Regulating the activities of Multinational Corporations in Nigeria: A Case for the African Union'. Forthcoming in International Community Law Review

Abstract

Due to the ineffectiveness of the extant regulatory framework (not limited to home country, host country and international law) governing the activities of multinational corporations (MNCs), new regulatory paradigms have been advocated by scholars. Arguably, the African Union (AU) (and its mechanisms) can be the basis of MNC regulation in Africa. However, regulation of the activities of MNCs operating in Africa appears not to be among the major or pressing priorities of the African Union (AU) and its institutions. There is no normative and institutional framework at the AU level regulating the activities of MNCs in Africa. There are, however, moves to design measures to redress this anomaly. This article will focus on the development of recent strategies by the AU and its institutions to “regulate” the activities of MNCs in Africa and its implications in Nigeria.

Keywords: Regulation, African Union, Multinationals, Nigeria, CSOs, Malabo Protocol

1. Introduction

Notwithstanding the apparent lack of a co-ordinated regulatory framework by the AU with regards to MNCs, some semblance of regulatory capacity can be extrapolated from AU conventions and mechanisms. For example, an indirect regulatory framework can be implied from the provisions of some AU treaties such as the African Convention on the Conservation of Nature and Natural Resources (revised)¹ and the African Union

¹ The African Convention on the Conservation of Nature and Natural Resources (Revised Edition) 2003, <http://www.au.int/en/sites/default/files/AFRICAN_CONVENTION_CONSERVATION_NATURE_NATURAL_RESOURCES.pdf>

Convention in Preventing and Combating Corruption 2003.² Furthermore, some modicum of MNC regulation is localised in the African Peer Review Mechanism (APRM).³

Furthermore, notwithstanding the paucity of research on AU regulation of MNCs, this article will contend that the AU is one of the most potent and underutilised regulatory frameworks in the regulation of MNCs. This view finds support in the work of the African Commission Working Group on Extractive Industries, Human Rights and the Environment which has been at the forefront in developing mechanisms on the control of MNCs operating in Africa. Ultimately, this article will contend that one major reason why the AU regulatory regime in respect of MNCs is ineffectual is the near absence or inadequate collaboration with civil society organisations (CSOs) in the process. Arguably, CSO involvement in AU regulatory paradigm will enhance the legitimacy of the regulatory process. This article identifies key developments at AU level that could be enhanced to better facilitate the role of CSOs in MNC regulation.

This article will be divided into six sections. The first part of the article is the introductory section. The second part of this article will be an overview of the evolution of the AU and its institutions. This section will focus on the African Commission on Human and People's Rights (African Commission). The third section of the article focuses on the African human rights system as a regulatory buffer against the activities of the MNCs operating in Africa. The role of the African Commission is highlighted in this section with particular focus on how it has dealt with the activities of MNCs. The fourth section dwells on the AU conventions wherein the regulation of MNCs can be

² The African Union Convention in Preventing and Combating Corruption [July 11 2003] 43 ILM 2004., <http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf>

³ Generally, see Eghosa Ekhator, *Roles of Non State Actors in the regulation of Multinational Corporations in the Oil and Gas Industry in Nigeria* (PhD Thesis 2015).

extrapolated from. Also, the various AU environmental and natural resource conventions will be highlighted with regards to their impact on the regulation of MNCs in Africa. The fifth part of the article focuses on the impact of some AU mechanisms or policies on the regulation of MNCs with the New Partnership for African Development (NEPAD) and African Peer Review Mechanism (APRM) in focus. The AU Mining Policy and the AU Working Group on Extractive Industries, Environment and Human Rights will also be in focus. The concluding part of the article will contend that the institutions of the AU should actively promote good governance (including explicit regulation of MNCs) and actively engage CSOs in the MNC regulatory paradigm.

2. Evolution of the African Union

The origin of the AU can be traced to the erstwhile Organization of African Unity (OAU) which used to be the continental mouthpiece of African States. The OAU was born out of the struggles against colonial rule in Africa by the African political elites led by Pan-Africanists such as Leopold Senghor, Kwame Nkrumah, Obafemi Awolowo and Nnamdi Azikiwe amongst others. The struggle for independence by the various African States was premised on the notion of Pan-Africanism or a goal for African Unity.⁴ Thus, the OAU was set up as a unifying medium or vehicle of the newly independent African States to fight against the scourge of colonialism and apartheid in parts of Africa. The OAU was established on 25 May 1963 with its headquarters in Addis Ababa, Ethiopia. The objectives of the OAU were inter alia:

to rid the continent of the remaining vestiges of colonization and apartheid; to
promote unity and solidarity among African States; to coordinate and intensify

⁴ Michele Olivier, "Civil Society and Democratisation in Africa with Specific Reference to the African Peer Review Mechanism", 33 (2) *Strategic Review for Southern Africa* (2011) pp. 106-127.

cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation within the framework of the United Nations.⁵

A major ill that plagued the OAU was the apparent lack of importance attached to human rights issues in Africa due to the non-interference policy in the activities of member States.⁶ Also, the OAU Charter did not provide for a substantive right to the environment and other human rights.⁷ However, the major achievement or contribution of the OAU was the introduction of the African Charter on Human and Peoples' Rights⁸ (hereinafