, as a hunter-gatherer community, rely on hunting animals and gathering honey and fruits for survival. They have their own traditional clothing, language, burial practices, rituals, and medicine. Additionally, they hold unique spiritual and traditional values that set them apart from other communities residing within and outside the Mau Forest Complex. This clearly indicates that the Ogiek people possess a distinct culture.[1559] Evicting them from the Mau Forest was a direct violation of their right to practice their unique culture, which is closely tied to the forest.[1560] Finally, the African Court held that Article 22 of the African Charter on the

[1555] Ibid, para 167.
[1556] Ibid, para 169.
[1557] Ibid, para 177.
[1558] Ibid, para 180.
[1559] Ibid, para 182.
[1560] Ibid, para 190.

right to development should be read in light of the provisions of Article 23 of UNDRIP on similar a right. The latter provides that Indigenous Peoples have the right to be actively involved in development programmes and to administer such programmes through their Indigenous institutions. The eviction from and the failure of the Kenyan government to consult or involve the Ogiek in the programmes concerning the Mau Forest constituted a breach of their right to development.[1561]

It granted the prayers of the Applicant and ordered the government of Kenya "to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this Judgment."[1562] The court reserved its ruling on reparations and ordered the parties to file fresh submissions on reparations within sixty days. This resulted in the *2022 Ogiek Judgement on Reparations*,[1563] where the court ruled on several pecuniary and non-pecuniary requests for fair reparations.

The African Commission, on behalf of the Ogiek, made ten prayers, which included monetary reparation for both tangible and intangible harm in the sum of US$ 297,104,578, as well as the restitution of their ancestral territories, clear delineation and legal recognition of their ancestral lands, official recognition of their status as an Indigenous People, a formal apology from the State for all the violations outlined in the *Ogiek Judgement on Merits*, the establishment of a public monument recognising the human rights abuses, the right to effective consultation on matters impacting their land, assurance from the State that such violations will not recur, and the establishment of a Community Development Fund.[1564] The State countered these prayers by arguing that non-repetition of the violation, together with rehabilitation measures by allowing the Ogiek people back to the Mau Forest, should be considered the only effective reparation. They equally argued that demarcating and titling ancestral lands was unnecessary and further opposed the request to erect a monument commemorating the violation of their rights.[1565]

Citing the old case of *The Factory at Chorzow (Jurisdiction)*,[1566] the African Court pointed out that the right to reparations for the breach of human rights obligations is now a general principle

[1561] Ibid, paras 209 – 210.
[1562] Ibid, para 227.
[1563] *2022 Ogiek Judgement on Reparations* (n 613).
[1564] Ibid, para 22.
[1565] Ibid, para 23.
[1566] *The Factory at Chorzow (Jurisdiction)* (n 1002).

of international law. In other words, "a State that is responsible for an international wrong is required to make full reparation for the damage caused."[1567] In its previous judgement in *Reverend Christopher Mtikila v United Republic of Tanzania*,[1568] the African Court had the opportunity to reiterate that this principle constitutes a customary norm of international law.[1569] As it concerns Indigenous Peoples, the court found guidance in Article 28 of the UNDRIP on the right of Indigenous Peoples to seek redress through restitution and monetary compensation. Based on this, the Court awarded the Ogiek KES 57,850,000 ($477,704 USD) for material prejudice[1570] and KES100,000,000 ($823,741 USD) for moral prejudice.[1571]

It arrived at this decision, firstly, by observing that even though Kenya became a party to the African Charter in 1992 before some of the violations took place, it was still responsible for making reparation for those violations together with the 26 October 2009 eviction notice. For the court, the test is to establish that the violations which occurred before Kenya became a party to the charter were "connected to the harm suffered by the Ogiek in relation to the infringement of their rights."[1572] Secondly, while it acknowledged that the violations of the rights of the Ogiek people have spanned a long period of time, which establishes a "systemic violation of their rights,"[1573] it was "inappropriate to order that each member of the Ogiek community be paid compensation individually or that compensation be pegged to a sum due to each member of the Ogiek Community."[1574] It was simply impractical to make a calculation for a group consisting of about forty thousand persons.

Furthermore, the court made some non-pecuniary orders. The first was an order for the restitution of the land to the Ogiek people through delimitation, demarcation, and titling to establish and clarify which areas of the Mau Forest are traditionally and effectively Ogiek people's land.[1575] Although the State contended that the right to use and access land is distinct from ownership,[1576] the Court concluded that the land must be legally owned by the community and clearly marked as such to protect the community from additional infringements effectively.

[1567] *2022 Ogiek Judgement on Reparations* (n 613) para 36.
[1568] *Reverend Christopher Mtikila v United Republic of Tanzania* (14 June 2013) 1 African Court Law Report 72.
[1569] Ibid, para 27 – 29.
[1570] *2022 Ogiek Judgement on Reparations* (n 613) para 77.
[1571] Ibid, para 93. These conversions from the Kenyan Shillings to the US Dollars were arrived at by the Economic, Social and Cultural Rights Net, "African Commission on Human and Peoples' Rights v. Republic of Kenya," (*ESCR-Net*) <https://www.escr-net.org/caselaw/2023/african-commission-human-and-peoples-rights-v-republic-kenya-judgment-application-no> accessed 29 March 2024.
[1572] *2022 Ogiek Judgement on Reparations* (n 613) para 27.
[1573] Ibid, para 75.
[1574] Ibid, para 76.
[1575] Ibid, para 115.
[1576] Ibid, para 103.

According to the 2016 Community Land Act passed by Kenya, every Ogiek community has the right to title to their land.[1577] If any portion of the land was leased by the State to non-Ogiek people and corporations and the State fails to reach a mutually agreeable arrangement on its use, the State is obligated to either return the land to the Ogiek people or provide compensation for their loss.[1578]

The second non-pecuniary order made by the African Court was on the recognition of the Ogiek as an Indigenous People who needed to be protected from their vulnerability.[1579] In the *Ogiek Judgement on Merits*, the Court recognised the Ogiek as an Indigenous population and an integral part of the Kenyan people. Following this, the State established a Task Force to collaborate with Ogiek to implement this recognition. However, the Task Force has yet to bring tangible improvements in service provision or political representation for the Ogiek.[1580] Consequently, the Court ordered the State to implement more efficient strategies within one year to ensure the complete recognition of the Ogiek as an Indigenous People. This includes protecting their language and religious practices and necessary legislative, administrative, and other measures.[1581]

Thirdly, the court ordered that it was imperative to establish a Community Development Fund specifically for the Ogiek community. This fund should be financed using the reparations money mandated in this order and supervised by a committee that includes representatives from the Ogiek community. The fund will be allocated to support initiatives aimed at improving the well-being of the Ogiek community. These initiatives may include projects related to healthcare, education, food security, natural resource management, and other causes deemed beneficial to the Ogiek as determined by the committee responsible for managing the fund in consultation with the Ogiek community.[1582]

The African Court refused to order the government to issue a public apology to the Ogiek people. It also refused to compel the Kenyan government to erect a monument recognising the human rights abuses. It reasoned that the judgement itself constitutes sufficient reparation and

[1577] Ibid, para 96.
[1578] Ibid, para 117.
[1579] *Ogiek Judgement on Merits* (n 168) para 112.
[1580] *2022 Ogiek Judgement on Reparations* (n 613) para 123.
[1581] Ibid, para 126.
[1582] Ibid, para 155.

measure of satisfaction.[1583] The Court ruled that a hearing would be scheduled twelve months following the verdict to assess the State's implementation of reparations.[1584]

As wonderful as these judgments are as "precedent for global conservation policy and practice,"[1585] it is important to point out that as of February 2024, the Kenyan government has yet to make the reparations,[1586] nor has it ceased evicting the Ogiek people from their ancestral land.[1587] The latest evictions from the Mau Forest are attributed to the global carbon credit market, which permits a polluter to release carbon dioxide or other greenhouse gases into the atmosphere and compensate a forest owner for capturing those emissions using the carbon-absorbing ability of their trees.[1588] An expert in forest peoples, Kenrick contends that since "the Mau is Kenya's biggest forest …it's clear that the interest shown by offsetting companies is prompting the Kenyan Government to assert its control. The Ogiek are on the front line of a false climate solution that is used to justify ongoing evictions and emissions."[1589]

In the *LIDHO case*,[1590] the African Court recently held that apart from States, non-State actors like TNCs could be held accountable for human rights violations under the African Charter. The facts of the case are that on 19 August 2006, the vessel M.V. Probo Koala, under charter by Trafigura Ltd, a TNC, arrived at the port of Abidjan, Côte d'Ivoire, carrying 528 cubic meters of extremely hazardous waste. This waste was unloaded from the ship and deposited at various locations in Abidjan, the country's economic hub and surrounding areas. None of these locations were equipped with facilities for treating chemical waste.[1591] Following the dumping of waste, air pollution emerged, and an unpleasant odour permeated the Abidjan district. Simultaneously, thousands of individuals flocked to hospitals, reporting symptoms such as nausea, headaches, vomiting, rashes, and nosebleeds. It was reported by the Ivorian authorities that seventeen individuals died from inhaling toxic gases. Additionally, hundreds of thousands of others were impacted, and environmental specialists documented significant groundwater

[1583] Ibid, paras 133 and 129.
[1584] Ibid, para 160 (xvi).
[1585] Claridge and Kobei (n 133) 322.
[1586] Cultural Survival, "Endorois and Ogiek to Take Over Attorney General's Office Over Kenyan Government's Refusal to Make Reparations" (*Cultural Survival*, 2 February 2024) <https://www.culturalsurvival.org/news/endorois-and-ogiek-take-over-attorney-generals-office-over-kenyan-governments-refusal-make> accessed 29 March 2024.
[1587] Claire Marshall, "Kenya's Ogiek People Being Evicted for Carbon Credits - Lawyers" (*BBC*, 9 November 2023) <https://www.bbc.com/news/world-africa-67352067> accessed 29 March 2024.
[1588] Ibid,
[1589] Ibid.
[1590] *The LIDHO case* (n 1398).
[1591] Ibid, para 3.

pollution.[1592] The Applicants, on behalf of the victims, alleged that the following rights, among other human rights, have been violated: (1) the right to life under Article 4 of the African Charter and Article 6(1) of the ICCPR, (2) the right of peoples to a general satisfactory environment favourable to their development enshrined under Article 24 of the African Charter, (3) the rights protected by the Algiers Convention.[1593]

Although in this instance case, the African Court found that "the main responsibility for human rights violations resulting from the dumping of the toxic waste in Abidjan is, ultimately, borne by the Respondent State,"[1594] it nonetheless held that a TNC could be responsible to respect human rights obligations. It ruled that:

> On the basis of this report, the Court notes that even though the responsibility, inter alia, to respect the obligations of international law is incumbent primarily on States, it is also true that this responsibility is incumbent on companies, notably, multinational companies. In this regard, the Court refers to the United Nations Guiding Principles on Business and Human Rights to recall that "The responsibility of enterprises in the respect for human rights is independent of the capacity or the determination of States to protect human rights". Such a responsibility require enterprises to commit themselves to public policies in prevention and reparation, due diligence in continuous identification of the consequences of their activities and lastly, setting up procedures aimed at solving problems caused by their action.[1595]

As wonderful as this judgement is, there is a gap. Dersso and Boshoff recognise a gap as Trafigura Ltd was not held liable for human rights violations, and neither is the pronouncement of the court indicative that TNCs would now become directly liable for human rights violations under the African human rights systems.[1596] According to them, the most the court did was to mandate "to amend its laws […] to ensure the responsibility of corporate entities in respect of acts relating to environment and the handling of toxic waste"[1597] They further argued that this highlights a missed opportunity for the court "to hold corporate actors directly responsible for blatant human rights violations."[1598] Fortunately, the dissenting opinion of Judge Blaise

[1592] Ibid, para 4.
[1593] Ibid, para 16.
[1594] Ibid, para 143.
[1595] Ibid, para 142.
[1596] Solomon Dersso and Elsabé Boshoff, "Extending Human Rights Accountability for Corporate Actors in the LIDHO v Cote d'Ivoire Case of the African Court" (*EJIL: Talk!*, 11 February 2024) <https://www.ejiltalk.org/extending-human-rights-accountability-for-corporate-actors-in-the-lidho-v-cote-divoire-case-of-the-african-court/> accessed 02 April 2024.
[1597] See *The LIDHO case* (n 1398) para 265 (xviii).
[1598] Dersso and Boshoff (n 1598).

Tchikaya[1599] points to the direction the court should have taken. For him, "the Court should horizontally extend the positive obligations contained in the African Charter to the powerful multinational companies that mastermind massive human rights violations on the continent."[1600] This is because the concept of "polluter pays" principle would be meaningless without attaching the concept of liability. In other words, there is a need for "an updated approach" "for serious crises and damage under international law" "so as to establish the liability of private individuals who infringe environmental law or life."[1601] This updated approach, referred to by Judge Blaise Tchikaya, reflects the paradigm shift in the investment law regime in Africa and the need to adopt an interpretative tool for legal instruments that advances the innovative provisions of the various African regimes. For him, the African Court should adopt an interpretative tool to extend the duty-regime under the African Charter to TNCs. These positive obligations, already examined, are one of the unique features in the African human rights system.

3. The Future The African Court of Justice and Human Rights and the African Court of Justice and Human and Peoples' Rights

To straighten the complicated situation in Africa regarding a court of justice, it is essential to point out, at the onset, that there exist four protocols that establish or intend to establish some courts in Africa. They are the following:

1. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 1998 (African Court Protocol).[1602] The protocol establishes the African Court discussed above. It is currently the only court that is functioning at the AU level.
2. The Protocol of the Court of Justice of the African Union of 2003 (the 2003 Protocol).[1603] This Protocol entered into force in 2009 after fifteen countries had ratified it. The objective of the Protocol was to establish the Court of Justice for the African Union (CJAU). Unfortunately, the court will never be constituted because, by the time

[1599] African Court on Human and Peoples' Rights, *Ligue Ivoirienne Des Droits De L'homme (LIDHO) and Others v Republic of Côte d'Ivoire* Application No 041/2016, Dissenting Opinion of Judge Blaise Tchikaya, 5 September 2023.
[1600] Ibid, para 52.
[1601] Ibid, para 38.
[1602] African Court Protocol (n 1519).
[1603] AU, *Protocol of the Court of Justice of the African Union*, July 2003, reprinted in 13 African Journal of International and Comparative Law 115 (2005).

the 2003 Protocol entered into force, the AU Heads of State and Government decided that it was necessary to merge the African Court and the CJAU together.

3. The Protocol on the Statute of the African Court of Justice and Human Rights of 2008 (the 2008 Protocol).[1604] It is intended to merge and replace the two previous courts – the African Court and the CJAU – to form the African Court of Justice and Human Rights (ACJHR). Of 15 ratifications required for the protocol to enter into force, only eight have ratified it.[1605]
4. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014 (the Malabo Protocol).[1606] It amends the 2008 Protocol by expanding the criminal jurisdiction of the court and renaming it the African Court of Justice on Human and Peoples' Rights (ACJHPR). It was negotiated in the heat of the impasse between the AU and the International Criminal Court (ICC) over the perceived targeting of African leaders by the ICC and "the indictment of or arrest warrants issued by certain European States against senior African State officials under charges of crimes under international law."[1607]

So, this section is dedicated to analysing the 2008 Protocol and the Malabo Protocol and how they are safeguarding measures for the rights of Indigenous Peoples specifically and human rights generally. The analysis will reveal that the human rights system in Africa i For instance, the 2008 Protocol gives the court the jurisdiction to, among others, interpret the Constitutive Act of the AU;[1608] interpret and apply all other treaties and subsidiary legislation adopted within the framework of the AU; interpret and apply the African Charter and its protocols; any question of international law; and the nature or extent of the reparation to be made for the

[1604] AU, *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008.
[1605] Rodríguez (n 1425) 249. See also, the Status List of the Protocol on the Statute of the African Court of Justice and Human Rights <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> accessed 03 April 2024.
[1606] AU, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, (Malabo Protocol) adopted 27 June 2014 <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> accessed 29 May 2024. The intention was to create a court that has the jurisdiction to prosecute not just African leaders but any individual who has violated some of the acts prohibited in the Protocol establishing it. For a detailed analysis of this impasse, see Sascha-Dominick Dov Bachmann and Naa A Sowatey-Adjei, "The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?" (2020) 29(2) *Washington International Law Journal* 247 – 302; Sascha Dominik Dov Bachmann and Eda Luke Nwibo, "Pull and Push - Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges" (2018) 43(2) *Brooklyn Journal of International Law* 457 – 543.
[1607] Amnesty International, *Malabo Protocol: Legal And Institutional Implications Of The Merged And Expanded African Court*, AFR 01/3063/2016, 22 January 2016, [p 9] <https://www.refworld.org/reference/research/amnesty/2016/en/108731> accessed 03 April 2024.
[1608] Heads of State and Government of the Member States of the AU, *Constitutive Act of the African Union*, 1 July 2000.

breach of an international obligation.[1609] It equally broadened the list of those who are eligible to present cases before it. For this, it creates two categories of entities. Firstly, those who are eligible to present cases to the court on any issues presented in Article 28. These entities include State parties to the Protocol, the Assembly, the Parliament, and other organs of the AU authorised by the Assembly, as well as a staff member of the AU on appeal in some special situations.[1610] Secondly, those eligible to present cases to the court only on questions arising from the violation of rights enshrined in the African Charter, the Child Charter, Women Protocol, and any other human rights instrument ratified by the State concerned. These entities include, among others, State parties, the African Commission, and individuals and NGOs who have been accredited to the AU.[1611] It is in this sense that the African Commission and NGOs can validly present cases of human rights violations on behalf of Indigenous Peoples. Moreover, the decisions of the court will be binding on all the parties involved in the dispute.[1612]

The Malabo Protocol innovatively expanded the jurisdiction of the court into three sections – the general affairs section, the human rights section, and the international criminal law section. Whenever it comes into force, the ACJHPR will have the jurisdiction to try fourteen international crimes, two of which could be regarded as most important for Indigenous Peoples and most relevant for this thesis. These two are trafficking in hazardous wastes[1613] and illicit exploitation of natural resources. The Malabo Protocol, in defining hazardous wastes, makes reference to the Bamako Convention and, therefore, prohibits "any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention."[1614]

On the other hand, "illicit exploitation of natural resources" is defined as:

> any of the following acts if they are of a serious nature affecting the stability of a State, region or the Union:
>
> a) Concluding an agreement to exploit resources, in violation of the *principle of peoples' sovereignty over their natural resources*;

[1609] The 2008 Protocol (n 1604) art 28.
[1610] Ibid, art 29.
[1611] Ibid, art 30.
[1612] Ibid, art 46 (1).
[1613] The Malabo Protocol (n 1606) art 28A. The list of crimes under the international criminal jurisdiction of the court are genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.
[1614] The Malabo Protocol (n 1606) art 28L.

b) Concluding with State authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;

c) Concluding an agreement to exploit natural resources through corrupt practices;

d) Concluding an agreement to exploit natural resources that is clearly one-sided;

e) Exploiting natural resources without any agreement with the State concerned;

f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and

g) Violating the norms and standards established by the relevant natural resource certification mechanism.[1615]

The phrase "principle of peoples' sovereignty over their natural resources" could be properly understood within the context of the right to property and peoples' right to dispose of their wealth and natural resources without interference under enshrined in Articles 14 and 21 of the African Charter. These rights were interpreted by the African Court, in the *Ogiek Judgement on Merits*, as accruing to Indigenous Peoples as collective rights. So, any agreement by an entity or State to violate the principle of peoples' sovereignty over their natural resources is a violation of the rights of Indigenous Peoples.

Furthermore, the Malabo Protocol provides for corporate criminal liability. This implies that when a violation of those rights enshrined in the African Charter or those fourteen crimes referred to as international criminal crimes are committed by a TNC, it will incur criminal liability. Like in the proof of any other crime, corporate criminal liability can be established by examining the *mens rea* and the *actus reus* of the corporation in question. Establishing an intent to commit a crime can be demonstrated by evidence indicating that the TNC had a predetermined plan or policy to engage in the actions that constituted the offence. Such a policy can be attributed to the corporation when it offers the most reasonable explanation for its behaviour.[1616] Corporate knowledge of a crime can be proven by demonstrating that the corporation had actual or constructive knowledge of the relevant information. Furthermore, the criminal responsibility of legal persons does not exclude the criminal responsibility of natural persons who are directly involved or complicit in the same offences.[1617]

The third aspect of the meaning of illicit exploitation of natural resources, which is "concluding an agreement to exploit natural resources through corrupt practices," deserves some

[1615] Ibid, art 28L Bis.
[1616] Ibid, art 46C (2 and 3).
[1617] Ibid, art 46C (4 and 6).

commentary. This provision should be read in conjunction with Article 28I of the Malabo Protocol, which covers acts of corruption. The article provides various instances where corruption can arise, including "offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, *a private sector entity*, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties."[1618] Instances where these provisions would have been useful, have been examined in Chapter Two because those instances of abuse of natural resources by States and TNCs have elements of corruption. For instance, Orano (formerly known as Areva S.A.) was accused of offering a bribe to the recently ousted President of Niger, Mohamed Bazoum, during the purchase of 2,500 tons of uranium by Orano.[1619] Similarly, The radioactive mining activities by the company were reported to have negatively impacted some Indigenous Peoples in Niger.[1620] Likewise, Perenco SA was discovered to have made several transfers to firms closely linked to the former president of DRC, totalling $1.3 million between 2013 and 2015.[1621]

The Malabo Protocol embodies the notion of AAIL because of its novel provisions. It is the first regional instrument to recognise corporate criminal liability and extends it to illicit exploitation of natural resources. Whenever the Malabo Protocol enters into force, and the ACJHPR is constituted, the judges of the court should understand the historical context for some of the provisions, by purposively applying its provisions to TNCs. For Indigenous Peoples, the inclusion of "concluding an agreement to exploit resources, in violation of the *principle of peoples' sovereignty over their natural resources*" as an element of the crime of illicit exploitation of natural resources, is germane to the protection of their right to self-determination and the right to dispose of their wealth and natural resources without interference. So, while providing for illicit exploitation of natural resources as a crime and the corporate criminal liability, the Malabo Protocol has successfully incorporated the protection of some of the rights of Indigenous Peoples. This aligns with the perception of contributionist scholars of AAIL.

The visible gap in the Malabo Protocol is its purported immunity not only to heads of State and government but also to an undefined category of senior State officials.[1622] The immunity clause

[1618] Ibid, art 28I (1)(e).
[1619] Furfari (n 375).
[1620] Ramadan (n 373) 2.
[1621] Miñano, Peigné and Philippin (n 366).
[1622] Amnesty International (n 1607) 11.

provides that "[n]o charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office."[1623] However, this notwithstanding, TNCs that offered bribes to a head of State or engaged in illicit exploitation of natural resources would not be excluded because TNCs do not enjoy such immunities.

Another issue with the Malabo Protocol is the slow ratification process by States, which raises concern about the commitment of African governments to see to the establishment of the court and their eagerness to commit to individual and corporate accountability for international crimes.[1624] Ba points out that although States have been reluctant to ratify the document, this slow pace is not peculiar to the Malabo Protocol, as African States have shown some sluggishness in ratifying AU treaties, especially when they perceive that such an instrument threatens their sovereignty.[1625] Another likely impediment to the success of the Court would be the issue of resources and capacity. The issue of resources may stymie the role of the future ACJHPR as most AU institutions are largely underfunded and, unfortunately, being funded by external sources like the EU, the *Deutsche Gesellschaft für Internationale Zusammenarbeit* GmbH (GIZ) and the Macarthur Foundation, among others.[1626] It is not likely that African States will ever allow the Malabo Protocol to enter into force or will be willing to establish the ACJHPR with such massive jurisdiction. As wonderful as the provisions of the Malabo Protocol are, the timing and the fact that it was negotiated at a time when the AU and the ICC were at loggerheads is an indication that it was not borne out of the sincere desires of African leaders to see that those crimes are prosecuted. It was a means of distraction from the numerous reports of human rights abuses by African leaders[1627] and to portray them as champions of human rights protection. Unfortunately, what came as a result of distraction from their squabble with the ICC now hangs around their necks like an albatross and as a test of their willingness to prosecute human rights violations and international crimes.

[1623] The Malabo Protocol (n 1606) art 46A bis.
[1624] Oumar Ba, "Exit from Nuremberg to the Hague: The Malabo Protocol and the Pan-African Road to Arusha" (2023) 3(3) *Global Studies Quarterly* 1, 8;
[1625] Ibid.
[1626] Jeremy Sarkin, "Is the African Court on Human and Peoples' Rights with Criminal Jurisdiction an African Solution to an African Problem?" in Jeremy Sarkin, Ellah T M Siang'andu (eds) *Africa's Role and Contribution to International Criminal Justice* (Intersentia, 2020) 225, 248.
[1627] Ibid, 247.

6.2.2. Soft Instruments

Apart from the above hard instruments on human rights in Africa, there are other non-legally binding instruments that serve as veritable sources of Indigenous Peoples' rights. Most of these instruments come from the resolutions of the African Commission. Resolutions issued by the African Commission, though not legally binding, provide guidance and set standards for member States. The African Commission has adopted resolutions specifically addressing the rights of Indigenous Peoples.

In 2000, it resolved to set up a working group of experts on the rights of indigenous or ethnic communities in Africa.[1628] The Working Group was given the mandate to "[e]xamine the concept of Indigenous People and communities in Africa" to determine how some of the rights in the African Charter could be enjoyed by Indigenous Peoples and to make recommendations on how rights of Indigenous Peoples could be appropriately monitored and protected.[1629] The Working Group has been meeting and has made some valuable recommendations. For instance, in 2005, the Working Group published the "Report by Experts Working Group on Indigenous Populations,"[1630] where they reported that Africa has many Indigenous Peoples who have faced various discrimination and denial of various rights.[1631] In this report, the Working Group reported that for identifying Indigenous Peoples in Africa, the socio-psychological description was more appropriate instead of a strict definition.[1632] The Working Group has similarly carried out more mandates by the African Commission.[1633]

In 2017, the WGIP issued a report on the Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights,[1634] where it called on African States to establish frameworks that protect the rights of indigenous populations/communities to customary ownership and control over their lands. This is particularly important as it is a core requirement for a people's FPIC regarding extractive enterprises. These frameworks include the ratification

[1628] African Commission, *Resolution on the Rights of Indigenous Peoples' Communities in Africa*, ACHPR/Res. 51(XXVIII) 2000, adopted at its meeting at its 28th Ordinary Session in Cotonou, Benin from 23rd October to 6th November 2000.
[1629] Ibid, para 3.
[1630] Report by Experts Working Group on Indigenous Populations (n 68).
[1631] Ibid, 19 – 57.
[1632] Ibid, 12.
[1633] See Working Group on Indigenous Populations/Communities and Minorities in Africa - 71OS <https://achpr.au.int/en/intersession-activity-reports/working-group-indigenous-populationscommunities-and-minorities-africa> accessed 03 April 2024.
[1634] African Commission's Working Group on Indigenous Populations/Communities, *Report on Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights*, 10 December 2017 <https://achpr.au.int/index.php/en/special-mechanisms-reports/report-extractive-industries-land-rights-and-indigenous-populationscommu> accessed 04 April 2024.

of international human rights instruments for the protection of the rights of Indigenous Peoples and the amendment of domestic laws to allow Indigenous Peoples ownership of benefits of natural resources on their ancestral lands.[1635] Furthermore, it called on TNCs to comply with the UN Guiding Principles, especially on the rights of Indigenous Peoples over their land and territories. TNCs should incorporate the UN Guiding Principles in their corporate policy, regardless of whether the country they operate in recognises the rights of Indigenous Peoples.[1636] Indigenous Peoples also have the responsibility to work closely with the African Commission whenever their rights are violated and to work toward strengthening their traditional institutions for easy involvement in decision-making and consultation.[1637]

Finally, the WGIP report on the Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights calls on the African Commission to urge States to implement measures to recognise the rights of Indigenous Peoples in their countries. To ensure that Indigenous populations/communities have ownership of and receive benefits from the natural resources found on or under the lands they historically occupy and use, States must consult with them and make necessary changes to their laws and constitutions. This also involves addressing the pressing need to recognise and protect indigenous religious, cultural, and spiritual rights, including their sacred sites, particularly in relation to extractive projects.[1638]

Meanwhile, the African Commission established a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (WGEI) in 2009[1639] with the mandate to examine the impact of extractive industries in Africa within the context of the African Charter.[1640] Other mandates include researching issues that affect the rights of all peoples to dispose of their wealth and natural resources freely and to a generally satisfactory environment favourable to their development, researching the violation of human rights by non-State actors and their human rights liability, and recommending measures on prevention and reparation of violations of human and peoples' rights by extractive industries in Africa.[1641]

Other African Commission resolutions that are relevant for the protection of the human rights of Indigenous Peoples also exist. For instance, the African Commission Resolution on the Right

[1635] Ibid, 132.
[1636] Ibid, 134.
[1637] Ibid, 136.
[1638] Ibid, 138.
[1639] African Commission, *Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa* - ACHPR/Res.148(XLVI)09.
[1640] Ibid.
[1641] Ibid.

to Food and Building Resilience in Nutrition across Africa[1642] acknowledges the fact that certain groups in Africa, like vulnerable and marginalised groups, suffer undernourishment due to *de facto* increasing delays in socio-economic development. It, therefore, calls on States to design policies to ease the realisation of the right to food and nutrition by vulnerable and marginalised groups. States should also ensure that sanitation and drinking water systems are incorporated into the food programme.

Furthermore, recalling the right of peoples to dispose of their wealth and natural resources freely and the right to a generally satisfactory environment favourable to their economic, social and cultural development as enshrined in Articles 21 and 24 of the African Charter, respectively, the African Commission in Resolution on Business and Human Rights in Africa,[1643] calls on WGEI and the Working Group on Economic, Social and Cultural Rights (WG-ECOSOC) to come up with a "draft of an African Regional Legally Binding Instrument to Regulate the Activities of Transnational Corporations and other Business Enterprises, towards ensuring accountability and access to remedy for business-related human rights violations in Africa, with particular focus on marginalised and vulnerable populations."[1644]

The Resolution on the Protection of Sacred Natural Sites and Territories,[1645] which calls for the recognition of the rights of Indigenous communities to their lands and sacred natural sites, recalls the special attachment of Indigenous Peoples to some natural entities considered sacred to them. The Commission determined that sacred natural sites are among the most ancient forms of culture-based conservation. These sites are defined as areas of land or water that hold significant spiritual importance to peoples and communities. They often contain diverse and abundant biodiversity, which enhances the interconnectivity, resilience, and adaptability of valuable landscapes and ecosystems. It, therefore, urged States to recognise and acknowledge sacred natural sites and territories, along with their customary governance structures, as playing a role in protecting human and peoples' rights.[1646] In addition, States were called to fulfil their human rights obligations under regional and international law on sacred natural sites. Similarly, TNCs and other stakeholders must recognise and respect the value of these sacred natural sites.

[1642] African Commission, *Resolution on the Right to Food and Building Resilience in Nutrition across Africa*, ACHPR/Res.514(LXX) 2022, 25 March 2022.
[1643] African Commission, *Resolution on Business and Human Rights in Africa* - ACHPR/Res.550 (LXXIV) 2023. 21 March 2023.
[1644] Ibid, para c.
[1645] African Commission, *The Resolution on the Protection of Sacred Natural Sites and Territories*, ACHPR/Res.372(LX)2017, 22 May 2017.
[1646] Ibid, para 1.

Apart from the various resolutions of the African Commission, other guidelines exist which are intended to expand the frontiers of human rights in Africa. Firstly, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Guidelines on ESCR) 2011.[1647] In this Guidelines on ESCR, the African Commission contended that the obligation imposed on States in Article 1 of the African Charter to recognise the rights enshrined therein and "to adopt legislative or other measures to give effect to them" includes the obligation to protect economic, social and cultural rights.[1648] The economic, social and cultural rights have four elements – availability, adequacy, physical and economic accessibility, and acceptability. Regarding the acceptability of these rights, it means that these rights must be provided in a way that "respects societal and cultural norms that are consistent with African and international human rights law."[1649] For instance, this entails the requirement that the provision of housing, specifically in terms of construction and the materials utilised, must be culturally appropriate, especially for minority groups and Indigenous Peoples. The Guidelines on ESCR reiterated the general notion that economic, social and cultural rights, just like all human rights, impose a combination of negative and positive duties on States, which include the obligation to respect, protect, promote, and fulfil.[1650]

In the analysis of the right to self-determination, as guaranteed under Article 20(1) of the African Charter, the African Commission pointed out in the Guidelines on ESCR that the right to self-determination can only be enjoyed with due regard to the inviolability of national borders of a State. In other words, Article 20(1) does not contemplate a right to secession.[1651] For Indigenous Peoples, the right to self-determination is expanded to incorporate economic, social, and cultural rights,[1652] and it imposes on States the obligation to ensure that there is no discrimination against Indigenous Peoples in access to economic, social, and cultural rights.[1653] Similarly, States must ensure that the prior informed consent of Indigenous Peoples should be

[1647] African Commission, *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (Guidelines on ESCR), 24 October 2011 <https://achpr.au.int/en/node/871> accessed 06 April 2024
[1648] Ibid, para 2.
[1649] Ibid, para 3(d).
[1650] Ibid, para 4.
[1651] Ibid, para 47. This position is not withstanding in some instances where remedial secession is justified as confirmed by the African Commission in some case law. These instances include where the rights of Indigenous Peoples are under very grave threat by the State they are a part of. See *Katangese Peoples' Congress v Zaire* (n 432); *Sudan Human Rights Organisation v Sudan* (n 81) para 222; Okafor and Dzah (n 1346) 679 – 684.
[1652] Guidelines on ESCR (n 1647) para 42.
[1653] Ibid, para 43.

sought and obtained for the exploitation of the resources of their traditional lands.[1654] The obligation includes encouraging Indigenous Peoples to participate in the democratic process of the country.[1655]

On the right to adequate housing, the Guidelines on ESCR provide that the right to adequate housing is the right of every individual to acquire and maintain a secure and safe community and neighbourhood in which to reside with tranquillity and dignity. It encompasses the availability of natural and commonly used resources, clean and potable water, energy for various purposes such as cooking, heating, cooling, and lighting, proper sanitation and washing facilities, methods for storing food, proper disposal of waste, efficient drainage systems, and emergency services.[1656] States must protect this right by refraining from evicting people from their community, guaranteeing security for the land tenure system, and ensuring basic shelter for everyone.[1657]

Secondly, in 2019, the African Commission adopted and published the Guidelines on the Right to Water in Africa (Guidelines on the Right to Water)[1658] to assist States in fulfilling their obligation to protect the right to water. In its Preamble, it recalls that Sub-Saharan Africa has the highest concentration of water-stressed countries compared to any other region in the world. As of 2019, approximately 300 million out of the estimated 800 million people living in Africa reside in areas with water scarcity.[1659] Fortunately, the right to water resources is embedded in Articles 21 and 24 of the African Charter on the right of all peoples to dispose of their natural resources freely and the right of all peoples to a generally satisfactory environment favourable to their development.[1660] This raises the question of States' obligation to protect the right to water as a fundamental human right. Guideline 1 of the Guidelines on the Right to Water is based on the general principle, which recognises that the main obligation to protect natural resources for the benefit of the population lies with the State. States must uphold and ensure the realisation of human rights in relation to several aspects of natural resources, including exploration, extraction, management of toxic waste, development, and governance.

[1654] Ibid, para 44.
[1655] Ibid, para 46.
[1656] Ibid, para 78.
[1657] Ibid, para 79.
[1658] African Commission, *Guidelines on the Right to Water in Africa*, (Guidelines on the Right to Water) adopted during the 26th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 16 to 30 July 2019, in Banjul, The Gambia, 31 July 2019 <https://achpr.au.int/en/node/904> accessed 06 April 2024.
[1659] Ibid, Preamble.
[1660] Ibid. See also the *Ogoni case* (n 554).

This obligation extends to international cooperation, investment agreements, and trade regulation.[1661]

However, it further recognises the indivisibility of human rights enshrined in the African Charter. Impliedly, States must provide measures to implement the rights in a comprehensive manner. By extension, States must ensure the realisation of water-related rights like the "right to life, the right to survival and development of children, the right to economic, social and cultural development, the right to food, the right to livelihood, the right to health, the right to education, the right to a satisfactory environment and the right to sanitation."[1662] Furthermore, this extension implies that the right is to be enjoyed equally by all individuals, including marginalised and Indigenous Peoples. This is why States are required to collaborate, consult, and actively involve Indigenous Peoples to aid them in preserving, advancing, and adapting their traditional water management systems for their ancestral territories. States must respect and uphold the Indigenous Peoples' right to access and use natural resources within their territory, as this right is fundamentally connected to their right to life, food, self-determination, and existence as a distinct group. The State can only impose restrictions on the rights of Indigenous Peoples to their natural resources, particularly water resources when it involves the "most urgent and compelling interest of the State."[1663]

Thirdly, the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment, 2021 (Reporting Guidelines on Articles 21 and 24).[1664] Pursuant to Article 62 of the African Charter on the requirement of States to submit a report every two years on measures taken to realise the rights enshrined in the charter, the African Commission, through its WGEI, revised and updated the previous guidelines on State reporting on Articles 21 and 24 into the 2021 version, otherwise referred to as the Reporting Guidelines on Articles 21 and 24. In relation to peoples' right to dispose of their wealth and natural resources freely, States are required to include in their reports the kind of natural resources which are exploited or available within their territory.[1665] The report should also contain efforts made toward regulating local participation, which must

[1661] Guidelines on the Right to Water (n 1658) Guideline 1.2.
[1662] Ibid, Guideline 2.
[1663] Ibid, Guideline 27.
[1664] African Commission, *State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment* (Reporting Guidelines on Articles 21 and 24), adopted 30 October 2021 <https://achpr.au.int/en/node/845> accessed 06 April 2024.
[1665] Ibid, 12.

encompass prior consultation.[1666] Equally important in the report is a declaration of the availability of transparency and environmental and labour norms guaranteeing that companies involved in extractive industries operate in accordance with human rights standards.[1667] Furthermore, it should include criteria ensuring fair revenue distribution between the national government and local authorities in impacted regions, aiming to ensure meaningful benefits for the populace from multinational corporations operating in extractive sectors. Additionally, a report on collaborating with other State parties to eradicate foreign economic exploitation.[1668]

Regarding a report on Article 24 on the right to a general satisfactory environment favourable to all peoples' development, the Reporting Guidelines on Articles 21 and 24 require States to provide information on how the right to a satisfactory environment is recognised in their laws and how the right can be enforced through judicial means.[1669] Information should also be provided on the "avenues available for effective and inclusive public consultation and meaningful participation of affected people in the protection and conservation of the environment."[1670] Finally, as part of sanctions and grievance mechanisms, States should report on available administrative, civil, and criminal liabilities for breaches of environmental standards, including the number of TNCs involved in environmental violations and if the TNCs were sanctioned through license revocation.[1671]

The Reporting Guidelines on Articles 21 and 24, in addition to containing guidelines for States, also contain explanatory notes on the guidelines. On the availability of means for participation and consultation, the guidelines explain that "environmental impact assessments have to be conducted in compliance with internationally acceptable standards."[1672] Additionally, it is imperative to conduct human rights and social impact assessments that involve the free and full participation of individuals who may be affected by the proposed actions. These assessments should also take into consideration Indigenous knowledge and information, as well as the specific needs of vulnerable groups such as Indigenous Peoples.[1673]

In the exercise of its obligation to protect Articles 21 and 24 rights, the obligations of the State encompass implementing globally recognised norms concerning environmental protection,

[1666] Ibid, 13.
[1667] Ibid, 14.
[1668] Ibid, 16.
[1669] Ibid.
[1670] Ibid, 17.
[1671] Ibid, 18.
[1672] Ibid, 27.
[1673] Ibid.

financial accountabilities pertaining to natural resource development, and safeguards against human rights abuses and labour standards violations throughout the entire operational process of extractive industries. Legislation regarding relevant standards should also guarantee the enforcement of human rights and appropriate safety and environmental measures to safeguard individuals and communities engaged in and reliant on artisanal mining. Special emphasis should be placed on protecting the rights of Indigenous Peoples and other disadvantaged groups.[1674]

6.3.The African Approach to International Law as a Concept

AAIL refers to the various perspectives, principles, and practices that African States and scholars bring to international law discourse. These approaches are shaped by Africa's historical experiences, cultural diversity, and contemporary challenges. For Fagbayibo, AAIL "encompass a variety of theoretical and processual elements that shape the way African countries, and Africa as a continent, continue to interact with the principles of international law."[1675] He further contends that AAIL, in essence, mirrors the continent's peripheral status in global realpolitik. This is particularly evident in how historical and contemporary circumstances perpetuate Africa's marginalisation. This situation is eloquently captured by Diallo: "Africa's independence remains a myth; the expected internal structural transformations have not taken place and, externally, on the international scene, Africa remains more marginalised and dominated than ever."[1676] Consequently, these approaches strive to propose alternative means of rectifying this issue, thereby serving as an "emancipatory and instrumentalist"[1677] agenda.

Gichuhi and Bucha perceive AAIL as "a comprehensive approach to or perspective on international law which reflects the continent's distinct historical context."[1678] While expatiating on this distinctiveness, Cole argues that AAIL is influenced by Africa's historical experiences and present realities. It is an approach conditioned by the continent's particularities

[1674] Ibid, 32 – 33.
[1675] Babatunde Fagbayibo, "African Approaches to International Law" (*Oxford Bibliographies Online in International Law*, 25 August 2021) [1]<https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0225.xml> accessed 24 April 2024.
[1676] Boubacar Sidi Diallo, "The Economic and Political Development of African States in the Historical Context of the Decolonization Process" (2023) LXXV(2) *Czasopismo Prawno-Historyczne* 225, 234.
[1677] Fagbayibo (n 1675).
[1678] Mumbi Gichuhi and Sandra Bucha, "A Tale on Belonging in Africa: An Analysis of the African Approach to Statelessness" in Frans Viljoen, Humphrey Sipalla, and Foluso Adegalu (eds) *African Approaches to International Law: Essays in Honour of Kéba Mbaye* (Pretoria University Law Press, 2022) 184.

and shows its unique historical context.[1679] The historical experiences include the "struggle for self-determination and the political and economic advancement of the continent."[1680] On the other hand, the historical experiences include the struggle for self-determination and the political and economic advancement of the continent.[1681] Additionally, Cole mentions that AAIL is influenced by political and economic denominators, such as sovereignty, equality of States, democracy, prohibition of unconstitutional changes of governments, humanitarian intervention, and the right to development.[1682]

AAIL may also be viewed as a theoretical framework for comprehending international law; however, it does so only from the viewpoint of Africa.[1683] This method focuses on power and economic imbalances between the rest of the world and Africa, such that international law needs to be reformed to bridge these imbalances.[1684] From the above conceptualisation, three classifications of AAIL have been made: the "contributionist (or weak) approach, a critical (or strong) approach,"[1685] and the intermediate approach.[1686] For Gathii, "contributionism is the most longstanding and enduring tradition of African international law."[1687] According to him, contributionists argue that the history of international law should be revised to acknowledge Africa's significant and ongoing role in its development, which has always been seen as only a product of European civilisation. To this extent, this approach sees Africa as "'an innovator and generator' of norms of international law."[1688] In his theoretical description of this approach, Fagbayibo contends that the contributionists participate in a discussion about civilisation by emphasising the role of precolonial African actors and sources in shaping the evolution of international law. The proponents view the decolonisation process of the 1960s, which granted independence to African States, as an opportunity for Africa to become a significant participant in contemporary international law. He further argues that the contributionist approach to AAIL utilises various disciplines such as history, sociology, archaeology, and anthropology to examine how precolonial empires and individuals navigated diplomacy, trade, and peace

[1679] Rowland J V Cole, "Africa's Approach to International Law: Aspects of the Political and Economic Denominators" in Abdulqawi A Yusuf (ed) *African Yearbook of International Law* (vol 18, Martinus Nijhoff, 2013) 287, 288.
[1680] Ibid.
[1681] Ibid, 291.
[1682] Ibid.
[1683] See generally Ugochukwu, (n 1343) 241 – 242.
[1684] James Thuo Gathii, "Africa and the Radical Origins of the Right to Development" (2020) 1 *Third World Approaches to International Law Review* 28, 36.
[1685] Ibid, 32.
[1686] Fagbayibo (n 1675) 1.
[1687] Gathii (n 1684) 33.
[1688] Ibid.

issues.[1689] For Indigenous Peoples, the contributionist theory has helped in the evolution of and the contribution to the general catalogue of Indigenous Peoples' rights. This, as discussed further in this chapter, includes especially the provision of collective rights and the interpretation of "peoples" to encompass Indigenous Peoples.

Gathii contends that the critical theorists centred their arguments on the structural and economic underpinnings of African States in the world. In the post-Second World War era, African critical thinkers directed their attention towards the disparities in power and wealth between African nations and the rest of the world. They viewed these inequalities as grounds for scepticism toward international law.[1690] Similarly, as pointed out by Fagbayibo, this school of thought emphasised the degree to which colonialism and neo-colonialism were the foundation for the domination, exploitation, and marginalisation of African nations and their people from the global political economy.[1691] This approach covers, for instance, AAIL's reconceptualisation of Indigenous Peoples by excluding elements of "pre-invasion" and pre-colonialism" in the definition of Indigenous Peoples and adopting the socio-psychological approach to identifying Indigenous Peoples.

Finally, for Fagbayibo, the intermediate approach "lies at the intersection of the contributionist and critical traditionalist approaches by utilising some of their major arguments in building an alternative ideational path."[1692] He further argues that in this regard, the Intermediates critically assess the strengths and weaknesses of both approaches and use this analysis to emphasise the importance of contextualisation and adaptability in proposed measures. This approach does not automatically reject ideas due to their Eurocentric origins but aims to extract from them elements that can contribute to the advancement of cultural development and the strengthening of African society.[1693] In his earlier work in 2019, Fagbayibo contends that the works of contributionists and critical traditionalists are essential instruments for reconsidering the didactic approach to international law in African institutions. It provides a "critical integrative approach" that incorporates Afrocentric notions, prioritises multidisciplinary approaches, and takes a critical ethical research stand that is cognizant of the drawbacks of adopted strategies.[1694] This suggestion is ideologically based on Nkrumah's thoughts in a book

[1689] Fagbayibo (n 1675) 1.
[1690] Gathii (n 1684) 36.
[1691] Fagbayibo (n 1675) 3.
[1692] Ibid, 5.
[1693] Ibid.
[1694] Babatunde Fagbayibo,[2] "Some Thoughts on Centring Pan-African Epistemic in the Teaching of Public International Law in African Universities" (2019) 21(2) *International Community Law Review* 170–189.

published in 1964 but reprinted in 2009. Here, Nkrumah argues that Africa occupies a central position in three distinct civilisational paradigms: the Indigenous traditional way of life, the influence of Islam, and the Christian tradition and culture of Western Europe. He, however, advocates for a deliberate combination of these three ideologies, placing traditional African humanist values at the centre to create a new ideology focused on development.[1695] For Indigenous Peoples in Africa, this covers the right to development. This is because, as examined later in this chapter, Western doctrines were used to justify this right.

In this thesis, therefore, AAIL is summarised as an emerging international law approach that seeks to refocus the present international law norms to accommodate Africa's peculiarities with the intended result of providing an international legal system that is more effective in all fields of international law. It encompasses Africa's objections to international law and the continent's contribution to the general understanding of international law norms through decisions by the various African State courts, the African Commission, the African Court, and AU's numerous laws and policies. Although three approaches to AAIL have been identified – contributionist, critical theory, and intermediate approaches, this thesis expands the approaches to include AAIL as an interpretative tool.

AAIL, as an interpretative tool, means the process of determining the meaning and purpose of the provisions of AU conventions and policies in order to understand the historical background and the reason for such provisions. In other words, AAIL as an interpretative tool implies that when faced with the duty to interpret a law or make a pronouncement on a legal principle, judicial organs in Africa, especially at the AU level, should consider if the intent of the lawmakers was to resist an existing international norm or if it is Africa's effort to contribute to the general development of international law. In serving as an interpretative tool, AAIL judicial bodies should advance those legal principles that emanate from Africa while suppressing those ones that AAIL scholars have identified as sources of Africa's marginalisation. Also, where there is a lacuna in international law, courts are to fill in the gap based on the peculiarity of the continent. AAIL is, therefore, a kind of interpretative instrument that adapts international law to African specificities. The need to take such specificities into account can be seen in the various human rights.

[1695] See Kwame Nkrumah, *Consciencism: Philosophy and Ideology for De-Colonization and Development with particular reference to the African Revolution* (New York University Press, 2009); Fagbayibo (n 1675) 6.

6.3.1. Justification for African Approaches to International Law

According to Kociołek-Pęksa and Menkes, new methods of looking at human rights due to "newly uncovered axiological sources such as the appearance of new values or a redefinition of existing ones" will be problematic, especially when these values that emanate from State or regional levels are to be transposed to international level.[1696] The authors argue that there is a pluralism of axiological sources of human rights, leading to an increase in the number and quality of human rights "due to newly uncovered axiological sources such as the appearance of new values or a redefinition of existing ones."[1697] Kociołek-Pęksa and Menkes are not alone, as others have pointed to the effect of the fragmentation of international law. Zouapet, while referring to Krieger and Nolte,[1698] argues that "the current debate on the fragmentation of international law expresses anxiety about both the discourse on international law of certain political leaders and the centrifugal tendencies of certain special regimes and regional groupings."[1699]

Although the ILC expressed concern about the "functional differentiation" effect of "the emergence of specialised and relatively autonomous spheres of social action and structure,"[1700] it has reassured that regionalism, when properly harmonised, could serve as a tool for "discuss[ing] the question of the universality of international law, its historical development or the varying influences behind its substantive parts."[1701] Consequently, regionalism could be viewed as "a set of approaches and methods for examining international law",[1702] "a technique for international law-making,"[1703] and "the pursuit of geographical exceptions to universal

[1696] Anna Kociołek-Pęksa and Jerzy Menkes, "Axiology of Human Rights on the Premises and Determinants of Contemporary Discourse in the Philosophy of International Law" (2017) 1(2) *Bratislava Law Review* 129.
[1697] Ibid, 131.
[1698] Heike Krieger and Georg Nolte, "The International Rule of Law—Rise or Decline?—Approaching Current Foundational Challenges" in Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds) *The International Rule of Law: Rise or Decline?* (Oxford University Press, 2019) 3 – 30.
[1699] Apollin Koagne Zouapet, "Is there an African Approach to International Law? Is it even needed?" in Apollin Koagne Zouapet (ed) *Sixty years after Independence, Africa and International Law: Views from a Generation* (Pretoria University Law Press, 2023) 3, 7. See also Heike Krieger, "Populist Governments and International Law" (2019) 30(3) *The European Journal of International Law* 971–996.
[1700] UN General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission during its Fifty-eighth session in Geneva, A/CN.4/L.702, 8 July 2006 [para 5] <https://legal.un.org/ilc/documentation/english/a_cn4_l702.pdf> accessed 1 May 2024.
[1701] UN General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC Report on Fragmentation) Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, at its Fifty-eighth session in Geneva, A/CN.4/L.682, 13 April 2006 [para 195] <https://digitallibrary.un.org/record/574810?ln=en&v=pdf> accessed 1 May 2024.
[1702] Ibid, paras 199 – 204.
[1703] Ibid, paras 205 – 210.

international law rules."[1704] Moreover, we have had critical legal studies which show that the narrative of international law is shaped by its environment, from which we get international law's "situatedness",[1705] consequently leading to many distinct schools of thought, each with unique features.

Based on the above, the infusion of new international values or the appreciation of norms from Africa's perspective is justified. The justification stems from attempts to address Baade's conclusion that "at the present no typically African school of thought in public international law, as contrasted with, say, Latin American doctrine" exists.[1706] Baade further postulates that there is "little danger to traditional "Western" values and concepts lurk[ing] in a specific "African" conception of law, national or international."[1707] According to Gathii, Baade's position meant that Africa had not yet formulated its own understanding of international law. It was assumed that Africa was considered to be lagging behind unless it adopted laws similar to those in Europe and North America.[1708] The initial absence of AAIL is noticeable in the ILC Report on Fragmentation, where it recognises the existence of other approaches like the "Anglo-American approach," "third-world approaches,"[1709] "Soviet" doctrines,[1710] and what it refers to as "European integration."[1711] In other words, AAIL became imperative because of the perceived bias by Africans that the contemporary international law norms are discriminatory and exclude or ignore Africa's objectives and concerns.[1712]

AAIL is further justified because of what Maxwel calls "the divergence between African and Western views." For him, the various interpretations and expressions of the human rights project in international law are closely connected to the philosophical divide between liberal and African perspectives on human rights.[1713] He further noted that even in 1947, during the

[1704] Ibid, paras 211 – 217.
[1705] Rashmi Raman, "Changing of the Guard: A Geopolitical Shift in the Grammar of International Law" in Frans Viljoen, Humphrey Sipalla, and Foluso Adegalu (eds) *African Approaches to International Law: Essays in Honour of Kéba Mbaye* (Pretoria University Law Press 2022) 107, 128. This situatedness of international law enriches international law norms. See Tiyanjana Maluwa, "Reassessing Aspects of the Contribution of African States to the Development of International Law Through African Regional Multilateral Treaties" (2020) 41(2) *Michigan Journal of International Law* 327, 411.
[1706] Hans W Baade, "Foreword" in Hans W Baade and Robinson O Everett (eds), *African Law: New Law for New Nations* (Oceana Publications, 1963) 5.
[1707] Ibid, 8.
[1708] Gathii (n 1684) 32.
[1709] ILC Report on Fragmentation (n 1701) para 197.
[1710] Ibid, para 199.
[1711] Ibid, paras 218 – 219.
[1712] Ugochukwu (n 1343) 239; James Thuo Gathii, "Africa" in Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 418.
[1713] Miyawa Maxwel, "African Approaches to International Law: A Communitarian Ethic as a Cultural Critique of the Western Understanding of the Human Rights Corpus" in Frans Viljoen, Humphrey Sipalla, and Foluso

initial meeting of the Human Rights Commission, significant philosophical and ideological inquiries arose regarding the meaning, source, and purpose of human rights.[1714] For Lauren, the fundamental polarities that prevented any agreement on principles were acknowledged at this stage. It was recognised that the challenges at hand could not be resolved by relying solely on Western philosophical worldviews. Therefore, it was deemed necessary to seek "wide-ranging perspectives"[1715] from scholars across the globe. As a result, they invited one hundred and fifty different leading intellectuals who shared a wide range of perspectives on topics such as individuality, governance, natural law, and cultural diversity.[1716] Lauren, however, pointed out that despite drawing from numerous culturally grounded perspectives of prominent scholars of the era, no unified explanation encompassing the philosophical foundations of human rights could be put forward.[1717]

As mentioned earlier, the ILC Report on Fragmentation mentions other existing approaches, including the TWAIL, but not AAIL. This could be because of the newness of AAIL, the fact that Africa is captured in the TWAIL and that AAIL is an offshoot of TWAIL. TWAIL is a critical perspective that challenges the traditional Eurocentric view of international law. TWAIL scholars aim to deconstruct the existing international legal order to reveal its biases and injustices, particularly towards Third World countries. It does not seek to destroy international law but to "unfold [ ] its essence in order to discover real intentions in the construction of the world legal order and present an alternative based on values and social aspects of non-European countries."[1718] For Gathii, "Third World" in TWAIL does not "refer to a geographical space or one that is historically fixed in time, or that supposedly represents a true essence of the Third World" but refers to "an anti-subordinating term whose aim or goal is to disrupt and hopefully dismantle the hierarchies on which unequal production about the knowledge of international law is produced and practiced."[1719]

TWAIL offers analytical frameworks to assess whether there are economic, political, military, or racial disparities within our rules, practices, and academic discourse on international law. It

Adegalu (eds) *African Approaches to International Law: Essays in Honour of Kéba Mbaye* (Pretoria University Law Press, 2022) 145, 151.

[1714] Ibid.

[1715] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (3rd edn, University of Pennsylvania Press, 2011) 210.

[1716] Ibid.

[1717] Maxwel (n 1713) 152.

[1718] Douglas de Castro, "The Resurgence of Old Forms in the Exploitation of Natural Resources: The Colonial Ontology of the Prior Consultation Principle" (2019) 16(34) *Veredas do Direito* 343, 351.

[1719] James Thuo Gathii[3], "The Promise of International Law: A Third World View" (2021) 36(3) *American University International Law Review* 377, 401.

also explores potential actions to address and rectify these inequalities.[1720] Although Gathii conceptualised TWAIL as not being confined to a geographical space, TWAIL is often associated with countries in the Global South, corresponding to the United Nations Conference on Trade and Development (UNCTAD)'s list of developing economies.[1721] Most of the countries in the Global South witnessed colonialism and are currently "condemned to serve as a market and source of raw material for the developed countries."[1722] Notwithstanding the utility of using the term "Third World,"[1723] some scholars have reservations, justifying the adoption of AAIL. Firstly, "Third World" is perceived to be derogatory and "signifies a backwardness."[1724] Secondly, legal practitioners and NGOs have expressed "resentment of the repeated reference in TWAIL to the "Third World."[1725] Thirdly, since the scope of this thesis is limited to the study of the situation of the Indigenous Peoples in Africa, it makes for uniqueness to develop an approach that clearly reflects this. This is particularly so because "the scholarship [of TWAIL] appears to treat all non-Western States as an undifferentiated or interchangeable whole."[1726] In addition to the above, Raman identifies three pillars that justify the carving out of AAIL as "a distinct voice under the broader TWAIL umbrella", including the unique understanding of history in Africa, the rule of law in Africa, and the African idea of community and human and peoples' rights.[1727]

Zouapet recognises two functions that AAIL strives to achieve. First, AAIL as a means for the universalisation of international law.[1728] In this way, the assumption of certain international law values as universal may be problematic as it may be the subjective assumptions of superior

[1720] Ibid.
[1721] The developing economies generally include Africa, Latin America, the Caribbean, most of Asia excluding Israel, Japan, and the Republic of Korea, and Oceania excluding Australia and New Zealand. The developed economies generally encompass Northern America, Europe, Israel, Japan, the Republic of Korea, Australia, and New Zealand. See UNCTAD, "UNCTADstat - Classifications" (*UNCTAD*) <https://unctadstat.unctad.org/EN/Classifications.html> accessed 02 May 2024; UNCTAD, *Handbook of Statistics* (UN Publications, 2022) <https://unctad.org/system/files/official-document/tdstat47_en.pdf> accessed 02 May 2024.
[1722] N Oluwafemi Mimiko, *Globalization: The Politics of Global Economic Relations and International Business* (Carolina Academic Press, 2012) 47.
[1723] For instance, Okafor in recognising that there are some objections to the use of the term, argues that "what is important is the existence of a group of States and populations that have tended to self-identify as such-coalescing around a historical and continuing experience of subordination at the global level that they feel they share." He therefore concludes that "so for me, and almost all other TWAIL scholars, the Third World remains a crucial analytic category." See Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43(1/2) *Osgoode Hall Law Journal* 171, 174, 175 – 176.
[1724] Themrise Khan and others, "How we Classify Countries and People—and why it matters" (2022) 7(6) *BMJ Global Health* 1, 2.
[1725] Naz Khatoon Modirzadeh, ""Let Us All Agree to Die a Little": TWAIL's Unfulfilled Promise" (2023) 65(1) *Harvard International Law Journal* 79, 89.
[1726] Ibid.
[1727] Raman (n 1705) 129.
[1728] Zouapet (n 1699) 13.

powers that have been imposed on others as universal. al-Attar clarifies the risk of such assumptions more poignantly when he observed that "European subjectivity has traditionally been presented and has often been received as universal objectivity" and that "questions abound as to whether it might be more accurate to designate international law as European outer-State law."[1729] Zouapet concludes that AAIL will aid in the infusion of different cultures and ideas into international law, thereby "serv[ing] the cause of the universality of international law."[1730] The second function of AAIL, as viewed by Zouapet, is AAIL as "a building block for a democratised international law."[1731] Inasmuch as it could be ideal to have a uniform or single corpus of international law, such singleness, according to Zouapet, "would fall prey to centrifugal tendencies" of little opportunity to examine the reality that never in history was international law conceived as homogenous.[1732] To this extent, AAIL and other approaches would bring much-needed multiculturalism and pluralism into international law, eventually leading to the "pluralism of equality."[1733] Furthermore, AAIL, as a form of pluralism, "logically opposes value monism as well as hegemonic and suppressive discourses that (mis)use the notion of truth as a pretext to dominate and subjugate alternative worldviews regarded as "less truthful."[1734]

6.3.2. African Approaches to International Law and the Human Rights System in Africa

AAIL as a concept has been practically applied to either the development of new norms or the approach of African States to international law. Although already pointed out in this chapter, these novelties deserve further elaboration. The influence of AAIL on the human rights system in Africa, as discussed above, cuts across the three approaches to AAIL or may even overlap. Some of them include the interpretation of "peoples" to include Indigenous Peoples based on the socio-psychological method of characterising Indigenous Peoples and provisions of collective rights in the African Charter. The essence of this section is to establish that whenever these legal systems are to be interpreted, one should bear in mind the AAIL theoretical basis that underpins them, whether as contributionism, critical traditional theory, or intermediate.

[1729] Mohsen al Attar, "Reframing the "Universality" of International Law in a Globalizing World" (2013) 59(1) *McGill Law Journal* 95, 127.
[1730] Zouapet (n 1699) 18.
[1731] Ibid, 19.
[1732] Ibid; Anne-Charlotte Martineau, "The Rhetoric of Fragmentation: Fear and Faith in International Law" (2009) 22(1) *Leiden Journal of International Law* 1, 3.
[1733] Zouapet (n 1699) 20.
[1734] Ibid, 21; Touko Piiparinen, "Exploring the Methodology of Normative Pluralism in the Global Age" in Jan Klabbers and Touko Piiparinen (eds) *Normative Pluralism and International Law Exploring Global Governance* (Cambridge University Press, 2013) 35, 55.

This means that AAIL serves as a tool for interpreting laws in Africa, and judges should look at either the historical background of the law and the imbalance it sets to correct under general international law or consider the law as Africa's attempt to make its mark in international law by contributing to international norm creation.

Before delving into the various ways AAIL has been expressed, it is important to acknowledge the African Agenda 2063, adopted by the AU in 2015, which serves as a comprehensive strategic framework for the continent's development.[1735] It could be said to have been inspired by the spirit behind AAIL because it provides African nations with a platform to take ownership of their development agenda, in contrast to the Millennium Development Goals[1736] that were crafted without significant African consultation.[1737] This strategic framework represents the continent's commitment to achieving inclusive and sustainable development. It embodies the pan-African aspirations for unity, self-determination, freedom, progress, and shared prosperity as advocated under Pan-Africanism and the African Renaissance and "a robust framework for addressing past injustices and the realisation of the 21st Century as the African Century." [1738] It contains seven Aspirations for the continent, including "Africa as a strong, united, resilient and influential global player and partner" with a significant role in world affairs.[1739] To achieve this Aspiration, Africa will persist in advocating for the reform of the UN and other international institutions, specifically focusing on the UN Security Council. This advocacy aims to rectify the historical injustice of Africa without permanent representation on the Council.[1740]

The Agenda 2063, especially Aspiration 7, embodies both the contributionist and critical traditionalist approaches to AAIL. As the continent seeks to assert itself "as a strong, united and influential partner on the global stage making its *contribution* to peace, human progress, peaceful co-existence and welfare,"[1741] it equally aspires to correct what it calls "historical injustices."[1742]

[1735] AU, *Agenda 2063: The Africa We Want* (*African* Commission, September 2015) <https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf> accessed 10 May 2024.
[1736] UN General Assembly, *United Nations Millennium Declaration*, (55th sess: 2000-2001) A/RES/55/2, 18 September 2000.
[1737] Oluwaseun Tella, "Agenda 2063 and Its Implications for Africa's Soft Power" (2018) 49(7) *Journal of Black Studies* 714, 716.
[1738] Agenda 2063 (n 1735) para 1.
[1739] Ibid, Aspiration 7.
[1740] Ibid, para 62.
[1741] Ibid, para 7.
[1742] Ibid, paras 1, 62, and 72(n).

6.3.2.1.“Peoples” as Embodying the Concept of Indigenous Peoples

The African Charter makes provisions for individual and collective rights, but Indigenous Peoples are not mentioned in the relevant provisions pertaining to collective rights. Rather, what is mentioned is “peoples.” The African Charter does not define “peoples” who are entitled to the rights contained therein. However, scholars have suggested that the omission was deliberate to allow for a flexible interpretation of the term by judicial bodies by either expanding the meaning or restricting it where necessary.[1743] It was meant to inspire a natural evolution of the phrase through flexible interpretation.

The general attitude of the African Commission and the African Court is to avoid giving a one-size-fits-all definition of “peoples” but to give enough room for as many groups that seek to be protected collectively as a people under the African Charter. This has given Indigenous Peoples in Africa the opportunity to seek protection collectively as a group. This aligns with the approach adopted in the Report of the Working Group of Experts on Indigenous Populations/Communities, where it was pointed out that a strict definition of Indigenous Peoples in Africa was not necessary and desirable but to give a general characteristic that can help to identify a group that qualifies as Indigenous People.[1744]

In the *Ogiek Judgement on Merits*, the African Court, for the first time, considered the provisions of the African Charter as they pertain to Indigenous Peoples. The court held that the Ogiek people qualify as an Indigenous group “that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.”[1745] The consequence of such recognition is that they enjoy the peoples/collective rights under the African Charter. In recognising the status of a group as Indigenous People in Africa, the jurisprudence followed, to an extent, disregards some of the elements included in the definition of Indigenous Peoples by Cobo and in the ILO 169. While Cobo identifies Indigenous Peoples as “having a historical continuity with *pre-invasion* and *pre-colonial*,”[1746] the ILO 169 describes Indigenous Peoples as a group that “inhabited the country… at the time of *conquest* or *colonisation*.”[1747] These definitions, as already noted, were described by Gilbert as an overly Western approach to ethnicity, comparable to neo-colonisation because of the idea of pre-

[1743] Okafor and Dzah (n 1346) 678; Yusuf (n 1466) 41.
[1744] Report of the Working Group of Experts on Indigenous Populations/Communities (n 68) 87.
[1745] *Ogiek Judgement on Merits* (n 168) para 122.
[1746] Cobo (n 46).
[1747] ILO Convention169 (n 12) art 1(1)(b).

invasion/conquest and pre-colonial/colonisation.[1748] To remedy this, the African Commission in the *Endorois case* concluded that in Africa, "validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims," although some Indigenous Peoples may be the first inhabitants of their territory.[1749]

The AAIL concept underpins the protection of the rights enjoyed by Indigenous Peoples. For instance, the history of the right of all peoples to "freely dispose of their wealth and natural resources"[1750] could be traced to an attempt by those who negotiated the African Charter to prevent the pilfering of Africa's natural resources by non-Africans without the consent of the Indigenous Peoples in whose territories those resources are located. This was noted by the African Commission in the *Ogoni case*.[1751] The African Commission traced the history of this provision to the effect of colonialism, where "the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land."[1752] It noted that the legacy of colonial exploitation has left Africa's valuable resources and its people susceptible to continued foreign exploitation. The drafters of the Charter clearly intended to underscore the continent's painful history and re-establish cooperative economic development as a central pillar of African society.[1753] This typifies the critical traditional theory of AAIL, where the proponents address the disparities between the African States and the rest of the world, which involves dependence, exploitation, and the pillaging of former colonised countries' resources.[1754]

6.3.2.2.Collective Rights in the African Charter

The African Charter is the only regional human rights instrument that explicitly provides for collective rights. The Charter's title, "The African Charter on Human and Peoples' Rights, together with its language, is the first pointer that the document covers not just individual rights but collective rights as well.[1755] As already pointed out in 6.3.1.1, Some of these collective rights include the equality of all peoples,[1756] the inalienable right to self-determination by all

[1748] Gilbert (n 8) 250.
[1749] *Endorois case* (n 86) para 154.
[1750] African Charter (n 82) art 27.
[1751] *Ogoni case* (n 554).
[1752] Ibid, para 56.
[1753] Ibid.
[1754] Mohammed Bedjaoui, *Towards a new International Economic Order* (UNESCO, 1979) 20.
[1755] Michael Talbot, "Collective Rights In The Inter-American And African Human Rights Systems" (2018) 49 *Georgetown Journal Of International Law* 163, 185.
[1756] African Charter (n 82) art 19.

peoples,[1757] all peoples' right to dispose of their wealth and natural resources,[1758] the right to development, which includes economic, social and cultural developments,[1759] and the right to a generally satisfactory environment favourable to all peoples' development.[1760]

The conceptualisation of human rights in the African Indigenous understanding is primarily based on the principles of Ubuntu and other Indigenous knowledge systems. Ubuntu, though of South African origin, pervades the whole of Africa in understanding human relationships. Mokgoro's description of Ubuntu is all-encompassing when she says that it is:

> …a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that … a person can only be a person through others.[1761]

Fundamental to Ubuntu is the notion that a person becomes a person via interaction with others and that one's humanity derives from recognising the 'other' as a distinct and unique individual. Thus, humanity is not rooted merely in one's persona as a human but is bestowed co-substantively upon the other and oneself, which requires to be sustained.[1762] This philosophy found its way into the African Charter, and it underscores why legal scholars have described the document as espousing elements of "collectivism",[1763] "communitarianism",[1764] and "communalism"[1765] since most of the rights are to be enjoyed collectively as a group. Under the UDHR, which forms the foundation for the ICCPR and ICESCR, Article 3 provides that "everyone has the right to life, liberty and security of person". This is an example of the "individualistic self-regarding entitlement"[1766] that underpins the liberal notion of human

[1757] Ibid, art 20.
[1758] Ibid, art 21.
[1759] Ibid, art 22.
[1760] Ibid, art 24.
[1761] Justice Yvonne Mokgoro, "Ubuntu and the law in South Africa" (1998) 1(1) *Potchefstroom Electronic Law Journal* 3; Simon Hull and Jennifer Whittal, "Human Rights and Land in Africa: Highlighting the Need for Democratic Land Governance" in Trudy Corrigan (ed) *Human Rights in the Contemporary World* (IntechOpen, 2022), 7.
[1762] Angelo Nicolaides, "Duty, Human Rights and Wrongs and the Notion of Ubuntu as Humanist Philosophy and Metaphysical Connection" (2022) 8 *Athens Journal of Law* 3; Michael Onyebuchi Eze, *Intellectual History in Contemporary South Africa* (Palgrave Macmillan, 2010) 93.
[1763] Clive Baldwin and Cynthia Morel, "Group Rights" in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (2nd edn, Cambridge University Press, 2008) 244 – 288.
[1764] Maxwel (n 1713); Munamato Chemhuru, "African Communitarianism and Human Rights: Towards a Compatibilist View" (2018) *Theoria* 65(157) 37 – 56.
[1765] EI-Obaid Ahmed EI-Obaid and Kwadwo Appiagyei-Atua, "Human Rights in Africa -A New Perspective on Linking the Past to the Present" (1996) 41 *McGill Law Journal* 819, 836.
[1766] Polycarp Ikuenobe, "Human Rights, Personhood, Dignity, and African Communalism" (2018) 17(5) *Journal of Human Rights* 589.

rights. On the other hand, while recognising that the right to life could be enjoyed individually,[1767] the African Charter also provides for situations where the right could be enjoyed collectively. For instance, Article 20 provides that "[a]all peoples shall have the right to existence" as the basis for the enjoyment of other rights like the right to self-determination and the right to determine their political status.

Indigenous land rights are valuable for examining the recognition of emerging norms because they involve ideas of dignity, the human person, and property that are implied in the African Charter.[1768] In Africa, especially for the Indigenous Peoples, the right to land is essential and inalienable. It extends even to the right to religion, as lands form part of the object of worship. In a broadly African worldview, for example, the right to own land is communal, and it incorporates many members, some of whom are dead, few are living, and numerous unborn.[1769] This understanding necessitates a cross-generational interpretation of land rights in African contexts. Because this cross-generational understanding challenges the fundamental definition of a human as understood in Western culture, it has implications for implementing human rights principles in land management.[1770] The right to land is an aspect of Africa's attempt at re-evaluating human rights principles and is considered part of the cultural inheritance, especially for Indigenous Peoples.

In the case of *Sudan Human Rights Organisation v Sudan*, the African Commission ruled that "[i]t doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by [the right to property]"[1771] of the African Charter. On the other hand, the right to culture is a collective right in Africa, like in other places with Indigenous Peoples.[1772] The connection between land rights and cultural integrity was given recognition by the African Commission in the *Endorois case*.[1773] Here, the African Commission acknowledged that removing the Endorois Indigenous People of Kenya from their ancestral land violated their right to cultural integrity and freedom of religion.

[1767] The African Charter (n 82) art 4.
[1768] Talbot (n 1755) 165.
[1769] Don N Ike, "The System of Land Rights in Nigerian Agriculture" (1984) 43 (4) *The American Journal of Economics and Sociology* 469.
[1770] Hull and Whittal (n 1761) 3.
[1771] *Sudan Human Rights Organisation v Sudan* (n 81) para 205.
[1772] Talbot (n 1755) 163 – 189.
[1773] *Endorois Case* (n 86).

While comparing the African Charter and the Inter-American system, Talbot argues that the African Charter is more developed in protecting collective rights more than the Inter-American system because 1) the express recognition of collective rights in the African Charter enables the African Commission and the African Court to focus on interpreting and expanding the contents of collective rights rather than their existence, 2) the power of the African Commission and the African Court under Articles 60 and 61 of the African Charter, to draw inspiration from other international human rights instruments, gives them "with a greater breadth of resources when analysing the content of collective rights."[1774]

6.4.Concluding Remarks

In summary, this chapter conceptualised AAIL and related it to the human rights system in Africa. The historical experience of Africa and Africa's position as home to many natural resources, together with the reality of the inclination of the West to be suspicious of norms emanating from Africa, influenced the emergence of AAIL. In other words, AAIL is influenced by political and economic denominators, such as sovereignty, equality of States, democracy, prohibition of unconstitutional changes of governments, humanitarian intervention, and the right to development. Of the three approaches to AAIL, this thesis recommends the intermediate approach because AAIL scholars should not seek to replace international law for the sake of replacing it but advocate more vigorously for a unique human rights system in Africa and endeavour to universalise the norms that can improve international law.

The chapter also explored and extrapolated AAIL and the nature of the human rights system in Africa, with a particular reference to protecting the rights of Indigenous Peoples. Various human rights instruments, the bedrock of which is the African Charter, provide for both individual and collective rights, which have served as the basis of Indigenous Peoples' rights. The core of the human rights system in Africa, which is equality for all, is largely shaped by the continent's historical experience of colonialism. This spurned the creation of a unique system incorporating new rights like collective rights and Indigenous land rights, which have been interpreted as forming part of the right to property. Although there is no single instrument that specifically addresses the rights of Indigenous Peoples, references are made to the protection of these rights in some other instruments, like the African Charter and the Kampala Convention. A broad and purposive interpretation of some other instruments, which underscores AAIL as an interpretative tool, indicates that the rights of Indigenous Peoples are

[1774] Talbot (n 1755) 165.

protected. As discussed in this chapter, such instruments include the Algiers Convention, the Protocol on Women's Rights, and the Charter on the Rights of the Child. This notwithstanding, the continent would benefit from a single document that addresses the various issues on the rights of Indigenous Peoples. So, it is pertinent that the AU sets in motion the process of negotiating such an instrument.

The safeguarding mechanisms of human rights in Africa have been active in protecting the rights of Indigenous Peoples on the continent. The African Commission, for instance, have interpreted and re-interpreted the rights of Indigenous Peoples, like in the *Ogoni case*, where it found that Indigenous Peoples enjoy, among other rights, the right to adequate housing even though the right is not explicitly enshrined in the African Charter. The judgement, although it does not mention AAIL expressly, explains that peoples' right to dispose of their wealth and natural resources freely was enshrined in the African Charter because of the effects of colonialism, where the resources of Africa were controlled by external forces. So, the right is both a novel contribution to and a critical theory to oppose international law. The same right of all peoples to dispose of their wealth and natural resources freely was interpreted to be a right that the Endorois people of Kenya were entitled to in the *Endorois case*. Flowing from this, the African Commission established that the Kenyan government had failed to protect this right and other rights of the Endorois people. Also, the African Court, in its first case on the rights of Indigenous Peoples, was emphatic that the Ogiek people were Indigenous People and qualified to enjoy the people's rights enshrined in the African Charter. In the *Ogiek Judgement on Merits*, the African Court declared the consistent eviction of the Ogiek from their ancestral land as a violation of their human rights. Violating such rights leads to reparation, both pecuniary and non-pecuniary, as confirmed by the court in *Ogiek Judgment on Reparations*. Currently, those with the legal standing to file communications NGOs, a group of individuals, and individuals in their own capacity or on behalf of other victims. As *de lege ferenda*, the African Charter should be amended to expand those with *locus standi* to file communications to include Indigenous Peoples as a community. This will increase the possibility of more communications from Indigenous Peoples without having to do so through NGOs.

Recognising the role TNCs play in the violation of human rights, the African Court, in its seminal judgement in the *LIDHO case*, ruled that corporations involved in the violation of human rights and environmental standards could be held accountable for human rights violations under the African Charter. Although, in this case, the TNC was not found to owe the obligation to protect human rights directly, it serves as a reminder of the role and significance

of regional justice in guaranteeing that States uphold their duties to protect human rights. This is novel because, apart from the majority holding that the African Charter creates an indirect horizontal human rights obligation on TNCs, the dissenting ruling by Judge Blaise Tchikaya favours a direct horizontal obligation. This is a step in the right direction in filling the gap of failure to impose a direct human rights obligation on TNCs. Many Indigenous Peoples in Africa are expected to utilise this ruling in holding TNCs that engage in various human rights violations accountable.

The yet-to-be-established African Court of Justice would have universal jurisdiction to entertain various crimes, including the illicit exploitation of natural resources committed by natural and legal persons. The corporate criminal liability established by the Malabo Protocol will even make it possible to hold accountable TNCs that engage in the illicit exploitation of natural resources and violation of human rights. This will benefit Indigenous Peoples whenever it enters into force because Indigenous Peoples have consistently been victims of various illicit exploitation of natural resources of their resources. African States are to speed up their ratification of the Malabo Protocol to get the number of ratifications required for it to enter into force, as the instrument has the potential to change the direction of corporate accountability and provide an extra mechanism for protecting Indigenous Peoples from harmful activities of TNCCs. The next chapter examines the environmental and investment regimes in Africa and how they affect the rights of Indigenous Peoples.

Chapter SEVEN

Africa's Investment Law and Environmental Law Regimes and the Protection of Indigenous Peoples' Rights

7.1.Introductory Remarks

This chapter studies the AU environmental treaties and Africa's investment law regimes to underscore their relationship with the rights of Indigenous Peoples. Like the human rights system, the environmental and investment law regimes in Africa exhibit distinct characteristics that make them effective in protecting Indigenous Peoples. They show the interconnectedness between the regimes on the one hand and sustainable investment in the territories of Indigenous Peoples on the other hand. As further discussed below, Africa has revolutionised international investment law by championing the incorporation of provisions that rebalance the interests of contracting States and investors, such as the provision on the responsibilities of investors, which has been adopted in BITs by non-African countries.[1775] Akinkugbe contends that these novel provisions in African investment law regimes exemplify unique "norms generated by African States in international economic and investment relations."[1776]A further novel aspect of the models in Africa is provided in the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement)[1777] and the draft Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Protocol on Investment).[1778] The AfCFTA Protocol on Investment, for instance, makes an attempt to factor in Indigenous Peoples in the context of the responsibility of investors to "respect the rights and dignity of Indigenous Peoples"[1779] and the imposition on investors of the responsibility not just to merely respect the environment but the responsibility to protect it.[1780] So, this chapter addresses these regimes by highlighting how they are relevant in the protection of the rights of Indigenous Peoples and the espousing of the responsibilities of TNCs.

[1775] Olabisi D Akinkugbe, "Africanization and the Reform of International Investment Law" (2021) 53(1) *Case Western Reserve Journal of International Law* 7, 20.
[1776] Ibid.
[1777] AU, *Agreement Establishing the African Continental Free Trade Agreement* (AfCFTA Agreement) adopted 21 March 2018 (entered into force 30 May 2019) <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> accessed 08 April 2024.
[1778] AU, *Protocol To The Agreement Establishing The African Continental Free Trade Area On Investment (Draft)* (AfCFTA Protocol on Investment), Seventh Extra ordinary Session of the Specialised Technical Committee on Justice and Legal Affairs (Experts Meeting) 16 - 21 January 2023, Accra, Ghana, <https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf> accessed 08 April 2024.
[1779] Ibid, art 35.
[1780] Ibid, art 34.

The chapter is divided into two main subchapters. The justification for examining the two regimes together is to underscore the interplay between the impact of the activities of TNCs on the environment. Also, almost all of the investment law instruments discussed in this chapter refer to the sustainable use of the environment. The first subchapter concerns investment law regimes that include hard instruments like the various intra-Africa BITs, AfCFTA, and the AfCFTA Protocol on Investment. The soft investment law instruments include the Pan African Investment Code (PAIC)[1781] and the 2022 Africa Arbitration Academy Model Bilateral Investment Treaty for African States (AAA Model BIT).[1782] Attempts are made to examine sub-regional mechanisms by the Regional Economic Communities (RECs) that can advance the situation of Indigenous Peoples in Africa. The second subchapter is dedicated to the AU environmental treaties, such as the Algiers Convention[1783] and the Revised Convention on Nature[1784] (jointly referred to as the African Conservation Conventions), the Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa (the Bamako Convention),[1785] and the Statute of the African Minerals and Development Centre (SAMDC).[1786]

7.2. Africa's Investment Law Regimes

As contended by Kidane, the investment regimes in Africa are marked by consistent and uniform substantive norms and regulations, as well as institutional mechanisms for enforcing the rights and obligations of both investors and host States. He argued further that several regional investment arrangements, although fragmented, include different types of innovations that warrant careful examination. This is not only because they need to be analysed independently but also because they are contributing to the creation of a comprehensive investment regime across the continent.[1787] Like environmental regimes, investment law regimes are based on hard and soft law instruments. The hard law instruments include the AfCFTA and the AfCFTA Protocol on Investment, various BITs, and sub-regional

[1781] Economic Commission for Africa Committee of Experts (ECACE), *Draft Pan-African Investment Code* (PAIC) UN Doc E/ECA/COE/35/18-AU/STC/FMEPI/EXP/18(II).
[1782] Africa Arbitration Academy, *Africa Arbitration Academy Model Bilateral Investment Treaty for African States* (AAA Model BIT 2022) <https://africaarbitrationacademy.org/> accessed 20 April 2024.
[1783] Algiers Convention (n 1396).
[1784] The Revised Convention on Nature (n 1397).
[1785] AU, *Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa* (adopted 30 January 1991, entered into force 22 April 1998) 30 ILM 773.
[1786] AU, *Statute of the African Minerals and Development Centre* (SAMDC), adopted 31 January 2016 <https://au.int/sites/default/files/treaties/32544-treaty-0050_-_statute_african_mineral_development_centre_e.pdf> accessed 08 April 2024.
[1787] Won L Kidane, *Africa's International Investment Law Regimes* (Oxford University Press, 2023) 285.

mechanisms by the RECs. On the other hand, the soft law instruments necessary for examination in this thesis consist of the PAIC, SADC Model BIT, and AAA Model BIT.

7.2.1. Hard Law Instruments

The BITs discussed in this section and the three RECs' investment mechanisms were chosen because of their uniqueness in balancing the protection of investors' rights and obligations.

7.2.1.1. The Agreement Establishing the African Continental Free Trade Area and its Protocol on Investment

First is the AfCFTA Agreement, which is a significant initiative to promote intra-African trade by eliminating trade barriers among its member States. It was signed on 21 March 2018 by over 40 countries to create a single continental market for goods and services, allowing the free movement of people and capital. It entered into force on 30 May 2019, and currently, as of April 2024, it has been signed by 54 of the 55 African States and ratified by 47 of these countries.[1788] This makes it the largest free-trade area in terms of member States, population, and geographic size after the WTO.[1789] Apart from creating a single continental market, another general objective of the AfCFTA Agreement is to promote and attain sustainable and inclusive socio-economic development of State parties.[1790] Specifically, it requires States to "establish a mechanism for the settlement of disputes concerning their rights and obligations."[1791]

It further calls on States to enter into the second phase of negotiations in the areas of intellectual property rights, investment, and competition policy.[1792] Additionally, it envisages that when these areas are negotiated, they shall form part of the AfCFTA Agreement as protocols.[1793] Based on this, the African Heads of State, on 19 February 2023, during the 36th AU Summit in Addis Ababa, adopted the AfCFTA Protocol on Investment.[1794] Although the final version of

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[1788] AU, "Agreement Establishing the African Continental Free Trade Area/Status List" <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> accessed 15 April 2024.
[1789] Justina Crabtree, "Africa is on the Verge of Forming the Largest Free Trade Area since the World Trade Organization" (*CNBC*, 20 March 2018) <https://www.cnbc.com/2018/03/20/africa-leaders-to-form-largest-free-trade-area-since-the-wto.html> accessed 15 April 2024; Yaw A Debrah and others, "The African Continental Free Trade Area (AfCFTA): Taking Stock and Looking ahead for International Business Research" (2024) 30(2) *Journal of International Management* 2.
[1790] AfCFTA Agreement (n 1777) art 3(e).
[1791] Ibid, art 4(f).
[1792] Ibid, art 7.
[1793] Ibid, art 8.
[1794] Hamed El-Kady and others, "The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and what's next for the Continent?" (*IISD*, 1 July 2023) <https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/#_ftn1> accessed 15 April 2024.

the protocol has yet to be available in the public domain, the analysis in this thesis is based on the final draft, dated January 2023.[1795] The Preamble elaborates on what the protocol is set to achieve by taking into cognisant various areas like sustainable development, human rights, rights and obligations of States and investors, the environment, and climate change. Essentially, it acknowledges the important role investment can play in promoting sustainable development for the State Parties. This includes reducing poverty and advancing human rights and human development in relation to investment. It also recognises that sustainable development requires attention to its economic, social, and environmental aspects.[1796] Typical of the investment regime in Africa, it seeks "to achieve an overall balance of the rights and obligations between State Parties and investors."[1797]

These principles pervade the entire substantive provisions of the Protocol. For instance, Article 2, which is on the objectives, provides that the Protocol is aimed to protect and expand investments that foster sustainable development of State Parties[1798] and to establish a balanced investment that considers the interests of State parties, investors, and local communities.[1799] The AfCFTA Protocol on Investment provides for both national treatment and MFN principles. In other words, a State party is to accord investors and investments from other State parties treatment no less favourable than it accords its national investors and investments.[1800] Similarly, on MFN, a State party is to accord all investors from any country treatment no less favourable than it accords to investors of any other State party or third parties.[1801] Uniquely, it introduces exceptions to the national treatment and MFN principles, especially when a State takes measures that are "designed and applied to protect or enhance legitimate public policy objectives such as, …public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment."[1802]

The Protocol prohibits direct and indirect expropriation or the nationalisation of investment[1803] without the payment of fair and adequate compensation.[1804] It nonetheless creates two exceptions to where expropriation could be justified – compulsory licensing in relation to

[1795] AfCFTA Protocol on Investment (n 1778).
[1796] Ibid, Preamble.
[1797] Ibid.
[1798] Ibid, art 2(a).
[1799] Ibid, art 2(b).
[1800] Ibid, art 12.
[1801] Ibid, art 14.
[1802] Ibid, arts 13(1) and 15(1).
[1803] Ibid, art 19.
[1804] Ibid, art 21.

intellectual property rights and "non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, such as public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment, labour rights or to comply with other international obligations."[1805] This obligation extends to the requirement of customary international law and other general principles of international law conferring a right on States to implement measures necessary to ensure that investments within their jurisdictions are consistent with the actualisation of the sustainable development goals and other environmental and climate change actions.[1806] Interestingly, measures taken by States to fulfil their international obligations under other relevant treaties do not constitute a breach of the AfCFTA Protocol on Investment, neither will such exercise of regulatory rights give rise to any claim by an investor for compensation.[1807]

Kidane criticises the regulatory power of the State under Article 24 as not being "robust", and as being "directly subject to customary international law and general principles of law." For him, the provision "contains no innovation and remains constrained by such rules."[1808] On the contrary, this provision expressly addresses the trend by investment tribunals, which holds a State liable to pay compensation if, in the exercise of its international obligation, it revokes the licenses and permits of an investor. In *South American Silver v Bolivia*,[1809] the Permanent Court of Arbitration held that the revocation of mining rights by the Bolivian government, motivated by environmental and social concerns raised by the Indigenous Peoples, entitles the investor to compensation from the Bolivian government. Similarly, in *Santa Elena SA v Costa Rica*,[1810] the ICSID, while ruling on revocation based on a State's international environmental obligation, declared that "the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference."[1811] So, it should be understood that Article 24 of the AfCFTA Protocol on Investment is innovative and makes it clear that measures undertaken for the legitimate purpose of protecting the environment, the climate, and public health cannot give rise to compensation.

[1805] Ibid, art 20.
[1806] Ibid, art 24(1).
[1807] Ibid, art 24(2 and 3).
[1808] Kidane (n 1787) 428.
[1809] *South American Silver v Bolivia* (n 1041).
[1810] *Santa Elena SA v Costa Rica* (n 1043)
[1811] Ibid, para 71.

Other State obligations include ensuring minimum standards on the environment, labour and consumer protection;[1812] encouraging investment that supports actions to mitigate greenhouse gas emissions and measures to adapt to the negative impacts of climate change;[1813] promoting laws and policies to protect investment-related human rights, labour rights, and the environment;[1814] promoting and enforcing anti-corruption, anti-money laundering, anti-terrorism financing and anti-bribery measures;[1815] promoting and enforcing laws and policies to protect the rights of Indigenous Peoples and local communities.[1816]

Chapter 5 of the AfCFTA Protocol on Investment is fully dedicated to investor obligation. It contains both indirect and direct investor obligations. It starts, as an indirect obligation, with "a catch-all provision that essentially incorporates all domestic and international law obligations."[1817] Thus, "State Parties shall ensure that investors and their investments comply with their domestic law, regulations, and international law."[1818] It further provides that "investors and their investments shall carry out their operations in compliance with all relevant domestic laws and regulations, administrative guidelines as well as applicable international law."[1819]

The other obligations are merely elaborations of this rule in areas like business ethics, human rights and labour standards,[1820] environmental protection,[1821] respect for Indigenous Peoples and local communities,[1822] socio-political obligations,[1823] anti-corruption,[1824] CSR,[1825] corporate governance,[1826] and taxation and transfer pricing.[1827] Three of these obligations are worth discussing – business ethics and human rights, environmental protection, and Indigenous Peoples.

[1812] AfCFTA Protocol on Investment (n 1778) art 25
[1813] Ibid, art 26.
[1814] Ibid, art 31(1)(a).
[1815] Ibid, art 31(1)(b).
[1816] Ibid, art 31(1)(c).
[1817] Kidane (n 1787) 429.
[1818] AfCFTA Protocol on Investment (n 1778) art 31(2).
[1819] Ibid, art 32.
[1820] Ibid, art 33.
[1821] Ibid, art 34.
[1822] Ibid, art 35.
[1823] Ibid, art 36.
[1824] Ibid, art 37.
[1825] Ibid, art 38.
[1826] Ibid, art 39.
[1827] Ibid, art 40.

Regarding business ethics and human rights obligations, the AfCFTA Protocol on Investment provides that:

> Investors and their investments shall comply with high standards of business ethics, investment-related human rights and labour standards, and in particular shall:
>
> a. support and respect the protection of internationally recognised human rights;
> b. ensure that they are not complicit in human rights abuses;
> c. comply with the International Labour Organisation (ILO) standards.[1828]

Furthermore, the Protocol imposes environmental obligations on investors, which, as described by Kidane, is "the most impactful provision"[1829] and "most important contribution" of the Protocol to international investment law.[1830] To settle the long-standing problem of investor environmental law obligations that are not clear in BITs, domestic laws, and investment contracts,[1831] the investor environment obligations are couched thus:

> 1. Investors and their investments shall, in carrying out their business activities, respect and protect the environment, and, in particular shall:
>
> a. respect the right to a clean, healthy and sustainable environment, as reflected in Article 24 of the African Charter of Human and Peoples' Rights, and the Resolution of the United Nations General Assembly A/RES/76/300 ("The human right to a clean, healthy and sustainable environment");
>
> b. comply with the principles of prevention and precaution when conducting their business activities to anticipate and prevent any risk of significant harm to the environment;
>
> c. carry out an environmental impact assessment, in accordance with the best international standards and practices and as required by domestic law;
>
> d. apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary; and
>
> e. where their business activities cause or may cause harm to the environment, take steps to mitigate the harm, to restore impacted sites and ensure a clean, healthy and sustainable environment.
>
> 2. Investors shall not exploit or use natural resources to the detriment of the rights and interests of the Host State and local communities.[1832]

[1828] Ibid, art 33 (a – c).
[1829] Kidane (n 1787) 429.
[1830] Ibid, 430.
[1831] Ibid, 429.
[1832] AfCFTA Protocol on Investment (n 1778) art 34.

Finally, another important development in the field of international investment, which the AfCFTA Protocol on Investment articulates, is the provision on matters affecting Indigenous Peoples and local communities. According to Kidane, this provision is important because it recognises Indigenous Peoples' rights to free and informed consent and to participate in the benefit of the investment.[1833] The obligation is elaborated thus:

> 1. Investors and their investments shall respect the rights and dignity of Indigenous Peoples and local communities in accordance with relevant domestic laws and regulations, international law, norms and best practices, including the right of Indigenous Peoples, and local communities where applicable, to free, prior and informed consent and to participate in the benefit of the investment.
>
> For greater certainty, the reference to the right to free, prior and informed consent of Indigenous Peoples, does not imply any obligation for investors and their investments to conclude agreements with those groups before conducting or operating their investment in the territory of State Parties which do not recognise Indigenous Peoples, taking into account applicable and relevant domestic laws and regulations.
>
> 2. Investors and their investments shall respect legitimate tenure rights to land, water, fisheries, and forests in accordance with relevant laws and regulations.
>
> 3. Investors, in accordance with relevant domestic law and regulations, shall submit their environmental and social impact assessments to the competent authorities and make them available and accessible to local communities and Indigenous Peoples and to any other stakeholder in the territory of the Host State.[1834]

One drawback to the investor's obligation to the rights of Indigenous Peoples is the condition that the obligation to obtain the free, prior, and informed consent of Indigenous Peoples is contingent on the State recognising such groups as Indigenous Peoples. So, where a State has yet to recognise a group as an Indigenous group, an investor is not to obtain the free, prior and informed consent of the group, even though they identify themselves as Indigenous People. As pointed out in Chapter One, the requirement that for a group to enjoy rights as an Indigenous group, the State must have to recognise them as an Indigenous People is dangerous. This is particularly so in countries where the governments have refused to recognise a group as Indigenous or to ratify international instruments on the protection of the rights of Indigenous Peoples.

[1833] Kidane (n 1787) 430.
[1834] AfCFTA Protocol on Investment (n 1778) art 35.

Failure to fulfil these obligations by an investor entitles the Host State the right to deny an investor or investment the benefits arising from the Protocol[1835] in addition to the possibility of some other consequences under domestic law. In addition, investors and their investments shall be subject to civil actions for liability in the judicial process of their Home State for damage caused by their acts or omissions.[1836] As part of the institutional arrangement, the Protocol establishes the Pan-African Trade Investment Agency as a technical institution of the AfCFTA Secretariat[1837] to assist State parties in their business promotion policies and to foster the expansion of intra-African investments.[1838] In the final analysis, according to Kidane, the Protocol has successfully corrected the perceived inequalities and excess arbitral jurisprudence. Nevertheless, the absence of dispute settlement procedures for both State-to-State dispute and investor-State dispute settlement is an obvious deficiency of the Protocol. Even though Article 46 mandates that the rules and procedures governing dispute prevention, management and resolution of disputes shall be negotiated after 12 months of this Protocol's adoption, such rules are not available to the public if they have been negotiated.

7.2.1.2.Some Selected BITs

The first BIT signed between an African and a European country was between Togo and Switzerland, signed on 16 May 1961. This ushered in a floodgate of BITs between European countries and African States in what has been described as a "predominantly Afro-European" BIT regime.[1839] While the first intra-Africa BIT was the Egypt-Tunisia BIT negotiated in 1989, the United States entered the field in 1982 with the Congo-US BIT that entered into force on 28 July 1989.[1840] As of 2018, of all the BITs signed by African States, 47% were with European countries, 29% with Asian States, 19% were intra-African, 3% with Latin America, and 2% with North America.[1841] This old generation of BITs is characterised by their "North-South genetic protectionist character in their occurrence and content"[1842] and elevated the protection of investors and their investments over and above the authority of a State to regulate

[1835] Ibid, art 5(g).
[1836] Ibid, art 47.
[1837] Ibid, art 42(1).
[1838] Ibid, art 42(2 and 3).
[1839] Kidane (n 1787) 363.
[1840] *The Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol* (Congo-USA BIT (1984)), signed 03 August 1984 and entered into force 28 July 1989 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/828/download> accessed 17 April 2024.
[1841] Hamed El-Kady and Mustaqeem De Gama, "The Reform of the International Investment Regime: An African Perspective" (2019) 34(2) *ICSID Review* 482, 487.
[1842] Kidane (n 1787) 363.

investment. This trend was reversed by some of the investment law regimes in Africa through the RECs and the provisions of PAIC discussed later in this chapter as a soft instrument. With time, the Afro-European BIT regime slowed down to the point that no BIT was signed between an African State and a European country during the most recent decade, except for the two BITs signed with Switzerland and the post-Brexit UK Trade and Partnership Agreements, which Kidane describes as "limited and inconsequential investment provisions."[1843]

As earlier mentioned, African States, through BITs, have attempted to balance the asymmetry in the investor-centric regime of international investment law. One such BIT is the 2016 Nigeria –Morocco BIT,[1844] examined extensively in Chapter Four. But it is important to reiterate that it is referred to as the best example of new generations of BITs, which seek not just the protection of investment but also to promote responsible and sustainable investment,[1845] thereby striking a balance between private and public interests.[1846] Mbengue and Schacherer refer to the Nigeria –Morocco BIT as "the wind of change"[1847] because of its innovative nature, which was designed to bring a better balance between the rights and obligations of investors and host States.[1848] As discussed earlier, the Nigeria –Morocco BIT imposes some obligations on the investors, such as the obligation to conduct an environmental impact assessment and social impact assessment of the potential investment before commencing operation,[1849] the obligation to strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices,[1850] the obligation to uphold human rights, and not to operate the investments in a manner that circumvents international environmental, labour and human rights obligations.[1851]

Just like the AfCFTA Protocol on Investment, the Nigeria –Morocco BIT allows a State to exercise its regulatory powers arising from customary international law and other general principles of international law in so far as they are consistent with the sustainable development goals and with other legitimate social and economic policy objectives. As a means of balancing

[1843] Ibid, 380.
[1844] Nigeria –Morocco BIT (n 1057).
[1845] Beechey (n 1055) 5 – 6.
[1846] Sipowo (n 1056) 93.
[1847] Makane Moise Mbengue and Stefanie Schacherer, "Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization"" in Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (eds) *Handbook of International Investment Law and Policy* (Springer, 2021) 2605.
[1848] Kidane (n 1787) 403.
[1849] Nigeria –Morocco BIT (n 1057) art 14.
[1850] Ibid, art 24(1).
[1851] Ibid, art 18.

the rights and obligations of investors and Host States, such measures taken by Host States to comply with their international obligations shall not constitute a breach of the BIT.[1852]

Other African BITs, mostly with countries from outside of Africa, contain similar ideas but in less strict language or in what is called the "not lowering of standards clause" (NLSC). According to Ajibo, NLSC "involves environmental, labour and human rights clauses that require 'a commitment to refrain from relaxing domestic environmental and labour legislation to encourage investment'… expressed either 'as a binding obligation or as a soft law clause.'"[1853] The drafting of the NLSC reflects the consensus among the parties that it is improper to weaken domestic measures concerning health, safety, or the environment, as well as fundamental labour standards.[1854] African nation's approach to treaties with Canada demonstrates recognition of the NLSC provisions. For instance, Article 15(1) of the 2014 Cameroon - Canada BIT[1855] provides that the State parties shall not encourage investment by lowering "domestic health, safety or environmental measures." Similarly, each State party should encourage enterprises within its jurisdiction to voluntarily incorporate internationally recognised standards of CSR and principles on labour, the environment, human rights, community relations, and anti-corruption.[1856]

The NLSC also finds its way into some BITs negotiated between African States and China, despite China's "BITs practice do not generally disclose sensitivity to the emerging standards."[1857] For instance, China-Tanzania BIT (2013),[1858] besides containing the NLSC,

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[1852] Ibid, art 23.
[1853] Collins C Ajibo, "Sustainable Development Agendas in African Investment Treaties: Reconciling Principle with Practice" (2019) 40(2) *Australasian Review of African Studies* 55, 63.
[1854] Ibid.
[1855] *Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments* (Cameroon-Canada BIT (2014)), signed 03 March 2014 and entered into force 16 December 2016, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3537/cameroon---canada-bit-2014- > accessed 17 April 2024.
[1856] Ibid, art 15(2). Other African nations BITs with Canada with similar provisions include: art 15 of the *Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments* (Burkina Faso - Canada BIT (2015)), signed 20 April 2015 and entered into force 11 October 2017, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3557/burkina-faso---canada-bit-2015- > accessed 17 April 2024; art 15 of the *Agreement Between Canada and Mali for the Promotion and Protection of Investments* (Canada - Mali BIT (2014)), signed 28 November 2014 and entered into force 08 June 2016 <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3540/canada---mali-bit-2014-> accessed 17 April 2024; art 15 of the *Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments* (Canada - Senegal BIT (2014)), signed 27 November 2014 and entered into force 05 August 2016 <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3541/canada---senegal-bit-2014-> accessed 17 April 2024.
[1857] Ajibo (n 1853) 64.
[1858] *Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments* (China-Tanzania BIT (2013)), signed 24 March 2013 and entered into force 17 April 2014

allows a State party to adopt and maintain "environmental measures necessary to protect human, animal or plant life or health."[1859] The China - Mauritius FTA (2019) [1860] combined the State's obligation to safeguard vital security interests, typically outlined in separate provisions, with the NLSC provision.[1861]

As pointed out by Ajibo, although "most Model BITs of the major capital exporting countries do not incorporate CSR provisions," there is a developing trend where CSR clauses are included in their BITs with African States. He further contends that this is particularly true of African States' BIT practices with Canada, even though Canada's 2004 Model BIT does not incorporate a CSR requirement.[1862] In the BITs with African States where a CSR clause is included, it typically provides that each party

> should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as Statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.[1863]

Additionally, the Canada-Senegal BIT adds that "such enterprises are encouraged to make investments whose impacts contribute to the resolution of social problems and preserve the environment."[1864] One noticeable feature of these African BITs with Canada is that there is no mention of a particular CSR standard that a State should encourage. This approach gives States the wide latitude "to choose their own CSR standards."[1865] These African States' BITs with

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<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download> accessed 17 April 2024.

[1859] Ibid, art 10(2).

[1860] *Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Mauritius* (China - Mauritius FTA (2019)), signed 17 October 2019 and entered into force 01 January 2021 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6074/download> accessed 17 April 2024.

[1861] Ibid, art 8.18(2).

[1862] Ajibo (n 1853) 64 – 65.

[1863] See art *Canada - Côte d'Ivoire Foreign Investment Promotion and Protection Agreement* (Canada - Côte d'Ivoire BIT (2014)), signed 30 November 2014 and entered into force 14 December 2015 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3242/download> accessed 17 April 2024; art 16 of the *Agreement Between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments* (Canada-Nigeria BIT (2014)), signed 06 May 2014 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3151/download> accessed 17 April 2024; Canada - Mali BIT (n 1856) art 15(3); Cameroon-Canada BIT (n 1855) art 15(2); Canada-Senegal BIT (n 1856) art 16.

[1864] Canada-Senegal BIT (n 1856) art 16.

[1865] Rainbow Willard and Sarah Morreau, "The Canadian Model BIT—A Step in the Right Direction for Canadian Investment in Africa?" (*Kluwer Arbitration Blog*, 18 July 2015) <https://arbitrationblog.kluwerarbitration.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/> accessed 17 April 2024.

Canada "reflect a growing trend to address social and environmental issues in investment treaties."[1866]

Although Indigenous Peoples are not expressly mentioned in the BITs, they mention human rights protection, which encompasses the rights of Indigenous Peoples. Again, the Nigeria – Morocco BIT mandates the Investment to establish and maintain local community liaison processes as part of its corporate governance and practices.[1867] Furthermore, the abovementioned NLSC provisions, which mandate States to maintain their responsibilities on issues like community relations, environment, and human rights, additionally serve as a mechanism for protecting Indigenous Peoples.

7.2.1.3.Sub-Regional Regimes

African regional trade and investment groupings are partly driven by social, cultural, and political factors and are influenced by specific geographical characteristics. The changing circumstances suggest a cautious strategy for integrating sustainable development goals within African regional communities.[1868] The AU recognises eight RECs: the Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel–Saharan States (CEN–SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), ECOWAS, Intergovernmental Authority on Development (IGAD), and Southern African Development Community (SADC).[1869] Of these eight, three have hard regional agreements relevant to investment – ECOWAS, SADC, and COMESA.

Economic Community of West African States

The ECOWAS is an association of 15 African countries with a Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (ECOWAS Supplementary Act) of 2008[1870] and the ECOWAS Common Investment Code (ECOWIC) 2019[1871] as instruments on investment. The two instruments are unique in their references to paying due regard to local communities, human rights and environmental

[1866] Ibid.
[1867] Nigeria –Morocco BIT (n 1057) art 19(1)(b).
[1868] Ajibo (n 1853) 61 – 62.
[1869] AU, "Regional Economic Communities" <https://au.int/en/recs> accessed 17 April 2024.
[1870] ECOWAS, *Supplementary Act Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS* (ECOWAS Supplementary Act), signed 19 December 2008 and entered into force 19 January 2009, A/SA.3/12/08 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download> accessed 18 April 2024.
[1871] ECOWAS, *ECOWAS Common Investment Code* (ECOWIC) 2019, signed and entered into force on 22 December 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6441/download> accessed 18 April 2024.

obligations of investors, and sustainable investment. They have a similar objective of "to promote investment that supports the sustainable development of the region,"[1872] but the ECOWIC has an expanded objective. So, in addition to the above, the ECOWIC adds the following objectives: to "promote the adoption of common regional rules on investments," "improve investment and trade relations with and within the region and between the region and foreign investors, conducive to regional stability and sustainable development" and enhance the role of foreign direct investment in the reduction of poverty, furthering human rights and human development.[1873]

The ECOWAS Supplementary Act and the ECOWIC are legally binding on ECOWAS States, investors, and investments concluded before and after the Act entered into force.[1874] However, investors' obligations and responsibilities do not apply retroactively.[1875] In the two instruments, States have various obligations like the obligation to ensure that there exist appropriate environmental protection regulations and laws,[1876] the obligation to ensure that local communities have the right to request the State to investigate an alleged environmental violation,[1877] and the obligation to ensure that its laws and regulations provide for high levels of human rights protection.[1878] Other States' obligations include the duty to have domestic social, health, and environmental impact assessment laws that are of a high standard[1879] and the duty to ensure that domestic laws and policies are consistent with international human rights, with the list of human rights obligations.[1880]

They both make provisions for national treatment and the MFN principle. For national treatment, a State must accord treatment no less favourable than that which it accords "in like circumstances" to its own investors.[1881] The inclusion of "in like circumstances" is novel, and it sets a highly broad standard that cannot be easily satisfied by an investor complaining of discrimination. This is because the condition includes circumstances like effects on the local community, effects on the environment, the health of the populations, global commons, and other factors in relation to investment measures.[1882] Additionally, the ECOWIC provides for

[1872] Art 3 of ECOWAS Supplementary Act and art 2(1)(a).
[1873] ECOWIC (n 1871) art 2(1) (b – d).
[1874] ECOWAS Supplementary Act (n) art 4(1 and 2).
[1875] Ibid, art 4(3); ECOWIC (n 1871) art 3.
[1876] Art 21(1) of ECOWAS Supplementary Act; art 22 of ECOWIC.
[1877] Art 24(2) of ECOWIC.
[1878] Art 21(2) of ECOWAS Supplementary Act.
[1879] Ibid, art 21(3).
[1880] Ibid, art 21(5).
[1881] Art 6(1) of ECOWIC; art 5(1) of ECOWAS Supplementary Act.
[1882] Art 6(3) of ECOWIC; art 5(4) of ECOWAS Supplementary Act.

an exception to the national treatment; that is, any regulation taken by a State in the "legitimate public welfare objectives, such as national interests, public health, safety, and the environment, does not constitute a breach of the National Treatment principle."[1883] Furthermore, even though the MFN principle is enshrined in both instruments,[1884] the ECOWIC provides elaborate exceptions, which include general exceptions like measures taken to protect human, animal, or plant life or health, to protect national treasures of artistic, historic, or archaeological value, for the conservation of exhaustible natural resources, to promote equality on issues like land for disadvantaged persons, to preserve and promote cultural and linguistic diversity, and to preserve and protect the biodiversity and the rights of local communities.[1885] There are other exceptions, which largely derive from maintaining national and international peace.[1886] Although Kidane sees these exceptions as "indications of Africa's continued struggle to make sense of existing international investment law principles,"[1887] they are important for Indigenous Peoples. These exceptions are directly linked to the protection of the rights of Indigenous Peoples, even to the protection of their cultural rights.

Finally, the two instruments impose some obligations on investors and their investments. Foremost, investors must carry out their business in strict conformity with the host State's existing laws, like environmental regulations.[1888] The obligation to undertake environmental and social impact assessments of the proposed business should include the impact of the business on the natural environment and the local population. Such assessments should comply with the precautionary principle, and where necessary, an alternative method to the investment should be taken to avoid damage to the environment or the local community.[1889] The ECOWIC additionally imposes a duty on the investor to "perform the restoration, using appropriate technologies, for any damage caused to the natural environment and to pay adequate compensation to all affected interested persons."[1890]

Furthermore, investors should uphold human rights in the community they are located and should not conduct business that will breach human rights or circumvent the host and home State human rights obligations, labour standards, and regional environmental and social

[1883] Art 7(1 and 2) of ECOWIC.
[1884] Art 8 of ECOWIC; art 6 of ECOWAS Supplementary Act.
[1885] Art 9(1) of ECOWIC
[1886] Ibid, art 9(2 – 4).
[1887] Kidane (n 1787) 335.
[1888] Art 27(1)(a) of ECOWIC; art 11 of ECOWAS Supplementary Act.
[1889] Art 12 of ECOWAS Supplementary Act; art 27 (1) (b – d) of ECOWIC.
[1890] Art 27 (1) (e) of ECOWIC.

obligations.[1891] This obligation extends to investors not violating human rights in complicity with public authorities.[1892] Investors are also "to promote and engage in corporate social responsibility in accordance with international best practices, taking into account the peculiar development plans and priorities of Member State and in particular the needs of the local communities."[1893] Regarding liability, investors shall face civil litigation in the judicial system of their host country for actions or decisions made concerning the investment, particularly if such actions or decisions result in substantial harm, personal injury, or loss of life within the host country.[1894]

The Common Market for Eastern and Southern Africa

The COMESA is a regional community that integrates the economies of 21 African Countries established under the COMESA Treaty.[1895] Two of its objectives stand out: "to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development" and "to promote joint development in all fields of economic activity … to raise the standard of living of its peoples."[1896] As an old treaty, it contains "some of the foundational and traditional principles of international investment law"[1897] in Chapter 26. This necessitated the need for the negotiation and adoption of the Investment Agreement for the COMESA Common Investment in 2007 (CCIA 2007),[1898] which was further revised in 2017 by the Revised Investment Agreement for the COMESA Common Investment Area (CCIA 2017).[1899] The revision became necessary to align the investment law regime in the region "with trends in [international investment law]."[1900]

Among the objectives Stated in the CCIA 2017, the COMESA region has the objective "to promote investments that support sustainable development in Member States" and to "provide COMESA investors, in the conduct of their business, with an overall balance of rights and

[1891] Art 14(2) of ECOWAS Supplementary Act.
[1892] Ibid, art 14(3).
[1893] Art 34(2) of ECOWIC; see also art 16 of ECOWAS Supplementary Act.
[1894] Art 17 of ECOWAS Supplementary Act.
[1895] *Treaty Establishing the Common Market for Eastern and Southern Africa* (COMESA Treaty), signed 5 November 1993, entered into force 8 December 1994 [art 1] <https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf> accessed 18 April 2024.
[1896] Ibid, art 3(a and b).
[1897] Kidane (n 1787) 306.
[1898] COMESA, *The Investment Agreement for the COMESA Common Investment Area* (CCIA 2007), signed 23 May 2007 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download> accessed 18 April 2024.
[1899] COMESA, *Revised Investment Agreement for the COMESA Common Investment Area* (CCIA 2017) <https://www.comesa.int/wp-content/uploads/2020/10/English-Revised-Investment-agreement-for-the-CCIA-28.09.17-FINAL-after-Adoption-for-signing.pdf> accessed 18 April 2024.
[1900] Akinkugbe (n 1775) 22.

obligations between investors and Member States."[1901] Regarding its coverage, the CCIA 2017 covers investors and their investments in any COMESA Member State.[1902] Just like in any traditional investment treaty, the CCIA 2017 prohibits discrimination and provides for national treatment[1903] and MFN[1904] principles. Innovatively and distinct from the ECOWAS Supplementary Act, the CCIA 2017 provides for unique exceptions to national treatment and MFN. In addition to other exceptions, "measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement"[1905] shall not constitute a breach of the national treatment and MFN principles. As there are many Indigenous Peoples in the Eastern and Southern regions of Africa, this exception would serve as a mechanism for bridging the economic gap that exists between Indigenous Peoples and other members of society. This can be achieved either by the government treating companies established by Indigenous Peoples more favourably than other competing companies or by imposing stricter regulations on companies operating within the territories of Indigenous Peoples more than other companies. Also, a State is not violating the national treatment and MFN principles if it introduces discriminatory measures to comply with its international obligations under other treaties.[1906] For any of these exceptions, the investor is not entitled "to compensation for any competitive disadvantages he may suffer."[1907]

Part 4 of the CCIA 2017 is dedicated to investor and investment obligations. They have the obligation to comply with all applicable domestic laws and measures of the host State[1908] and to disclose risks related to environmental liabilities timely.[1909] While investors are expected to respect the cultural value of the locality where they operate,[1910] they should desist from offering or taking bribes.[1911] Similarly, Article 29 is dedicated to business ethics and human rights. For this, COMESA investors and their investments shall comply with the principles enunciated in the UN Guiding Principles[1912] with modifications necessary for local circumstances.[1913] Like

[1901] CCIA 2017 (n 1899) art 2 (a and c).
[1902] Ibid, art 3.
[1903] Ibid, art 17.
[1904] Ibid, art 18.
[1905] Ibid, art 19(2).
[1906] Ibid, art 19(4).
[1907] Ibid, art 19(3).
[1908] Ibid, art 25.
[1909] Ibid, art 26(3)(c).
[1910] Ibid, art 27(1)(b).
[1911] Ibid, art 28.
[1912] UN Guiding Principles (n 28).
[1913] CCIA 2017 (n 1899) art 29(1).

other investment treaties that reflect the new trend in Africa, the CCIA 2017 provides that investors shall "support and respect the protection of internationally proclaimed human rights" and "ensure that they are not complicit in human rights abuses."[1914] When addressing actual and potential adverse human rights impacts, it is important for COMESA investors to prioritise actions. The focus should be on preventing and mitigating the most severe impacts or those that could become irreparable if not addressed promptly.[1915] Ultimately, "investors and their investments shall proceed in ways that do not conflict with the social and economic development of host countries."[1916]

Moving forward, COMESA Investors and their investments must prioritise environmental protection and take responsibility for any harm caused to the environment. They should make efforts to restore the environment as far as possible and provide fair compensation to those affected by the environmental damages.[1917] Additionally, they must adhere to the environmental and social assessment screening criteria and assessment processes that are relevant to their proposed investments before they are established, as required by the laws of the host State for such an investment. These impacts assessments must include "assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment",[1918] which must be made public and accessible to the local communities[1919] and should be in accordance with the precautionary principle.[1920] The consequence of failure to comply with its obligations is that "a host State may initiate a proceeding against a COMESA investor or its investment in the courts of the host State for breaches of its obligations under this Agreement."[1921]

The Southern Africa Development Community

The SADC comprises 16 Southern African States with the objectives "to achieve economic development…alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through Regional Integration."[1922] Flowing from this objective, the SADC, in 2006, adopted the Protocol on Finance and

[1914] Ibid, art 29(2)(a and b).
[1915] Ibid, art 29(2).
[1916] Ibid, art 30.
[1917] Ibid, art 31(1).
[1918] Ibid, art 31 (2 and 3).
[1919] Ibid, art 31 (4).
[1920] Ibid, art 31(5).
[1921] Ibid, art 33.
[1922] SADC, "SADC Objectives" <https://www.sadc.int/pages/sadc-objectives> accessed 19 April 2024.

Investment (SADC Protocol)[1923] with the objective to "foster harmonisation of the…investment policies of the State Parties."[1924] This shall be achieved "by creating a favourable investment climate within SADC with the aim of promoting and attracting investment in the Region"[1925] as set out in Annex1.[1926] Annexe 1 is dedicated to substantive and procedural investment-related rules but is not as elaborate and innovative as the other RECs' investment mechanisms.

In 2016, Annex 1 was further amended by the Agreement Amending Annex 1 of the SADC Finance and Investment Protocol (Amended Annex to the SADC Protocol).[1927] The Amended Annex to the SADC Protocol, which entered into force in 2017, modified or replaced most of the investment protection standards provided under the original Annex 1.[1928] The Amended Annex to the SADC Protocol, for instance, provides more detailed explanations than the original Annex concerning provisions pertaining to the regulatory authority of each host State in the domains of environmental protection, safety, and domestic health.[1929] To protect the environment and human health, the Amended Annex to the SADC Protocol adopts a less strict obligation based on NLSC. However, instead of using "lowering", as is common in other BITs, the SADC Protocol uses "relaxing." In other words, "it is inappropriate [for State Parties] to encourage investment by *relaxing* domestic health, safety or environmental measures and agree not to waive or otherwise derogate from, international treaties they have ratified, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment."[1930] This flows from the State parties' obligation "to promote the use of their natural resources in a sustainable and an environmentally friendly manner."[1931]

As mentioned earlier, the Amended Annex to the SADC Protocol is, for the most part, modelled as a traditional investment treaty with less innovative provisions, such as the regimes in COMESA and ECOWAS. This is also exemplified in its provision for investor obligation. It

[1923] SADC, "Protocol on Finance and Investment," signed 18 August 2006, <https://www.sadc.int/document/protocol-finance-and-investment-2006> accessed 19 April 2024.
[1924] Ibid, art 2(1).
[1925] Ibid, art 2(2)(a).
[1926] Ibid, art 3.
[1927] SADC, Agreement Amending Annex 1 - Cooperation on investment - on the Protocol on Finance and Investment (Amended Annex to the SADC Protocol) 2016.
[1928] Talkmore Chidede, "The Right to Regulate in Africa's International Investment Law Regime" (2019) 20(2) *Oregon Review of International Law* 437, 452.
[1929] Ibid.
[1930] Amended Annex to the SADC Protocol (n 1927) art 11.
[1931] Ibid, art 10.

simply adopts the indirect corporate obligation by providing that "investors and their investments shall abide by the laws, regulations, administrative guidelines and policies of the Host State for the full life cycle of those investments."[1932] The regulatory right of a host State is preserved to provide measures to ensure that development in their territory is consistent with sustainable development and legitimate social and economic policy objectives. This means that in the Amended Annex to the SADC Protocol, SADC host States maintain the authority to regulate investments in alignment with their development objectives and in accordance with customary international law and other general principles of international law.[1933]

So, in the final analysis, although the Amended Annex to the SADC Protocol reflects some improvements, it does not elaborate on the investor obligation. It is still a good investment law as it retains the host State's regulatory right to introduce laws and policies to exercise their obligations under customary international law that could potentially affect investment. This notwithstanding, there is a suggestion that the SADC may have impacted the region's intra-trade performance.[1934]

7.2.2. Soft Investment Instruments

This section is dedicated to some of the non-legally binding investment instruments that have the potential to advance the protection of the rights of Indigenous Peoples through provisions related to human rights and environmental protection. Three regimes will be examined – the PAIC,[1935] the Southern African Development Community (SADC Model BIT),[1936] and the AAA Model BIT. The method employed here is to analyse the PAIC and the SADC Model BIT together, as they contain almost similar provisions. The AAA Model BIT will be examined separately since it contains elaborate provisions regarding the rights of Indigenous Peoples and contains far more innovative provisions on balancing investment and sustainable use of the environment.

[1932] Ibid, Annex 1, art 10.
[1933] Ibid, art 12; Chidede (n 1928) 453.
[1934] Busani Moyo, "Impact of SADC Free Trade Area on Southern Africa's Intra-Trade Performance: Implications for the African Continental Free Trade Area" (2024) 59(1) *Foreign Trade Review* 146–180.
[1935] PAIC (n 1781).
[1936] SADC, *SADC Model Bilateral Investment Treaty Template with Commentary* (SADC Model BIT) July 2012 <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 19 April 2024.

7.2.2.1. Pan African Investment Code and the Southern African Development Community Model BIT

The PAIC was established in 2016 under the African Union and is considered the first continent-wide African model investment treaty developed under the auspices of the AU.[1937] It is the foundation of those RECs' investment regimes and the AfCFTA Protocol on Investment that consistently shape the African investment law agenda.[1938] Furthermore, it is part of the broader trend towards the "Africanization" of international investment law, as seen in various African regional investment instruments and new-generation BITs that have influenced other BITs in other jurisdictions.[1939] PAIC's primary aim is to promote sustainable development amongst African States.[1940] This is because, in the African context, it is crucial to prioritise the pursuit of sustainable development due to the prevailing economic, social, and environmental issues faced by the continent.[1941]

On the other hand, the SADC Model BIT is designed to promote and protect foreign investments within the SADC region[1942] by reflecting the organisation's commitment to creating a favourable investment climate and fostering sustainable economic development in the region. It is not binding and is not intended to be binding. As part of the Pan-Africanism in investment law in Africa, the unique provisions of the PAIC and SADC Model BIT are presented in the table below:

Regime / Feature	PAIC	SADC Model BIT
Objective	"The objective of this Code is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State	"The main objective of this Agreement is to encourage and increase investments [between investors of one State Party into the territory of the other State Party] that support the sustainable development

[1937] Makane Moïse Mbengue and Stefanie Schacherer, "The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" (2017) 18 *Journal of World Investment and Trade* 414.
[1938] Ally Possi, "Africanacity of International Investment Law: A Reflection on Investment Agreements in Africa" (2021) 113 *Journal of Law, Policy and Globalization* 1.
[1939] Emmanuel T Laryea and Oladapo O Fabusuyi, "Africanisation of International Investment Law for Sustainable Development: Challenges" (2021) 20(1) *Journal of International Trade Law and Policy* 42, 49.
[1940] PAIC (n 1781) art 1.
[1941] Mbengue and Schacherer (n 1937) 420; Laryea and Fabusuyi (n 1939) 49.
[1942] Mmiselo Freedom Qumba, "Assessing African Regional Investment Instruments and Investor–State Dispute Settlement" (2020) 70(1) *International and Comparative Law Quarterly* 197, 207.

	where the investment is located."[1943]	of each Party, and in particular, the Host State where investment is to be located."[1944]
Expropriation	It prohibits expropriation except if the following four conditions are met in a cumulative manner: "a. a public purpose related to the internal needs of that Member State; b. on a non-discriminatory basis; c. against adequate compensation; and d. under due process of law."[1945] It further provides for generation exceptions where a State adopts or enforces "measures relating to the protection of human, animal or plant life or health." It also includes the NLSC.[1946]	It equally prohibits expropriation except if the following three conditions are satisfied: (a) in the public interest; (b) in accordance with due process of law; and (c) on payment of fair and adequate compensation within a reasonable period of time.[1947] No further exceptions are provided.

[1943] Art 1 of PAIC.
[1944] Art 1 of SADC Model BIT.
[1945] Art 11(1) of PAIC.
[1946] See art 14(1 and 2).
[1947] Art 6(1) of SADC Model BIT.

Investor obligations: Corruption.	"Investors shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a Member State, or to a member of an official's family or business associate or other person in order that the official or other person act or refrain from acting in relation to the performance of official duties. Investors shall also not aid or abet a conspiracy to commit or authorise acts of bribery."[1948]	"Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an Investment. Investors and their Investments shall not be complicit in any act described [above], including incitement, aiding and abetting, and conspiracy to commit or authorisation of such acts.[1949]
Investor obligations to observe domestic law.	"Investors shall abide by the laws, regulations, administrative guidelines and policies of the host State."[1950]	"Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments."[1951]
Investor obligations as to the use of natural resources	1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State. 2. Investors shall respect the rights of local populations and avoid land-grabbing practices vis-à-vis local communities.[1952]	No provisions in this regard.

[1948] Art 21 of PAIC.
[1949] Art 10 of SADC Model BIT.
[1950] Art 22(1) of PAIC.
[1951] Art 11 of SADC Model BIT.
[1952] Art 23 of PAIC.

Business ethics and human rights obligations of investor	The following principles should govern compliance by investors with business ethics and human rights: a. support and respect the protection of internationally recognised human rights; b. ensure that they are not complicit in human rights abuses; c. eliminate all forms of forced and compulsory labour, including the effective abolition of child labour; d. eliminate discrimination in respect of employment and occupation; and e. ensure equitable sharing of wealth derived from investments.[1953]	15.1. Investors and their investments have a duty to respect human rights … in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife. 15.2. … 15.3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.[1954]
Obligation to carry out an environmental and social impact assessment	The PAIC does not impose this obligation exclusively on investors. Instead, it provides rather too simplistic that "Member States and investors shall carry out Environmental Impact Assessment (EIA) in relation to investments." Investors shall, in performing their activities, protect the environment and, where such activities cause damages to the environment, take reasonable steps to restore it as far as possible.[1955]	An investor has an obligation to carry out an environmental and social impact assessment. These assessments must include "assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realisation of human rights in those areas." The result must be public and accessible to the local communities and must be conducted by applying the precautionary principle.[1956]

[1953] Ibid, art 24.
[1954] Art 15 of SADC Model BIT.
[1955] Art 37(3 and 4) of PAIC.
[1956] Art 13 of SADC Model BIT. The progressive realisation of human rights, although gives opportunity for less buoyant States to fulfil their obligation to human rights gradually and according to their capacity, has been used to justify failure to protect some rights. See Lisa Forman and others, "What could a Strengthened Right to Health

State obligation regarding the environment	"Member States shall ensure that their laws and regulations provide for environmental protection." States should avoid lowering their environmental protection standards in their bid to attract investments.[1957]	"Each State Party has the right to establish its own levels of domestic environmental protection and development policies and priorities, as well as labour laws and standards, and to adopt or modify such laws, standards, and policies." States should avoid lowering their environmental protection standards in their bid to attract investments.[1958]
State obligation regarding cultural life	1. "Member States may adopt policies on cultural and linguistic diversity in promotion of investments."[1959] 2. States may introduce performance requirements to "measures to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the adoption of this Code."[1960] 3. States must "protect traditional knowledge systems and expressions of culture as well as genetic resources that are sought, used or exploited by investors."[1961] 4. "States shall provide, within national laws, principles for the patenting of biological materials or of traditional knowledge systems and expressions of	There are no many references to cultural life except that "a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement."[1963]

bring to the Post-2015 Health Development Agenda?: Interrogating the role of the Minimum Core Concept in Advancing Essential Global Health Needs" (2013) 13(48) *International Health and Human Rights* 1 – 11;

[1957] Art 37(1 and 3) of PAIC

[1958] Art 22(1 and 2) of SADC Model BIT.

[1959] Art 38 of PAIC.

[1960] Ibid, art 17(2)(d).

[1961] Ibid, art 25(3).

[1963] Art 21(3) of the SADC Model BIT.

	culture for the protection of local communities."[1962]	
Investor liability	It does not include this clause, apart from the general dispute settlement mechanism	"Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State."[1964]

7.2.2.2.Africa Arbitration Academy Model Bilateral Investment Treaty for African States

The establishment of the AAA in 2019 was prompted by the increasing need for enhanced expertise and training of African arbitration practitioners. Its purpose is to provide African practitioners with exposure to the latest trends and advancements in international commercial and investment treaty arbitration.[1965] In July 2022, the AAA launched the AAA Model BIT as a guide for African States' Investor-State Dispute Settlement. The AAA Model BIT is one of Africa's most advanced model BITs in terms of its elaborate provisions for the recognition and protection of Indigenous Peoples in investment regimes. Its innovation was acknowledged in 2023 when it won the Global Arbitration Review award for the Campaign for Greener Arbitration Award for Sustainable Behaviour,[1966] in addition to its nomination in two other categories: Best Development and Best Innovation.[1967]

In its Preamble, it recognises the "importance of encouraging investment promotion activities that are more accessible to underrepresented groups, including the specific investments of women, Indigenous Peoples, and micro, small or medium-sized enterprises."[1968] Furthermore, it emphasises the significance of promoting ethical business practices, preserving cultural

[1962] Ibid, art 25(4).
[1964] Art 17(1) of the SADC Model BIT.
[1965] Africa Arbitration Academy, "Mission and Objectives" <https://africaarbitrationacademy.org/ > accessed 20 April 2024.
[1966] Global Arbitration Review, "GAR Awards 2023 – the first shortlists" <https://globalarbitrationreview.com/article/gar-awards-2023-the-first-shortlists > accessed 20 April 2024.
[1967] Africa Arbitration, "Record breaking feat! the Africa Arbitration Academy Model BIT shortlisted for 3 GAR Awards" <https://africaarbitration.org/2023/02/21/record-breaking-feat-the-africa-arbitration-academy-model-bit-shortlisted-for-3-gar-awards/> accessed 20 April 2024.
[1968] AAA Model BIT (n 1782) Preamble.

identity and diversity, protecting the environment, promoting gender equality, respecting the rights of Indigenous Peoples, supporting sustainable development, and valuing traditional knowledge. It also recognises the host State's authority to regulate in the best interest of the public.[1969] Moreover, it advances the preservation and harnessing of "the knowledge, tradition, expressions of culture and genetic resources of all Indigenous Peoples for the benefit of their local and ethnic communities of origin."[1970]

The principle of *Ubuntu* forms part of the overriding principle of the AAA Model BIT. In this sense, it defines *Ubuntu* as a concept "which accords respect to human dignity and equality to any person irrespective of status in a communitarian sense. The principle recognises that a person has an inborn corresponding duty to accord respect to human dignity and equality to other members of the community within which such person operates."[1971] By extension, an investor is considered as "part of the larger community of the Host State" and, therefore, must apply the principle Ubuntu in its dealings with Indigenous communities where the investment is located/operated.[1972]

Article 11 is titled "Protection of Indigenous Peoples and Local/Ethnic Communities' Rights and Resources", where both States and investors are expected to comply with certain standards regarding Indigenous Peoples' traditional knowledge. First, in accordance with international and domestic laws, States must adopt measures to:

> (a) the collective intellectual property rights, Traditional Knowledge and Traditional Cultural Expressions of Indigenous Peoples and local/ethnic communities in which any of their creations are used or exploited commercially by an Investor and/or Investment of an Investor; and
>
> (b) the conservation, access to and sustainable use of Indigenous Peoples and local/ethnic communities' biological resources (including genetic resources such as plant and animal genetic resources) biological diversity, genetic material, plant variety and the Traditional Knowledge developed by the Indigenous Peoples and local/ethnic communities regarding the use of such biological resources, biological diversity, genetic material and plant variety, while recognizing fair and equitable participation in the benefits derived from such access and use.
>
> Such protection may be accomplished through a special system of registering, promoting, and marketing the rights of Indigenous Peoples and local/ethnic communities, with a view to recognizing and preserving the autochthonous

[1969] Ibid.
[1970] Ibid.
[1971] Ibid, art 1(1).
[1972] Ibid, art 1(2).

> sociological and cultural values of the Indigenous People and the local/ethnic communities, and to promote and bring them social justice in a manner that treats men and women equitably.[1973]

For investors, whenever they intend to use the "intellectual property rights, Traditional Knowledge, Traditional Cultural Expressions, biological resources, biological diversity, plant variety and/or genetic materials owned or developed by the Indigenous Peoples and local/ethnic communities," they must respect such rights as per the provisions of international law, generally accepted international standards and domestic laws.[1974] Some of these international law instruments include the UNDRIP and CBD.[1975]

Uniquely, the AAA Model BIT makes provision for the involvement of Indigenous Peoples in dispute settlement by way of submissions before an arbitral tribunal. It can be a written or oral submission on the interpretation of the agreement.[1976] In particular, "a sub-national group, local or ethnic community of a Contracting Party may, at the discretion of the Tribunal, provide oral or written *shawara* (insight, information or other useful details) to the Arbitral Tribunal regarding the *tarihi* (history) or *asiri* (secrets) of any aspects of Traditional Knowledge, Traditional Cultural Expression or genetic resources which form the core of the subject matter in dispute before the Tribunal.[1977]

The MFN and national treatment provisions follow the provisions of PAIC and other new generation of BITs. However, regarding MFN treatment, the AAA Model BIT provides that the obligations outlined in various international investment treaties and trade agreements alone do not qualify as 'treatment' and, therefore, cannot result in a violation of the MFN treatment unless a Contracting Party implements or upholds measures in accordance with those obligations under similar circumstances.[1978] Furthermore, the exceptions to MFN and national treatments include, among others, a measure "that is designed and applied to protect or enhance a legitimate public welfare objective, such as public health, safety and the environment, labour rights, human rights, consumer rights and social welfare."[1979]

[1973] Ibid, art 11(1).
[1974] Ibid, art 11(3)
[1975] Ibid, art 11(4)(b).
[1976] Ibid, art 22(K)(1).
[1977] Ibid, art 22(K)(3). Wasiński explored the effectiveness or otherwise of involving Indigenous Peoples and approaches in dispute resolution. See Marek Jan Wasiński, "The Mabanga Peace Accord - A Grassroot and Indigenous Approach to Reconciliation and Conflict Resolution in the Mt Elgon District, Kenya" in Hansen Thomas Obel (ed) *Victims and Post-Conflict Justice Mechanisms in Africa* (Kenya Human Rights Commission-Law Africa, 2017) <https://ssrn.com/abstract=3093831> accessed 29 May 2024.
[1978] AAA Model BIT (n 1782) art 4(A)(2)(a).
[1979] Ibid, art 4(D)(1)(a).

It also prohibits expropriation except if it was carried out for public purpose or in the public interest, on a non-discriminatory basis, according to the law, and subject to prompt payment of fair and adequate compensation.[1980] However, a measure designed and applied by a State "to protect or enhance public welfare objectives, such as public health, safety and the environment, labour rights, human rights, social welfare and consumer rights shall not constitute indirect expropriation."[1981] This is subject to the measure meeting the following criteria: "(a) for a public purpose or in the public interest; (b) applied on a non-discriminatory basis; and (c) in accordance with the due process of the law."[1982]

7.3.Environmental Protection in Africa and the Rights of Indigenous Peoples

According to Diallo, the history of environmental regimes in Africa could be traced to the 1900 London Convention for the Protection of Wild Animals, Birds and Fish in Africa (1900 London Convention),[1983] adopted by six colonialist countries – France, Germany, Great Britain, Italy, Portugal and Spain with "the primary goal … to preserve a good supply of game for trophy hunters, ivory traders and skin dealers."[1984] The 1933 London Convention Relative to the Preservation of Flora and Fauna in their Natural State[1985] later replaced the 1900 London Convention, which, unlike the latter, entered into force and became the first legally binding to provide for the establishment of protected areas in Africa. Although its further revisions were disrupted due to the decolonisation,[1986] it nonetheless, together with the 1900 London Convention, "included provisions and techniques for international conservation that are still found in modern treaties, including a system of annexes to list protected species, and the use of trade regulations as an instrument of environmental protection."[1987]

[1980] Ibid, art 6(1).
[1981] Ibid, art 6(4).
[1982] Ibid.
[1983] *Convention for the Preservation of Wild Animals, Birds, and Fish in Africa*, Signed at London, 19 May 1900. Issue 5 of Africa, 4 IPE 1607
[1984] Boubacar Sidi Diallo, "African Legal Instruments as Regional Tools of Harmonization of International Environmental Law" (2022) 14 *Adam Mickiewicz University Law Review* 85, 93. According to Negm, it should not be taken that there was no existing protection of the environment prior to colonialism in Africa. This is because environmental management was "an integral part of the religious, cultural, and social life of Africans before their colonisation." Such ritualised environmental management included the designation of forests, rivers, animals, and groves as sacred. See Namira Negm, *An Introduction to the African Union Environmental Treaties* (Brill, 2024) 9; Emeka Polycarp Amechi, "Linking Environmental Protection and Poverty Reduction in Africa: An Analysis of the Regional Legal Responses to Environmental Protection" (2010) 6(2) *Law, Environment and Development Journal* 112, 115 – 116.
[1985] *London Convention Relative to the Preservation of Flora and Fauna in Their Natural State*, London, 8 November 1933, in force 14 January 1936, 172 LNTS 241.
[1986] Diallo (n 1984) 94.
[1987] Philippe Sands and others, *Principles of International Environmental Law* (Cambridge University Press, 2018) 437.

7.3.1. Environmental Hard Law

Most of the existing legal systems at the AU level, especially those negotiated after 1986, have their legal basis in the African Charter. Although its provisions relating to the environment are tied to human rights, Negm recognises it as one of the AU environmental treaties.[1988] For instance, an individual right to receive information under Article 9(1) of the African Charter incorporates environmental impact assessment. The idea is that while an individual has the right to receive this information, the government is obligated to ensure that an environmental impact assessment is carried out for any activity that may impact the environment.[1989] This also goes with environmental rights enshrined in Article 24 of the African Charter.[1990] Apart from these anthropocentric environmental instruments, there are existing instruments that seek to protect nature for nature's sake.

The newly independent African States, in 1968, negotiated and adopted the Algiers Convention under the umbrella of the then Organisation of African Unity. As of early 2024, 46 African States have signed the Algiers Convention, and out of those, 33 have ratified it.[1991] Its primary objective is to impose on States the undertaking of adopting measures "necessary to ensure the conservation, utilisation and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people."[1992] States should always understand that the essence of conservation is to harness natural resources and the total advancement of the African peoples.[1993] According to Negm, the reference to "the best interests of the people" could be construed as referring to the economic, nutritional, scientific, educational, social, cultural, and aesthetic interests of the African peoples.[1994] For Amechi, in contrast to earlier Conventions negotiated by the colonial powers in Africa, the Algiers Convention not only departs from the idea of nature preservation solely for utilitarian reasons but also highlights the fundamental premise that underlies traditional African practices of environmental conservation and management.[1995]

[1988] Negm (n 1984) 29 – 43.
[1989] Ibid, 30.
[1990] Diallo (n 1984) 95.
[1991] AU, *African Convention on the Conservation of Nature and Natural Resources/Status List* <https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources> accessed 09 April 2024.
[1992] The Algiers Convention (n 1396) art II.
[1993] Ibid, Preamble.
[1994] Negm (n 1984) 13; Amechi (n 1984) 120.
[1995] Amechi (n 1984) 120.

Although there is no express mention of Indigenous Peoples in the Algiers Convention, it imposes obligations on States similar to the obligations of States to protect the territories and natural resources of Indigenous Peoples. This is especially so as Africa's Indigenous Peoples have always asserted their role in conservation.[1996] To this end, it mandates States to take measures consistent with customary rights.[1997] Article IV incorporates measures to protect soil from erosion by promoting the establishment of land-use plans, implementing agricultural practices, and enacting agrarian reforms that guarantee sustainable productivity in the long run. Similarly, it mandates States to implement water conservation regulations and protect flora using scientifically driven conservation methods that consider social and economic requirements.[1998] It mandates the careful management of fauna, emphasising conservation, prudent utilisation, and advancement, all within the context of land-use planning and socioeconomic progress. Wildlife populations must be managed in designated areas for optimal sustainable output.[1999] Activities such as hunting, capturing, and fishing require appropriately regulated permits, with certain techniques being prohibited.[2000]

The Algiers Convention had the capacity to develop a comprehensive environmental plan for African nations. Its innovative nature, being the sole agreement of its sort for African States and one of the few worldwide, along with its fairly adequate provisions, had the potential to serve as the basis for a comprehensive environmental strategy in Africa.[2001] Some gaps and pitfalls in the Algiers Convention have been recognised as reasons why it needed to be revised. First, it "emphasised utilitarianism against protectionist preservationist conceptions of the environment."[2002] Secondly, for Sands and others, the Algiers Convention "lacks any institutional arrangements for its implementation."[2003] Ultimately, the rapid evolution of environmental law as a separate field of study and the advancement of scientific knowledge of the environment resulted in many multilateral environmental instruments that made some of the provisions of the Algiers Convention ineffective.[2004]

[1996] ICCA Consortium, "Indigenous Peoples and Local Communities Assert Their Role in Conservation at the IUCN African Protected and Conserved Areas Congress" (*ICCA Consortium*, 6 February 2024) <https://www.iccaconsortium.org/2024/01/29/iucn-african-protected-conserved-areas/> accessed 09 April 2024.
[1997] Sands and others (n 1987) 438.
[1998] Algiers Convention (n 1396) arts V and VI.
[1999] Ibid, art VII(1).
[2000] Ibid, art VII(2).
[2001] Bolanle T Erinosho, "The Revised African Convention on the Conservation of Nature and Natural Resources: Prospects for a Comprehensive Treaty for the Management of Africa's Natural Resources" (2013) 21(3) *African Journal of International and Comparative Law* 378, 384 – 385.
[2002] Negm (n 1984) 19.
[2003] Sands and others (n 1987) 438.
[2004] Negm (n 1984) 20.

After a series of requests for the Algiers Convention to be reviewed from the governments of Nigeria and Cameroon and the works of the International Union for Conservation of Nature (IUCN) in the form of drafts submitted to the then OAU, the Heads of State and Government at the second Summit of the AU on 11 July 2003, adopted the Revised African Convention on Nature.[2005] The Revised African Convention on Nature is equally considered a milestone in protecting natural resources in Africa, and it is a product of the will of States to cooperate in this area.[2006] Additionally, it differentiates between the global environment, considered a "common concern," and the African environment, prioritised as a fundamental concern for Africans, and the individual States' responsibility for their territorial environments, aligning with Principle 2 of the Rio Declaration.[2007] It has three main objectives:

> 1. to enhance environmental protection;
>
> 2. to foster the conservation and sustainable use of natural resources; and
>
> 3. to harmonise and coordinate policies in these fields
>
> with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.[2008]

A notable departure from the Algiers Convention is the provision on peoples' rights. In other words, States should be guided by the following while implementing the provisions of the convention:

> 1. the right of all peoples to a satisfactory environment favourable to their development;
>
> 2. the duty of States, individually and collectively, to ensure the enjoyment of the right to development;
>
> 3. the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner.[2009]

The primary obligation of States is to "adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations."[2010] Furthermore, it

[2005] The Revised Convention on Nature (n 1397); Diallo (n 1984) 95 – 96.
[2006] Negm (n 1984) 21.
[2007] Erinosho (n 2001) 387.
[2008] The Revised Convention on Nature (n 1397) art II.
[2009] Ibid, art III.
[2010] Ibid, art IV.

embodies additional obligations for States because it expects States to "take effective measures to prevent land degradation and, to that effect, shall develop long-term integrated strategies for the conservation and sustainable management of land resources, including soil, vegetation and related hydrological processes."[2011] Land use plans should be established based on scientific investigations and local knowledge,[2012] and the land tenure system must consider the rights of local communities.[2013]

Similar obligations are imposed on States regarding the conservation of water. States must maintain their water resources to maintain them at the highest possible quantitative and qualitative levels.[2014] To achieve this, States are required "to establish and implement policies for the planning, conservation, management, utilisation and development of underground and surface water, as well as the harvesting and use of rainwater, and shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water."[2015] They should ensure that water resources are not polluted and are free of water-borne diseases.[2016]

As a departure from the Algiers Convention, the Revised Convention on Nature added new provisions on sustainable development and natural resources. To promote sustainable development, the management and conservation of natural resources must be treated as part of the developmental plans of a country by giving due consideration to ecological, economic, cultural, and social factors in any developmental plans.[2017] An environmental impact assessment is required whenever policies, plans, programmes, strategies, projects and activities likely to affect natural resources, ecosystems and the environment are to be carried out.[2018]

Another interesting aspect of the Revised Convention on Nature is the provision of traditional rights of local communities and Indigenous knowledge. The States are required to enact laws and implement other actions to guarantee that the traditional rights and intellectual property rights of local communities, particularly the rights of farmers, are protected. They must ensure that access to indigenous knowledge and its use is contingent upon obtaining the prior consent of the relevant communities and complying with specific legislation that recognises their rights to such knowledge and their right to benefit economically from the knowledge. Finally, States

[2011] Ibid, art VI(1).
[2012] Ibid, art VI(3)(a).
[2013] Ibid, art VI(4).
[2014] Ibid, art VII(1).
[2015] Ibid, art VII(2).
[2016] Ibid, art VII(1)(a)(b).
[2017] Ibid, art XIV(1).
[2018] Ibid, art XIV(2)(b)

are required to implement the necessary measures to facilitate the active participation of local communities in the planning and management of natural resources that are essential for their livelihoods. The aim is to establish local incentives for the conservation and sustainable use of these resources.[2019]

The provisions of the Revised Convention on Nature are detailed and comprehensive regarding the conservation of nature. It expects that while conserving nature, regard should be given to peoples' right to a satisfactory environment and the respect and protection of Indigenous knowledge in environmental management by States. This notwithstanding, Erinosho contends that the convention is silent on the principles of polluter pays and the common but differentiated responsibility.[2020] While Article 29 mandates parties to provide reports detailing the actions taken to implement the Convention, including the laws and regulations in effect aimed at ensuring compliance, it does not specify any penalties for failing to submit or providing insufficient reports.[2021]

As pointed out in Chapter Six, the African Court recently, in *LIDHO v Côte d'Ivoire*,[2022] interpreted both the Algiers Convention and the Revised Convention on Nature as not just an instrument for conserving natural resources but as a human rights instrument. This is to underscore that while it is important to protect nature for its intrinsic value, environmental pollution has a direct impact on humans. The Court acknowledged that while the two conventions commit States "to act in a manner that prevents harmful effects on the environment, especially those resulting from toxic waste and hazardous waste,"[2023] they impose obligations on States to fulfil "the right to the enjoyment of the best attainable State of physical and mental health and the right to a general satisfactory environment conducive to development."[2024] It is to be noted that even though the African Court ruled that in the present case, the government of Côte d'Ivoire had an obligation to prevent environmental pollution, the dissenting judgement of Blaise Tchikaya is to the effect that these two conventions should be interpreted as creating a direct horizontal human rights obligation on TNCs.

The third environmental law instrument in Africa that could impact the status of Indigenous Peoples is the Bamako Convention.[2025] This convention is a response to the Basel Convention

[2019] Ibid, art XVIII
[2020] Erinosho (n 2001) 389.
[2021] Ibid, 395.
[2022] *LIDHO v Côte d'Ivoire* (n 1398).
[2023] Ibid, para 37.
[2024] Ibid, para 39.
[2025] The Bamako Convention (n 1785).

on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention),[2026] which allowed parties to enter into agreements on toxic waste, particularly developing countries. The Basel Convention was negotiated due to concerns about the continuous shipment of hazardous wastes from industrialised nations to developing countries, even when these developing countries did not have adequately prepared sites. Expectedly, there were lots of debates between developing, particularly African countries and developed States, as developing countries wanted a total ban on transboundary movement of hazardous wastes. On the other hand, the industrialised economies argued for a regulated regime instead of a total ban.[2027] Unfortunately, as often is the case, the developed countries won, and the Basel Convention was adopted with a regulated regime instead of a total ban on the transboundary movement of hazardous wastes.[2028]

The Bamako Convention was therefore made to address these three concerns as Magliveras[2029] identified them. First, Africa's expansive oceans and inland water bodies provided ample opportunities for the widespread (and often unidentified) disposal and burning of hazardous and radioactive wastes, posing significant risks to the inhabitants of nearby regions. Secondly, The revelation that industrialised nations had previously been shipping hazardous wastes to African countries. Thirdly, the posturing of the industrialised economies during the negotiations of the Basel Convention and the eventual refusal to outlaw trade in toxic wastes in the Basel Convention.[2030] According to Diallo, the African States negotiated the Bamako Convention because the Basel Convention failed to address three issues: "how to control shipments of mixed waste; how to address inadequate disposal by the importing State; and how to address the issue of bribery and forgery."[2031] When the Bamako Convention was eventually adopted in 1991, it outrightly criminalised the import of all hazardous wastes, for any reason, into Africa.[2032] Still, it allows the transboundary movement of toxic wastes within Africa and permits African States to export them.[2033] To achieve this, State parties are obligated to prohibit the importation of such wastes, inform the Secretariat of the Convention of such illegal import

[2026] UN, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57.
[2027] Negm (n 1984) 47 – 48.
[2028] Ibid, 48.
[2029] Magliveras (n 1342) 370-399.
[2030] Ibid, 375 – 376.
[2031] Diallo (n 1984) 96.
[2032] The Bamako Convention (n 1785) art 4(1).
[2033] Negm (n 1984) 51.

of hazardous wastes, and cooperate with other States to ensure that no waste is imported from a non-contracting State to a State party.[2034]

Furthermore, it bans the dumping of hazardous wastes at sea and internal waters. This requires State parties to adopt legislative and other appropriate measures to prohibit the dumping of hazardous wastes within their internal waters, waterways, territorial seas, exclusive economic zones, and continental shelf.[2035] It further imposes strict, unlimited liability as well as joint and several liability on hazardous waste generators. States should ensure that hazardous waste generation is reduced to a minimum, taking into account social, technological and economic aspects. Moreover, the convention provides for precautionary measures by making it the responsibility of States to ensure that individuals involved in the management of hazardous wastes within their jurisdiction take appropriate measures to prevent pollution caused by these substances. If pollution does occur, they must take steps to minimise its impact on human health and the environment.[2036] The precautionary measures involve the adoption and implementation of a preventive, precautionary approach to pollution issues, which includes, among other things, taking action to prevent the release of substances into the environment that may potentially harm humans or the environment, even without waiting for scientific evidence of such harm.[2037] The Parties are required to collaborate to implement the precautionary principle for pollution prevention. This will be achieved by prioritising and adopting clean production methods rather than the permissive approach of relying on assimilative capacity assumptions for emissions.[2038]

The institutional aspect of the Bamako Convention consists of a Conference of the Parties (COP) and a Secretariat. The COP, comprising the environmental ministers of all contractual parties, has thus far convened three sessions, the last being in 2020.[2039] The COP, among other functions, is expected to "promote the harmonisation of appropriate policies, strategies and measures for minimising harm to human health and the environment by hazardous wastes" and "make decisions for the peaceful settlement of disputes arising from the transboundary movement of hazardous wastes."[2040] Additionally, the settlement of disputes between States regarding the interpretation and application of the Bamako Convention shall be by negotiations

[2034] The Bamako Convention (n 1785) art 4(1)(a-b).
[2035] Ibid, art 4(2)(a).
[2036] Ibid, art 4(3)(e).
[2037] Ibid, art 4(3)(f).
[2038] Ibid, art 4(3)(g).
[2039] Magliveras (n 1342) 378.
[2040] The Bamako Convention (n 1785) art 15(4).

or any other peaceful means of dispute settlement. If this process fails, the dispute shall be submitted to an ad hoc organ set up by the COP or referred to the ICJ.[2041]

If States should strictly observe their stipulated obligations, the Bamako Convention would serve as an effective instrument in the protection of Indigenous Peoples. This is especially so because, as reported in 2022 by the UN Special Rapporteur on toxics and human rights, Orellana, Indigenous Peoples who have been exposed to dangerous substances are experiencing a type of environmental violence that has resulted in deaths and put lives at risk by depleting food sources and medicinal plants, displacing communities, and causing birth deformities and cancers.[2042] In this case, the provision of the unlimited and several liability regimes of the Bamako Convention serves as a unique feature. In other words, when a State causes damages due to the violation of the convention, it can be penalised by monetary sanction that a trier of fact determines. In this case, it is not important to ascertain who was at fault; rather, the waste generator is strictly liable.[2043]

Moving forward, the SAMDC 2016 has some unique provisions that advance environmental protection, human rights, and sustainable development. Although it has not yet entered into force, its driving forces are the importance of minerals and other natural resources and their contribution towards inclusive growth and sustainable development and the realisation that Africa's abundant natural are not yet contributing equitably and effectively towards improving the living conditions of its populations.[2044] Another purpose of the SAMDC is to enable the continent to regain ownership of its natural resources and implement the Africa Mining Vision (AMV)[2045] to maximise the benefits of exploiting natural resources for the present and future generations while mitigating negative environmental and macroeconomic impacts.[2046]

[2041] Ibid, art 20.
[2042] UN General Assembly, *The Impact of Toxic Substances on the Human Rights of Indigenous Peoples*, report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Marcos Orellana, 28 July 2022, A/77/183 <https://www.ohchr.org/en/documents/thematic-reports/a77183-impact-toxic-substances-human-rights-indigenous-peoples-report> accessed 12 April 2024.
[2043] Negm (n 1984) 59.
[2044] SAMDC (n 1786) Preamble.
[2045] Africa Heads of State endorsed the AMV during the February 2009 AU summit sequel to the October 2008 gathering of African Ministers in charge of Mineral Resources Development. It represents Africa's indigenous approach to addressing the contradiction of abundant mineral resources coexisting with widespread poverty. The AMV is comprehensive in nature, advocating for innovative perspectives beyond traditional mining frameworks. See AU, *Africa Mining Vision*, February 2009 <https://au.int/en/ti/amv/about> accessed 13 April 2024.
[2046] SAMDC (n 1786) Preamble.

It establishes the African Minerals Development Centre (AMDC) as a specialised agency of the AU.[2047] The main objective is to coordinate and oversee the implementation of the AMV and its action plan to enable the mineral resource sector to play its role in the social and economic transformation, inclusive growth, and sustainable development of African economies. The AMDC should collaborate with Member States, Regional Economic Communities, the private sector, civil society organisations, women and youth organisations, collaborating institutions and other key stakeholders.[2048] Specifically, the AMDC has the objective to ensure that States have coherent policies and robust regulatory and legal frameworks on exploration, exploitation, licensing, contracting, taxation, exporting, mineral processing and handling, promote good governance in mineral resources development for the betterment of local communities in Africa, and foster sustainable development principles based on environmentally and socially responsible mining, which respects human rights, health and safety of the local communities, workers and other stakeholders.[2049]

According to Negm, African States, through the SAMDC, have committed themselves towards protecting the environment and promoting sustainable development through good governance of mineral resources. This is crucial, particularly now that the world is fighting climate change due to human activities, including the over-exploitation of mineral resources and mining.[2050] When the SAMDC enters into force, the AMDC, as part of its objective, will be able to advance the rights of Indigenous Peoples and their safety either as local communities or stakeholders through fostering sustainable development and respect for their rights.

Other human rights instruments exist that are interpreted as embodying principles of environmental protection. For instance, the Protocol on Women's Rights[2051] provides women's rights that are necessary for environmental protection. Article 18 provides women the right to live in a healthy and sustainable environment. To fulfil this right, States have the following obligations:

a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
b) promote research and investment in new and renewable energy sources and appropriate technologies;

[2047] Ibid, art 2.
[2048] Ibid, art 3(1).
[2049] Ibid, art 3(2).
[2050] Negm (n 1984) 117 – 118.
[2051] Protocol on Women's Rights (n 1404).

c) protect and enable the development of women's indigenous knowledge systems;
d) regulate the management, processing, storage and disposal of domestic waste;
e) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.[2052]

The obligation of States to ensure that proper standards are followed for the storage, transportation, and disposal of toxic waste is similar to their obligation in the Bamako Convention. Also, even though the Protocol on Women's Rights does not expressly mention Indigenous Peoples, Braun and Mulvagh have interpreted it to be an important instrument for the protection of Indigenous Peoples in Africa.[2053]

7.3.2. Environmental Soft Law

There are also a few soft instruments that provide guidance on how the environment should be protected. The Reporting Guidelines on Articles 21 and 24[2054] can also serve as a source of environmental soft instruments in Africa as it contains guidelines on how extractive TNCs can observe environmental and transparency standards. As already discussed in Chapter Six, while Article 21 of the African Charter is on the collective right of all peoples to dispose of their wealth and natural resources freely, Article 24 is on the right to a generally satisfactory environment. As part of a State's obligation to file a report regarding Article 24, a State should include in its report a Statement on the "applicable laws and regulations, including administrative laws, on the protection of the environment, as well as the nature of environmental issues that the applicable legal regime covers."[2055] It should also State "the institutions and regulatory bodies responsible for inspection, monitoring and enforcement of environmental laws, as well as their competencies."[2056]

As part of the implementation, States should endeavour to indicate measures adopted to ensure that environmental risk assessments are carried out prior to the implementation of industrial-scale economic projects and in accordance with international standards.[2057] These environmental risk assessments should be done with full regard "to indigenous knowledge and information as well as the needs of vulnerable groups such as … Indigenous Peoples…."[2058] In

[2052] Ibid, art 18.
[2053] Braun and Mulvagh (n 1405) 19.
[2054] the Reporting Guidelines on Articles 21 and 24 (n 1664).
[2055] Ibid, 16.
[2056] Ibid.
[2057] Ibid.
[2058] Ibid, 27.

addition, there should be a clause on the "provisions for monitoring the environment to ensure the conservation and improvement of the environment." Also, relevant parties (both State and private actors) must take the necessary actions and responsibilities to address and mitigate environmental damage caused by pollution or despoliation. This involves conducting scientific assessments of the environmental and social impacts, as well as implementing appropriate measures to restore the affected land or water body.[2059]

Other soft instruments are specifically dedicated to climate change while making references to environmental protection. The African Union Green Recovery Action Plan 2021-2027 (Green Action Plan)[2060] aims to provide a continental vision to tackle the challenges of the COVID-19 recovery and climate change in Africa. Through its biodiversity and nature-based solutions, the Green Action Plan recognises that effectively managing and sustainably utilising wildlife (fauna and flora) has a positive impact on the well-being of local communities, enhancing their ability to withstand the negative effects of climate change while also benefiting national economies.[2061] As a result, a sense of "resource custodianship" towards the environment is fostered among local communities, leading to coexistence with wildlife, decreased conflicts, and a reduced risk of poaching and illegal wildlife trade. This approach acknowledges the crucial role that local communities play as the "front line of defence" in combating poaching and illegal wildlife trade.[2062]

In 2022, the AU, through its Committee of the African Heads of State and Government on Climate Change, published the "AU Climate Change And Resilient Development Strategy and Action Plan (2022-2032)" (Climate Change Action Plan).[2063] It is "a 10-year strategic planning document that defines the main priorities, intervention areas and action areas required to build resilient capacities for adaptation– and to unlock the benefits of the mitigation potential of the continent."[2064] The vision is to achieve "a sustainable, prosperous, equitable and climate-resilient Africa."[2065] Its goal is "to provide a continental framework for collective action and enhanced cooperation in addressing climate change issues that improves livelihoods and well-

[2059] Ibid, 17.
[2060] AU, *African Union Green Recovery Action Plan 2021-2027*, 15 July 2021 <https://au.int/en/documents/20210715/african-union-green-recovery-action-plan-2021-2027> accessed 16 May 2024.
[2061] Ibid, 16.
[2062] Ibid, 16 – 17.
[2063] AU, *African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032)* (Climate Change Action Plan), 28 June 2022 <https://au.int/en/documents/20220628/african-union-climate-change-and-resilient-development-strategy-and-action-plan> accessed 15 May 2024.
[2064] Ibid, 6.
[2065] Ibid.

being, promotes adaptation capacity, and achieves low-emission, sustainable economic growth."[2066]

The overall objective of the Climate Change Action Plan is to build the resilience of African communities, ecosystems, and economies and support regional adaptation.[2067] However, it has four specific objectives. First, it intends to strengthen the adaptive capacity of affected communities and manage the risks related to climate change. Second, the Climate Change Action Plan would pursue equitable and transformative low-emission, climate-resilient development pathways. Third, it aims to enhance Africa's capacity to mobilise resources and improve access to and development of technology for ambitious climate action. Finally, it is intended to enhance inclusion, alignment, cooperation, and ownership of climate strategies, policies, programmes and plans across all spheres of government and stakeholder groupings.[2068]

A key principle that underpins the Climate Change Action Plan is "a core emphasis on a people-centred approach and equitable access for all citizens to green economic recovery and sustainable development."[2069] It underscores the necessity of supporting the most vulnerable communities and groups and the importance of social inclusion by recognising the role played by Indigenous Peoples as agents of driving climate responses.[2070] To this end, therefore, States must establish comprehensive mechanisms and procedures to facilitate the active participation of Indigenous Peoples and local communities. They should strive not only to avoid causing harm but also to achieve favourable social outcomes for these groups.[2071] Furthermore, it is crucial for States to enhance the recognition of ecosystem-rich areas managed by communities, enhance their capacity for management, and empower Indigenous Peoples and local communities by clarifying land rights, offering training, and strengthening governance as part of managing and protecting land-based ecosystems[2072] and protecting land-based ecosystems and carbon sinks.[2073]

[2066] Ibid.
[2067] Ibid.
[2068] Ibid, 7.
[2069] Ibid, 5.
[2070] Ibid.
[2071] Ibid, 38.
[2072] Ibid, 42.
[2073] Ibid, 83.

7.4. The Influence of African Approaches to International Law on Environmental and Investment Law Regimes in Africa

Just as in Chapter Six regarding human rights, the AAIL has greatly influenced the formation of unique environmental and investment regimes in Africa. The areas of novelty include the right to development and the right to environment, TNCs' human rights obligations under the African human rights regime, and the movement towards the Africanisation of international investment law.

7.4.1. Rights to Development and Right to Environment

Okafor and Dzah discuss these rights as evidence that the African human rights system is a "norm leader,"[2074] thereby corresponding to the contributionist theory of AAIL. This is because "the African Charter is the only legally binding international treaty on human rights which makes the right to environment reviewable by an international adjudicative or quasi-judicial body",[2075] effectively becoming the first regional human rights treaty to recognise the right to a healthy environment.[2076] Several decisions by the African Commission[2077] and the African Court[2078] have confirmed that the right to environment forms part of the catalogue of Indigenous Peoples' rights as already analysed in Chapter… The norm-creating feature of the African human rights system is seen in the recognition of the right to development. The African Charter recognises the right to development as belonging to all peoples and encompassing economic, social, and cultural aspects.[2079] Since States have the obligation to ensure the full realisation of the right to development,[2080] it could be argued that all peoples have a right to a generally satisfactory environment favourable to their development. Just like the right to the environment, this right has been interpreted as forming part of the rights of Indigenous Peoples in Africa.[2081]

Africa regarded environmental preservation as an indirect consequence of its peoples' and leaders' struggles for resource sovereignty and the establishment of the New International

[2074] Okafor and Dzah (n 1346).
[2075] Azadeh Chalabi, "A New Theoretical Model of the Right to Environment and its Practical Advantages" (2023) 23 *Human Rights Law Review* 1, 4.
[2076] Ibid, 5.
[2077] *Ogoni case* (n 554) and *Endorois case* (n 86).
[2078] See the *Ogiek Judgement on Merits* (n 168). See also the decision of the sub-regional body, the ECOWAS Community Court in *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* (SERAP v Federal Republic of Nigeria) No ECW/CCJ/JUD/18/12 (2012).
[2079] African Charter (n 82) art 22(1).
[2080] Ibid, art 22(2).
[2081] *Ogoni case* (n 554), *Endorois case* (n 86), and *Ogiek Judgement on Merits* (n 168).

Economic Order[2082](NIEO).[2083] The recognition of this right in the African Charter signalled a new point for international environmental law and human rights activists as it became "a pioneering move in linking both bodies of norms and their praxis."[2084] In describing this nexus, Okafor and Dzah poignantly contend that "the human rights-environment nexus in the African human rights system pooled what had hitherto been silos of law into a mutually-reinforcing composite and its extension into current human rights discourse accurately transcended the prevailing normative categories of rights at the time."[2085] This is part of Africa's renunciation of the siloed division between civil and political rights and social, cultural and economic rights because the consciousness of the environment has always been part of communal obligation in Africa.[2086]

Before the African human rights system introduced and contributed the right, there was no legally enforceable right to the environment, which inspired a global trend to recognise it as a fundamental human right,[2087] especially in the UN. The UN General Assembly in 2022 adopted a landmark resolution recognising the human right to a healthy environment[2088] following the recognition of the right by the HRC in October 2021.[2089] Unfortunately, these two resolutions do not mention nor acknowledge that the right originates from Africa's human rights system. In criticising this omission in the HRC resolution, Okafor and Dzah noted that

> it is regrettable that the final text of this resolution failed to acknowledge the origins in the African Charter of the formulation of this right as a binding entitlement in international human rights law; a situation that suggests that the marginalisation of Africa's pioneering role in international law continues to pose challenges to a more comprehensive outlook of the global human rights system.[2090]

[2082] Okafor and Dzah (n 1346) 690.
[2083] UN General Assembly, *Declaration on the Establishment of a New International Economic Order*, A/RES/3201(S-VI), 1 May 1994. This NIEO was a significant initiative proposed in 1974 by the Group of 77, representing developing countries, to address economic disparities and transform the global economy. See Indrajit Roy, "Southern Multilateralism: India's engagement with Africa and the Emergence of a Multiplex World Order" (2023) 35(4) *Journal of International Development* 566, 568. The NIEO provides the need for a just and equitable relationship between developed and developing countries in the "formulation and application of all decisions that concern the international community." (para 3).
[2084] Okafor and Dzah (n 1346) 690.
[2085] Ibid, 691.
[2086] Ibid.
[2087] Ibid, 690.
[2088] UN General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment*, A/RES/76/300 (28 July 2022).
[2089] Human Rights Council, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/RES/48/13 (18 October 2021).
[2090] Okafor and Dzah (n 1346) 693.

The right to development has equally been contextualised as a product of AAIL. Mbaye first conceptualised this right in 1972 in his address to the Institute of International Law of Human Rights in Strasbourg.[2091] For Okafor and Dzah, following the official end of colonialism in the 1960s, African States and other nations in the Global South adopted a more critical position on the unequal global economic framework that partly contributed to the underdevelopment of the Global South. At this time, the Global South started advocating for significant transformations in the international system, which included a call for a NIEO.[2092] African States considered the interplay between the right to development and self-determination, as the former is an indispensable condition for the latter. Cheru, in considering this right as part of the emerging Pan-Africanism, argues that "the right to development was intrinsically linked to the right to self-determination."[2093] The recognition of this right in the African Charter eventually led to its international recognition, first in 1986 as the UN Declaration on the Right to Development.[2094] The HRC has also proposed and adopted the Revised Draft Convention on the Right to Development.[2095]

The influence of this African jurisprudence on international law was not without some opposition from the Western countries. The Global North was suspicious of this right led by Africa and supported by the Global South and considered it "antithetical to its interests."[2096] There are three reasons why the Global North initially opposed the recognition of the right to development as a legally binding right. First, the conceptualisation of the right as "a peoples' (collective) right and not an individual right,"[2097] an idea that is alien to the individualistic human rights system in Europe. Secondly, they argued that it is the States' responsibility to fulfil development "through good governance, democracy and responsible economic

[2091] Roman Girma Teshome, "The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?" (2022) 22(2) *Human Rights Law Review* 1, 2; Umo Orji Umozurike, "The African Charter on Human and Peoples' Rights" (1983) 77(4) *The American Journal of International Law* 902, 906.
[2092] Okafor and Dzah (n 1346) 684.
[2093] Fantu Cheru, Developing Countries and the Right to Development: A Retrospective and Prospective African View" (2016) 37(7) *Third World Quarterly* 1268, 1269.
[2094] UN General Assembly, *Declaration on the Right to Development* A/RES/41/128, 4 December 1986. It is pertinent to note that the Declaration received support from 146 States, with 8 abstentions from Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden, and the UK. The US was the only State that outrightly voted against it. See UN General Assembly, *Provisional Verbatim Record of the Ninety-Seventh Meeting*, held in New York on 4 December 1986, A/41/PV.97 [page 64] <https://documents.un.org/doc/undoc/pro/n86/646/38/pdf/n8664638.pdf?token=JS14SpzVjYBBf6fMON&fe=true> accessed 10 May 2024.
[2095] Draft Convention on the Right to Development (n 694).
[2096] Okafor and Dzah (n 1346) 685.
[2097] Ibid.

management at the national level"[2098] and not a right to be enjoyed by individuals. Thirdly, the Global North argued that African countries are using the concept of the right to development as a pretext to revive the outdated notion of the NIEO and to push for legally binding treaties requiring developed countries to transfer resources to the Global South.[2099]

In the Declaration on the Right to Development, which was adopted in 1986, five years after the African Charter was adopted, a compromise was reached between the aspiration of African States that the right to development should be seen as a collective right and the Global North concept of the right as an individual right. Article 1(1) of the Declaration provides that "[t]he right to development is an inalienable human right by virtue of which *every human person* and *all peoples*[2100] are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised." The same definition is replicated, *mutatis mutandis*, in the Draft Convention on the Right to Development, with the addition that the right "is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms."[2101]

The African Commission, as already pointed out, had defined "all peoples" that are entitled to this right to include Indigenous Peoples. This was arrived at in the *Endorois case*, where the Commission held that "peoples" for the purpose of this right are those with "a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy…or suffer collectively from the deprivation of such rights."[2102] The African Court, while holding that Indigenous Peoples qualify as "peoples" for the enjoyment of this right, defines "peoples" as "compris[ing] all populations as a constitutive element of a State", including "sub-State ethnic groups and communities" in a State.[2103]

In the final analysis, although Okafor and Dzah see the right to development as one of Africa's human rights system's innovative contributions to international law, Gathii considers this right as falling within the domain of the intermediate approach to AAIL, especially as conceptualised by Mbaye. This, he argues, was because Mbaye used Western philosophies to justify the

[2098] Cheru (n 2093) 1217.
[2099] Ibid.
[2100] Emphasis supplied.
[2101] Draft Convention on the Right to Development (n 694) art 4(1).
[2102] *Endorois case* (n 86) para 151.
[2103] *Ogiek Judgement on Merits* (n 168) paras 197–199 and 208.

recognition of the right. Mbaye used the positive aspects of Western philosophy to advocate for a right which emanated from Africa.[2104]

7.4.2. The Dialectic of Duty and Rights in Africa and the Obligations of Transnational Corporations

The African Charter is *sui generis* in its recognition of rights and the duties Africans owe to the continent. Gyekye emphasises that African cultural philosophy views the relationship between rights and duties differently from strict liberal perspectives. In this view, while everyone is recognised as having rights, the importance placed on fulfilling duties to the community is highly regarded.[2105] He further argues that the African communitarian society places great importance on social or communal life, which requires individuals to prioritise their duty towards others and the community. This forms the basis for moral responsibilities and obligations.[2106] This correlation of rights with corresponding duties in Africa, as encapsulated in the African Charter, has been referred to as the "dialectic of duty and rights approach."[2107]

Chapter II of the African Charter contains various individual duties "towards his family and society, the State and other legally recognised communities and the international community."[2108] Other relevant duties include the duty of an individual to exercise their rights and freedoms "with due regard to the rights of others, collective security, morality and common interest",[2109] "the duty to respect and consider [others] without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance,"[2110] and the duty not to compromise the security of the State where they are resident.[2111] Furthermore, an individual has the duty to preserve and strengthen social and national solidarity[2112] and the duty "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation

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[2104] Gathii (n 1684).
[2105] Kwame Gyekye, "African Ethics" (*Stanford Encyclopedia of Philosophy*, 9 September 2010) <https://plato.stanford.edu/entries/african-ethics/> accessed 9 May 2024.
[2106] Ibid.
[2107] Maxwel (n 1713) 161; B Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American System" (1984) 6(2) *Human Rights Quarterly* 141, 145.
[2108] African Charter (n 82) art 27(1).
[2109] Ibid, art 27(2).
[2110] Ibid, art 28.
[2111] Ibid, art 29(3).
[2112] Ibid, art 29(4).

and, in general, to contribute to the promotion of the moral well-being of society."[2113] Finally, it is the duty of an individual "to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity."[2114]

In a work by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC),[2115] an argument was proffered to the effect that individual duties enshrined in the African Charter could be extended to TNCs as legal persons. SAIFAC argues that a holistic analysis of the African Charter suggests that non-State actors may have legal duties that they are required to fulfil. These duties can be categorised as either negative or positive. Negative obligations involve TNCs refraining from breaching rights, while positive duties involve taking proactive measures to achieve human rights standards outlined in the African Charter.[2116] SAIFAC's argument stems from the fact that individual duties are imposed on "every individual" without an exception. They examined whether corporations generally, with their separate legal personality, fall within the definition of individuals as contemplated by the African Charter.[2117]

SAIFAC further argues that considering that the African Charter aims to articulate the duties of persons in fulfilling their rights rather than only their freedoms, it would be inconsistent with this objective to permit individuals to hide behind the separate legal personality of corporations. Furthermore, they contend that it would be contradictory in the context of this objective to protect them from being accountable for the infringements of rights that they are responsible for. Therefore, it is unlikely that the African Charter could have anticipated a situation where States and individuals are required to uphold rights, but companies, due to their separate legal personality, would be exempt from accountability. The SAIFAC concludes that "in our view, the term 'individuals' ought to be interpreted to include corporations."[2118] To concretise their argument, the SAIFAC analyses some of the duties and relates them to corporations.

For instance, in the duty for individuals to exercise their rights "with due regard to the rights of others, collective security, morality and common interest" under Article 27(2) of the African Charter, the SAIFAC argues that the phrase "with due regard" "suggests the existence of an

[2113] Ibid, art 29(7).
[2114] Ibid, art 29(8).
[2115] SAIFAC, "The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System" (*SAIFAC*, 17 February 2010) <https://media.business-humanrights.org/media/documents/f6d9723bf8058ce0ee910577a969a61d3fc88b90.pdf > accessed 9 May 2024.
[2116] Ibid, 31 – 32.
[2117] Ibid, 32.
[2118] Ibid, 33.

applicable threshold that must be met by individuals when the exercise of their rights and freedoms has the potential to impair the rights of others." When related to TNCs, it would then imply "that when the freedom to trade is exercised anywhere, the threshold of 'due regard to the rights of others' must be met."[2119] Similarly, according to the same logic, the duty to respect others without discrimination under Article 28 would mean that TNCs have the duty to treat everyone equally, especially the most vulnerable members of society, such as Indigenous Peoples. Of particular importance to Indigenous Peoples is the duty "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society."[2120] Using the logic established by SAIFAC, this provision means that TNCs have the duty to preserve Indigenous Peoples' cultural values and consult with them whenever TNCs' business activities are likely to impact them. This would especially be the case when the business activities of a TNC are likely to impact the cultural values of particular Indigenous Peoples.

The SAIFAC's final analysis that the dialectic of rights and duty in the context of Africa could be applied "in a direct horizontal manner to corporations"[2121] resonates with the recent judgement of the African Court in the *LIDHO case*,[2122] particularly in the Dissenting Opinion of Judge Blaise Tchikaya,[2123] where Judge Tchikaya ruled that "the Court should horizontally extend the positive obligations contained in the African Charter to the powerful multinational companies that mastermind massive human rights violations on the continent."[2124] As discussed below, this attempt in Africa to impose human rights and environmental obligations on TNCs is well-pronounced in investment law regimes in Africa. Judge Tchikaya's position TNCs should be understood to have positive obligations is akin to the paradigm shift in the investment law regime in Africa, generally examined as part of AAIL. For him, the notion that only States "normally and traditionally" have the duty to protect human rights and the environment, especially in the context of business operations, "could be reviewed."[2125]

While pointing to the possibility of "horizontally extend[ing] the positive obligations contained in the African Charter to the powerful multinational companies" that operate in Africa, quoted

[2119] Ibid.
[2120] African Charter (n 82) art 29(7).
[2121] SAIFAC (n 2115) 3.
[2122] *LIDHO case* (n 1398).
[2123] Dissenting Opinion of Judge Blaise Tchikaya (n 1599).
[2124] Ibid, para 52.
[2125] Ibid, para 38.

two sources that warned of the imbalance in international law regarding the regulation of the dumping of hazardous wastes in Africa.[2126] First, the study carried out by Guillaume Pambou-Tchivounda, a former member of the UN ILC, where it was pointed out that "it is from the moral dimension alone of the problems it raises that the question of the dumping of hazardous industrial waste in Third World countries, and particularly in Africa, enters the world of law."[2127] He equally referred to the Resolution on the Dumping of Nuclear and Industrial Wastes in Africa by the Council of Ministers of the then OAU, where it declared "that the dumping of nuclear and industrial wastes in Africa is a crime against Africa and the African people"[2128] and "condemns all transnational corporations and enterprises involved in the introduction"[2129] of such wastes. The Resolution also criticised the "growing practice of dumping nuclear and industrial wastes in African countries by transnational corporations and other enterprises from industrialized countries, which they cannot dispose of within their territories."[2130] Because of this, Judge Tchikaya argues that international jurisdiction should strike a balance on this issue, especially "when this suffering results from the excessive power of another subject of the law."[2131]

7.4.3. Africanisation of International Investment Law

Another aspect that the principles of AAIL should always be considered when interpreting laws in Africa is in the area of international investment law. Africa's innovative approach to investment law has been described as the Africanisation of international investment law[2132] due to its ability to change the dynamics of international law. International investment law has always been perceived by critical African scholars as a continuation of colonialism[2133] due to its asymmetric character that places more emphasis on the protection of investment without a

[2126] Ibid, para 51.
[2127] Guillaume Pambou-Tchivounda, "L'interdiction de déverser des déchets toxiques dans le Tiers Monde : le cas de l'Afrique" (1998) 34 *Annuaire Français de Droit International* 709-725, cited ibid.
[2128] OAU, *Dumping of Nuclear and Industrial Wastes in Africa*, a resolution adopted at the meeting of the Council of Ministers of the OAU in its Forty-eighth Ordinary Session, in Addis Ababa, Ethiopia, from 19 to 23 May 1988, CM/Res.1153 (XLVIII) [para 1].
[2129] Ibid, para 2.
[2130] Ibid, Preamble.
[2131] Dissenting Opinion of Judge Blaise Tchikaya (n 1599) para 54.
[2132] Laryea and Fabusuyi (n 1939) 42-64; Akinkugbe (n 1775) 7 – 34; Harrison Otieno Mbori, "Benign and Radical Africanization in International Investment Law and Investor-State Dispute Settlement in Africa" (2023) 24(4-5) *The Journal of World Investment and Trade* 632-658. Another author refers to this development as the Africanacity of international investment law. See Possi (n 1938) 1 – 14.
[2133] David Schneiderman, *Investment Law's Alibis: Colonialism, Imperialism, Debt and Development* (Cambridge University Press, 2022) 16; Ibironke T Odumosu-Ayanu, "Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law" (2023) 24(4-5)*The Journal of World Investment and Trade*, 792-837.

corresponding regulatory power of the State or obligations by investors.[2134] The situation was even more manifest in the nature of BITs negotiated between African and European States due to the "predominantly Afro-European" BIT regime,[2135] which formed 47% of total BITs negotiated by African States.[2136] This is part of the concerns raised by critical traditionalist scholars of AAIL, where attention was shifted towards the disparities in power and wealth between African nations and the rest of the world. The reality of the current situation is the realisation by African States that there is a need to change the dimension of international investment law to create a balance between the need to protect investment and the necessity of African States to exercise their sovereign power through the regulation of investment.

This is primarily reflected in the already examined BITs, AfCFTA and AfCFTA Protocol on Investment, and various RECs' legal instruments on investment. This is also reflected in soft instruments like the PAIC, SADC Model BIT and the AAA Model BIT. The investment law regime in Africa does not just impose human rights and environmental obligations on investors, but specifically an obligation toward Indigenous Peoples. For instance, Article 35 of the AfCFTA Protocol on Investment States that investors must respect the rights of Indigenous Peoples, including the right to free, prior, and informed consent and to participate in the benefit of the investment. This obligation is further elaborated in the AAA Model BIT. The AAA Model BIT is one of Africa's most advanced model BITs in terms of its elaborate provisions for recognising and protecting Indigenous Peoples in investment regimes. In its Preamble, it emphasises the need for investors to protect the environment and respect Indigenous Peoples. Specifically, Article 11 contains elaborate provisions on the obligations of States to adopt measures aimed at protecting the rights and interests of Indigenous Peoples and the obligation of investors to respect Indigenous Peoples' rights as per the provisions of international law, generally accepted international standards, and domestic laws.

Another innovation introduced in Africa is the possibility of holding TNCs and investors criminally liable for the illicit exploitation of natural resources under the Malabo Protocol.[2137] As already noted, the Malabo Protocol was a product of African States' opposition to what they consider the unfair targeting of African leaders by the ICC[2138] and "the indictment of or arrest warrants issued by certain European States against senior African State officials under charges

[2134] Arcuri and Montanaro (n 1054) 2804.
[2135] Kidane (n 1787) 363.
[2136] El-Kady and De Gama (n 1841) 487.
[2137] Malabo Protocol (n 1606) art 28L Bis.
[2138] Bachmann and Sowatey-Adjei (n 1606).

of crimes under international law."[2139] The intention was to create a court with jurisdiction to prosecute African leaders and any individual who has violated some of the acts prohibited in the Protocol establishing it. According to Samaradiwakera-Wijesundara, the creation of such a court "could avoid the custodial power relations of the international courts that replicate the colonial realpolitik and such transformations in the global order have amounted to reconfigurations rather than radical paradigm shifts."[2140] Although it has not entered into force, the Malabo Protocol is regarded as the first to grant an international or regional criminal court jurisdiction over corporations.[2141] It is a product of Africa's resistance to what African leaders perceived as targeting African leaders and Africa's attempt to contribute to international law.

7.5.Concluding Remarks

This chapter has examined the environmental and investment law regimes in Africa. The only instruments specifically on climate change in Africa are contained in soft instruments like the Green Action Plan and Climate Change Action Plan 2022 – 2032 as examined in 7.3.2. The foundation of environmental law in Africa is the African Charter, which has some unique provisions regarding the right of all peoples to a generally favourable environment and the incorporation of environmental impact assessment as part of the right of an individual to receive information under Article 9(1) of the African Charter. Substantive environmental law instruments like the Algiers Convention and the Revised African Convention on Nature depart from the idea of nature preservation solely for utilitarian reasons and also highlight the fundamental premise that underlies traditional African practices of environmental conservation and management. Environmental conservation, consistent with Indigenous Peoples' traditional environmental management, could be interpreted as being covered by the Algiers Convention and the Revised African Convention on Nature. This is especially so when the obligation of States to take measures consistent with customary rights is brought into perspective.

Furthermore, the refusal of the UN to adopt a total ban on the transboundary shipment of hazardous wastes during the negotiation of the Basel Convention chiefly informed why the AU adopted the Bamako Convention. The latter completely bans the shipment of hazardous wastes into Africa and makes it a crime for one to import any hazardous wastes, for any reason, into

[2139] Amnesty International (n 1607) 9.
[2140] Charmika Samaradiwakera-Wijesundara, "Complementarity and Criminal Liability of Companies in Africa: Missing the Mark?" in Emma Charlene Lubaale and Ntombizozuko Dyani-Mhango (eds) *National Accountability for International Crimes in Africa* (Palgrave Macmillan, 2022) 115, 155.
[2141] See Malabo Protocol (n 1606) art 46C; Taygeti Michalakea, "Article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and Its Contours" (2018) 7(2) *International Human Rights Law Review* 225.

Africa. This is a stricter regime, unlike the Basel Convention, which allows States to negotiate hazardous waste disposals. For Indigenous Peoples, the total ban on the importation of any hazardous substance into Africa serves as a step in the right direction because, as reported by Orellana, they have been exposed to dangerous substances and are experiencing a type of environmental violence that has resulted in deaths and put lives at risk by depleting food sources and medicinal plants, displacing communities, and causing birth deformities and cancers.

The investment regimes in Africa are equally innovative. The AfCFTA Protocol on Investment, which was adopted in 2023, contains provisions on sustainable development, human rights, rights and obligations of States and investors, the environment, and climate change. It imposes an obligation on States, in Article 31(1)(c), to promote and enforce laws and policies to protect the rights of Indigenous Peoples and local communities. In addition, it imposes environmental and human rights obligations on investors. By extension, it obligates investors to respect Indigenous Peoples' and local communities' rights and dignity.

Apart from the above multilateral investment agreement, various BITs signed by African countries are potential instruments for the protection of the rights of Indigenous Peoples and instruments of the obligations of investors. For instance, the Nigeria –Morocco BIT imposes on investors the obligation to uphold human rights and not to operate the investments in a manner that circumvents international environmental, labour and human rights obligations. Other BITs adopt the NLSC to discourage States from lowering or relaxing their environmental or human rights laws to attract investments. These BITs, as discussed, point to the Africanisation of international investment law.

Finally, soft investment instruments have effectively shaped the investment landscape in Africa. The PAIC and the SADC Model BIT, although with minor differences, are indicative of the direction African States are willing to adopt in investment law. The most radical and innovative of the non-legally binding instruments is the AAA Model BIT. Its incorporation of Indigenous Peoples in various articles and the adoption of Ubuntu as its guiding principle makes an investor a part of the local community where its investment is located. That way, the investor will respect human rights, the environment, and other stakeholders. According to Ojok, the AAA Model BIT's progressiveness makes Africa an appealing choice for foreign investors, ensuring the protection of rights for all stakeholders involved. It fosters a fair contractual relationship that ensures the inclusion and protection of all parties involved,

including marginalised groups like indigenous communities.[2142] Future BITs and other multilateral investment treaties in Africa should follow the AAA Model BIT.

These innovations could be said to be products of AAIL, and as discussed in this chapter, AAIL's influence in both the environmental and investment regimes was highlighted. Such novelties include the right to development, which can be realised through sustainable investment. The environment is to be protected by TNCs' responsible use of natural resources, which eventually leads to the realisation of the right to a healthy environment. To fully achieve these, African States should put measures in place to address some of the challenges raised.

[2142] Francis Ojok, "The African Arbitration Academy's Model Bilateral Investment Treaty for African States" (*Kluwer Arbitration Blog*, 26 January 2023) <https://arbitrationblog.kluwerarbitration.com/2023/01/26/the-african-arbitration-academys-model-bilateral-investment-treaty-for-african-States/> accessed 21 April 2024.

Final Remarks

This research has been conducted on the hypothesis that universal international law has not been effective in protecting the rights of Indigenous Peoples in Africa from the activities of TNCs, thereby creating a need to complement it with the innovative legal norms and developments under the African human rights, environmental, and investment law regimes for more effective protection of Africa's Indigenous Peoples. The conclusion of the thesis is based on a thorough analysis of the research questions, findings, interpretations, and discussions presented in the study.

This final part of the thesis summarises the study findings and offers recommendations and a conclusion. It answers the research questions identified in the Introduction and discussed in each chapter. In other words, each point here serves as an answer to each research question and a summary of each chapter. Each point also provides recommendations for possible future direction.

1. The question of whether Indigenous Peoples exist in Africa became necessary due to debates surrounding the legal definition of Indigenous Peoples, which has been interpreted as possibly excluding the possibility of Indigenous Peoples existing in Africa. So, instead of a strict definition that could exclude Indigenous Peoples in Africa, the socio-psychological approach, the socio-psychological approach adopted by the African Commission and its committees, where a group is characterised based on their sociological environment and the psychological aspect of self-definition and recognition of self-identification of peoples, was adopted in this thesis. Using this approach, the following Indigenous Peoples were identified and examined, together with their unique characteristics and struggles: the Ogoni people in Nigeria, the Endorois people of Kenya, the Pygmy people of Central Africa, the San people of Southern Africa, and the Ogiek people of Kenya. These groups were chosen because of the jurisprudence they have generated and to, as far as possible, represent each region of the continent. By way of recommendation, it would improve the protection of the rights of Indigenous Peoples if human rights instruments removed the requirement of State recognition of Indigenous Peoples before they could enjoy rights reserved for Indigenous Peoples. Self-definition and self-identification by a group as an Indigenous People should be the yardstick.

2. The establishment of economic supranational bodies like the WTO, IMF, and World Bank, as revealed in Chapter Two although with the intention to coordinate business activities, serves

as agent of neoliberal programmes,[2143] since "large private and public TNCs are the leading players of this past and current capitalist world-system rooted in colonial times"[2144] ultimately furthering the economic hold of former colonial countries on their former colonies. This is particularly so with the imbalance in the relationship between the enormous protection of investment and the weak regulatory regime of TNCs under international law. Moreover, neoliberalism, transnationalism, and globalisation underpin the behaviour of TNCs in Africa. The WTO's liberalisation of markets and open market access principles allow corporations to move to Africa using the location-specific advantage of Dunning's eclectic paradigm theory. The consideration here would include the availability of natural resources, cheap labour, and market access. The resultant effect is that TNCs establish subsidiaries on the territories of Indigenous Peoples for easy access to natural resources, pollute the environment, and violate human rights. Various reports of human rights and environmental violations committed by TNCs were aided by African States. This situation is sustained by the notion of neoliberalism and globalisation, and they have contributed to the various reports of the violations of Indigenous Peoples' rights in Africa. To improve the situation, there is a need to move away from State-centrism as regards which entities are subjects of international. It is nonetheless important that TNCs should be vested with the status of participants of international law to facilitate the accountability mechanisms of their business activities. This will, in turn, address the issue of whether TNCs should be imposed with direct human rights and environmental obligations.

3. Indigenous Peoples have evolved into a distinct group with various human rights. Some of these rights are protected under the ICCPR and ICESCR as rights to which every person is entitled. However, some human rights instruments like the ILO Convention 169 and the UNDRIP have crystallised some *sui generis* rights for Indigenous Peoples. For Indigenous Peoples, most of their rights are founded on the right to self-determination, which enables them to determine their political status and freely pursue their economic, social and cultural development. The right is well considered very important that it was posited as *jus cogens* and having an *erga omnes* character by the ICJ in the *Separation of the Chagos Archipelago case* and is enshrined in the common Article 1 of the ICCPR and ICESCR. Another paramount right of the Indigenous Peoples is the right to land and natural resources. This is because of their special tie to the land, which serves as a place of religious worship, ancestral abode, and food

[2143] Gorden Moyo (n 245) 41.
[2144] Bragato and da Silveira Filho (n 245) 48.

source. Although these rights exist, they are constantly violated by States and TNCs. It is important that the international community adopts the draft copy of the Convention on the Right to Development to protect the right to self-determination since self-determination enables Indigenous Peoples to determine their political status freely and freely pursue their economic, social and cultural development.

4. State obligations to protect the rights of Indigenous Peoples stem from human rights treaties, environmental law, climate change law, and international investment law. As proved in Chapter Four, State obligations are generally reflected in the State tripod obligations to business and human rights. These tripod obligations are the obligation to respect, the obligation to protect, and the obligation to fulfil human rights. Furthermore, the human rights obligations of States are found in hard law instruments like the UN Charter, ICCPR, ICESCR, African Charter, ILO Convention 169, and ICERD and soft law instruments like the UNDRIP and UN Guiding Principles.

5. Similarly, environmental law regimes and climate change law impose some obligations on States to protect the environment and to work towards limiting global warming to well below 2 degrees Celsius. Investment law, on the other hand, is traditionally investor-centric. It gives rights to the investor without any corresponding duties. Moreover, even a State's regulatory power is impeded as any form of direct expropriation must be against compensation for the value of the expropriated investment. Even in cases of indirect expropriation, it must also be backed with expropriation. The implication is that the fear of compensation may impede government regulation for the public interest. In the *Santa Elena case*, the arbitral tribunal held that measures taken by the government to protect the environment gave rise to compensation. So, under many BITs and MITs, this is the situation, and the absence of human rights and environmental obligations by TNCs creates a gap in international law. The ongoing process for a Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, although seeks to obligate States to put measures in place to ensure that TNCs respect the rights of Indigenous Peoples, is still a process yet to materialise. States are to, as soon as possible, ensure that the Legally Binding Instrument is finalised and adopted to strengthen their regulatory power over TNCs. Until this is done, the current legal regime on the obligations of States is not effective in the protection of the rights of Indigenous Peoples in Africa.

6. Arising from Chapter Five are the sources of responsibility for TNCs, and unfortunately, there is not yet a direct model of corporate responsibility for TNCs, which recognises that international human rights instruments impose direct obligations on TNCs to protect human rights and the environment. What is currently being obtained is the requirement that TNCs comply with human rights laws in the host State where they operate. The danger is that where a State is not human rights friendly and does not ratify international human rights treaties, those TNCs are not under any obligation to observe human rights not protected by their host State. There is a paradigm shift in how the new generation of BITs are couched, especially BITs emanating from Africa. The Nigeria–Morocco BIT typifies this as it imposes direct human rights and environmental obligations on investors and empowers the State parties to regulate an investor that breaches its obligations. The Advisory Note from WGEI to the African group that participated in the negotiation of the Legally Binding Instrument suggested that direct human rights obligations should be imposed on TNCs, but this was rejected as the current copy of the draft only contains an indirect obligation.

7. Also, the instruments that provide redress options are mostly guidelines with no binding force. The option of arbitral tribunals in BITs does not benefit individuals and Indigenous Peoples since they are not parties to those instruments. Indigenous Peoples are left with the provisions of the UNDRIP, which is a legally non-binding instrument. Its effectiveness depends on the willingness of a State to enforce its provisions. Consequently, the approach in the old generation of BITs does not create responsibilities for TNCs, but with the new generation of BITs, especially in Africa, a direct human rights obligation is gradually being imposed on TNCs. As a result of this, the universal human rights system is not effective in forcing TNCs to meet the need to protect Indigenous Peoples in Africa. To solve this, a new clause should be included in the ongoing Draft Binding Instrument to impose direct human rights and environmental obligations on TNCs.

8. The AAIL has shaped how Africa interacts with the rest of the world and the norms of international law. This interaction has either produced unique norms intended to solve Africa's issues, which international law was reluctant to solve, or served as a ground for Africa to identify its perceived exclusion from international law. The result of these various contributions is the international rule of law is enriched from different cultures rather than declining by these new norms.[2145] Based on the theoretical framework of AAIL, the human rights system,

[2145] Maluwa (n 1705) 411.

environmental law instruments, and investment law regimes are recognised as norm creators. The African Charter and other human rights instruments, as examined in Chapter Six, embody these contributions to the general international law discourse. For instance, the African Charter is the only regional law that contains collective rights, such as the right to equality of all peoples,[2146] the inalienable right to self-determination by all peoples,[2147] all peoples' right to dispose of their wealth and natural resources,[2148] the right to development, which includes economic, social and cultural developments,[2149] and the right to a generally satisfactory environment favourable to all peoples' development.[2150] Innovatively, the African Court and African Commission have interpreted "peoples" in the African Charter to include Indigenous Peoples.[2151] This expansive interpretation of "peoples" aligns with the Report of the Working Group of Experts on Indigenous Populations/Communities[2152] that proposed a flexible approach to the characterisation of Indigenous Peoples. By adopting such an approach, the African human rights system entitles Indigenous Peoples to the collective rights enshrined in the African Charter.

9. Furthermore, the dialectic of duty and rights approach enshrined in the African Charter is unique to the African human rights system. The African Charter does not just enshrine individual and collective rights; it equally imposes duties on every individual. The dialectic of duty and rights helps balance the consumeristic and individualistic approach to human rights by creating corresponding duties. For instance, the duty of an individual to exercise their rights and freedoms "with due regard to the rights of others, collective security, morality and common interest",[2153] "the duty to respect and consider [others] without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance,"[2154] and the duty not to compromise the security of the State where they are resident.[2155] Furthermore, an individual has the duty to preserve and strengthen social and national solidarity[2156] and the duty "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation

[2146] African Charter (n 82) art 19.
[2147] Ibid, art 20.
[2148] Ibid, art 21.
[2149] Ibid, art 22.
[2150] Ibid, art 24.
[2151] *Endorois case* (n 86); *Ogiek Judgement on Merits* (n 168).
[2152] Report of the Working Group of Experts on Indigenous Populations/Communities (n 68).
[2153] African Charter (n 82) art 27(2).
[2154] Ibid, art 28.
[2155] Ibid, art 29(3).
[2156] Ibid, art 29(4).

and, in general, to contribute to the promotion of the moral well-being of society."[2157] Finally, it is the duty of an individual "to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity."[2158] According to SAIFAC, these duties can be imposed on TNCs as legal persons by holistically interpreting the African Charter. In this sense, an individual's duty to exercise their rights with due regard to the rights of others becomes a duty on TNCs to exercise their right to trade with due regard to the rights of others.[2159] Similarly, according to the same logic, the duty to respect others without discrimination under Article 28 would mean that TNCs have the duty to treat everyone equally, especially the most vulnerable members of society, such as Indigenous Peoples. Of particular importance to Indigenous Peoples is the duty "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society."[2160]

10. However, the Malabo Protocol would establish corporate accountability when it enters into force. It would establish the ACJHPR as the first regional judicial body with jurisdiction to entertain corporate criminal accountability. The ACJHPR will have jurisdiction to cover fourteen international crimes, two of which could be regarded as most important for Indigenous Peoples and most relevant for this thesis. These two are trafficking in hazardous wastes[2161] and illicit exploitation of natural resources.[2162] One of the elements of the definition of illicit exploitation of natural resources is concluding an agreement to exploit natural resources through corrupt practices. This should be read in conjunction with the general definition of corruption in Article 28I of the Malabo Protocol, that is, "offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, *a private sector entity*, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties."[2163] As pointed out in 6.3.1.2, the inclusion of corruption as an element of the definition of illicit exploitation of natural resources is to curb the tendency of TNCs to offer bribes to obtain permits and licences and to prevent public officials from seeking and receiving bribes from

[2157] Ibid, art 29(7).
[2158] Ibid, art 29(8).
[2159] SAIFAC (n 2115) 33.
[2160] African Charter (n 82) art 29(7).
[2161] The Malabo Protocol (n 1606) art 28A.
[2162] Ibid, art 28L.
[2163] Ibid, art 28I (1)(e).

corporations. Instances where African leaders aided the violation of human rights and environmental standards due to receiving bribes from TNCs were discussed in 2.8. The provisions of the Malabo Protocol are very valuable in addressing the issue of corruption in Africa but, as it is not yet into force, African States are to quickly sign and ratify the document.

11. Another area where innovative norms are seen in Africa is in the AU environmental treaties. This starts with including in the African Charter the right to a healthy environment[2164] for the first time in a binding document and the provision for the right to receive information,[2165] interpreted by judicial decisions as including the right to receive environmental information.[2166] These two rights have long formed part of the catalogue of Indigenous Peoples' rights and have been interpreted by the African Court[2167] and the African Commission[2168] as rights to which Indigenous Peoples in Africa are entitled. Moving forward, the Bamako Convention was negotiated and adopted by the African leaders because of the failure of the international community to provide a total ban on the transboundary movements of hazardous wastes in the Basel Convention. As already discussed in 7.2.1, the UN Special Rapporteur on toxics and human rights, Orellana, pointed out that Indigenous Peoples who have been exposed to dangerous substances are experiencing a type of environmental violence that has resulted in deaths and put lives at risk by depleting food sources and medicinal plants, displacing communities, and causing birth deformities and cancers. So, the total ban on the importation of hazardous wastes into Africa is of great importance to Indigenous Peoples.

12. Africa's international investment regimes are unique as they move towards remedying the deficits identified in the general international investment law, that is, the restriction on States to exercise expropriation without the liability of paying compensation, the lack of human rights and environmental obligations on investors, and the recognition of Indigenous Peoples as a group that needs to be specially protected in business and human rights. The AfCFTA and the AfCFTA Protocol on Investment recognise the importance of protecting Indigenous Peoples' rights. The AfCFTA Protocol on Investment aims to establish a balanced investment that considers the interests of State parties, investors, and local communities.[2169] Although it prohibits expropriation, which must be backed by compensation if it happens, it creates two exceptions where a State is not liable to pay compensation. These exceptions are compulsory

[2164] African Charter (n 82) art 24.
[2165] Ibid, art 9(1).
[2166] *Ogiek Judgement on Merits* (n 168); Negm (n 1984) 30.
[2167] *Ogiek Judgement on Merits* (n 168).
[2168] *Ogoni case* (n 554); *Endorois case* (n 86).
[2169] AfCFTA Protocol on Investment (n 1778) art 2(b).

licensing in relation to intellectual property rights and "non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, such as public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment, labour rights or to comply with other international obligations."[2170]

13. Chapter 5 of the AfCFTA Protocol on Investment is fully dedicated to direct investor obligations. Among these obligations are the obligation to respect Indigenous Peoples and local communities[2171] and the environmental protection obligations.[2172] These direct obligations are also contained in the instruments of the African sub-regional groups and in soft law instruments. Of these soft instruments, the AAA Model BIT is the most advanced in terms of its elaborate provisions for the protection of the rights of Indigenous Peoples in investment regimes and the direct obligation investors owe to them. As examined in 7.3.2.2, the AAA Model BIT incorporates the concept of *Ubuntu*,[2173] making investors an integral part of the community where they operate. It further provides for the involvement of Indigenous Peoples in dispute settlement by way of submissions before an arbitral tribunal. It can be a written or oral submission on the interpretation of the agreement.[2174] AAIL scholars have pointed to the Africanisation of international investment law due to the contribution of investment regimes in Africa.

14. Therefore, AAIL has been used to evaluate international law critically and examine Africa's contribution to the general international law discourse. These contributions, as discussed in points 8 to 13 above, can be summarised as the provision for collective rights, the interpretation of "peoples" as encompassing Indigenous Peoples for the purposes of enjoying collective rights, the provision of individual duties, which has been argued to form part of the duties of TNCs, and the provision, for the first time, the right to a healthy environment and the right to development. Others are the imposition of direct investor obligations, the recognition of the importance of protecting Indigenous Peoples' rights in the investment regimes, the total ban on the importation of transboundary hazardous wastes into Africa, and the provision for corporate criminal liability. When properly strengthened and enforced, Indigenous Peoples in Africa are better protected using the systems in Africa. As a way of recommendation, African leaders

[2170] Ibid, art 20.
[2171] Ibid, art 35.
[2172] Ibid, art 34.
[2173] AAA Model BIT (n 1782) art 1(1).
[2174] Ibid, art 22(K)(1).

should quickly ratify the Malabo Protocol and renegotiate any existing BIT to align with the AAA Model BIT.

15. For Indigenous Peoples, dispute resolution is paramount and their involvement in access to remedy is an aspect of their rights. The AAA Model BIT contains innovative provisions on the involvement of Indigenous Peoples in dispute settlement, especially through arbitration. However, even though Indigenous Peoples are not parties to BITs, the AAA Model BIT requires that affected Indigenous Peoples, "sub-national group, local or ethnic community of a Contracting Party", at the "discretion of the tribunal, provide oral or written *shawara* (insight, information or other useful details) to the Arbitral Tribunal regarding the *tarihi* (history) or *asiri* (secrets) of any aspects of Traditional Knowledge, Traditional Cultural Expression or genetic resources which form the core of the subject matter in dispute before the Tribunal."[2175] The effectiveness of Indigenous Peoples' involvement in such dispute resolution was confirmed by Wasiński in his analysis of the grassroot and Indigenous approach to reconciliation and conflict resolution in the Mt Elgon District, Kenya.[2176] For Wasiński, "Indigenous conflict resolution methods based on joint inter-communal efforts to deal with past human rights abuses can be a feasible solution if customary authority of local leaders is seen as legitimate."[2177] This Indigenous approach is unique to Africa and reflects "the African attitude to human rights as accentuating communal dimension of individual human being" and "does not necessar[ily] comply with the 'Western' individualistic approach to human rights as evidenced for example by the ICCPR."[2178] This form of dispute settlement is part of the general Africa's unique human rights system.

16. AAIL scholars, as proved in Chapter Six, have identified three approaches to understanding it – the contributionist approach, the critical traditionalist approach, and the intermediary approach. In this thesis, I expand on this to establish AAIL as an interpretative tool. What this means is that whenever a court or a tribunal in Africa is to interpret an Indigenous Peoples' right or, more broadly, a human right or when applying an international norm, it should understand the historical context of the right/norm and the normative nature of the right/norm, that is, whether the right/norm is of Western or African origin. Historically, if the right/norm arose as a result of colonialism or as an attempt to emasculate Africa further economically, such a right/norm should be suppressed. On the other hand, if the right/norm arose from Africa

[2175] AAA Model BIT (n 1782) art 22 (K)(3).
[2176] Wasiński (n 1977).
[2177] Ibid, 18.
[2178] Ibid, 19.

as a response to the perceived inadequacy of international law or as a result of Africa trying to assert itself as equally capable of creating rights/norms, the court or tribunal should as far as possible, give meaning to the right/norm. furthermore, AAIL serves as an interpretative tool to aid judicial organs of the AU in advancing African norms and suppressing international law norms that arose due to colonialism Two instances in this thesis explain this better.

17. Firstly, the status of TNCs as non-subjects of international law gives them the privilege to evade responsibility. As pointed out by Blanco and Grear, TNCs' ideological structure gives them the "juridical privilege and power to evade jurisdictional responsibility."[2179] And what is more, this ideological structure makes "corporation [] the liberal Eurocentric trope of the rational actor writ large," which unfortunately "enables it to evade core vulnerabilities attaching to corporeal human bodies."[2180] The authors argue further that "the neoliberal corporate globalisation is, in a central sense, a Eurocentric matrix of power with its roots in the history of European colonialism"[2181] and has resulted in the "contemporary marginalised human subjects" such as Indigenous Peoples.[2182] To this end, whenever the African Court and the African Commission are presented with the issue of deciding on the status of TNCs *vis-à-vis* their obligations to human rights, the African Court and the African Commission should advance the argument that TNCs should have direct human rights obligations and that nothing in their legal personality prevents them from having such obligations especially when contemporary marginalised human subjects such as Indigenous Peoples are concerned. The "Africanacity"[2183] of investment law in Africa also embodies the idea of direct human rights obligations. Furthermore, the African Court in the *LIDHO case*[2184] nearly achieved this. Although the majority judgment opted for indirect human rights and environmental obligations, the dissenting opinion of Judge Blaise Tchikaya[2185] serves as what should be the standard – direct human rights and environmental obligations for TNCs. Failure to interpret it in this way directly perpetuates what Blanco and Grear describe as "a Eurocentric matrix of power with its roots in the history of European colonialism."[2186]

[2179] Blanco and Grear (n 289) 87.
[2180] Ibid, 105.
[2181] Ibid, 90.
[2182] Ibid, 99.
[2183] Possi (n 1938)1 – 14.
[2184] *LIDHO case* (n 1398).
[2185] Dissenting Opinion of Judge Blaise Tchikaya (n 1599).
[2186] Blanco and Grear (n 289) 90.

18. Secondly, the right to development and the right of all peoples to freely dispose of their wealth and natural resources under the African Charter, both of which have been interpreted as part of the catalogue of Indigenous Peoples' rights, came as a result of Africa trying to recover from the aftermath of colonialism by catching up developmentally with the rest of the world and the need for Africans to be in charge of their natural resources, respectively. So, in the event that these rights are to be interpreted, recourse should be had to this historical context. This approach was utilised by the African Commission in the *Ogoni case*,[2187] where it traced the history of the right of all peoples to freely dispose of their wealth and natural resources to the effect of colonialism, where "the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land."[2188] It noted that the legacy of colonial exploitation has left Africa's valuable resources and its people susceptible to continued foreign exploitation. The drafters of the Charter clearly intended to underscore the continent's painful history and re-establish cooperative economic development as a central pillar of African society.[2189] If the African Commission had failed to interpret this right as a right to which the Ogoni people are entitled, it would have inadvertently advanced the Eurocentric matrix of power, now represented by Shell, where Indigenous Peoples and local communities were denied access to their natural resources.

19. Inadequate financial capability presents a possible setback to Africa's promotion of its norms as a result of over dependence of African States on external partners to fund their programmes, which sometimes requires that African States behave in a way dictated by external partners. This is particularly so with the SAPs of the IMF and the World Bank, which "require liberalisation of the economy so that markets can function more easily and the recipient countries are more open to foreign investment."[2190] To this end, if neo-colonialism is defined as the imposition of capitalism, then all SAPs become neo-colonialism by default.[2191] In order to address this dilemma, the continent would need to develop strategies to ensure its financial independence.

22. Another impact of inadequate financial capability is the inability of some African States to comply with their obligations, thereby relying on the principle of progressive realisation of

[2187] *Ogoni case* (n 554).
[2188] Ibid, para 56.
[2189] Ibid.
[2190] Mohan and Chiyemura (n 269) 61.
[2191] Ikenze (n 268) 39.

rights to evade responsibility. The progressive realisation principle acknowledges that the full realisation of human rights may require a gradual approach due to resource constraints and other challenges faced by States. It has been critiqued for potentially allowing States to justify not providing even basic levels of essential services based on available resources.[2192] Although the concept is not expressly provided for in the African Charter, as it is provided for in the ICESCR,[2193] the African Commission in *Kevin Mgwanga Gumne v Cameroon*[2194] held that the current scarce financial resources of Cameroon could not have permitted it to fulfil its obligation in the realisation of the right to development under Article 22 of the African Charter. It further recognised that although such an inability to fulfil its obligation to the right to development may be a basis for generating grievances among the Southern Cameroonians, it cannot be interpreted as violating that right.[2195]

23. Furthermore, inadequate financial resources have exposed African nations to the risk of doing anything possible to attract foreign direct investment to boost national revenue. According to Sucker, while analysing digital trade in Africa, expresses the fear that "some countries might lower their standards to attract foreign direct investment."[2196] This may account for the unwillingness of some African States to hold some TNCs accountable even when they have clearly violated some norms. Finally, corrupt practices by some government officials can affect the effective application of AAIL norms. In Nigeria, for instance, Friends of the Earth International published that Shell and Eni, an Italian oil company, paid over $1 billion for an oil field off the coast of Nigeria to a corrupt former petroleum minister and convicted money launderer, David Etete.[2197] Also, the former president of DRC, Joseph Kabila, was bribed by Perenco's Congolese subsidiaries as part of deals to secure licence extensions and drilling rights despite reports of violations of environmental standards and human rights.[2198] The same situation cuts across Africa, thereby threatening the possible success of AAIL.

[2192] Forman and others (n 1956) 1 – 11.
[2193] ICESCR (n 14) art (2)(1).
[2194] *Mgwanga Gunme v Cameroon* (n 84).
[2195] Ibid, para 206.
[2196] Sucker (n 6).
[2197] Friends of the Earth International (n 364).
[2198] Peigné, Trellevik, and Miñano (n 367), Miñano, Peigné and Philippin (n 366).

Summary of the Recommendations

1. The necessity of State recognition of a group as Indigenous Peoples should be jettisoned as a requirement for the identification of a group as an Indigenous group. Self-definition and self-identification by a group as an Indigenous People should be the yardstick.

2. It is important that TNCs should be vested with, at least, the status of participants of international law to facilitate the accountability mechanisms of their business activities.

3. The international community should adopt the draft copy of the Convention on the Right to Development to protect the right to self-determination since self-determination enables Indigenous Peoples to determine their political status freely and freely pursue their economic, social and cultural development.

4. States are to, as soon as possible, ensure that the Legally Binding Instrument is finalised and adopted to strengthen their regulatory power over TNCs.

5. A new clause should be included in the ongoing draft Legally Binding Instrument to impose direct human rights and environmental obligations on TNCs.

6. African leaders should quickly ratify the Malabo Protocol and renegotiate any existing BIT to align with the AAA Model BIT.

7. It is paramount for African leaders and AU organs to utilise AAIL as an interpretative tool to assert Africa and its peoples as equally capable of generating human rights and environmental norms.

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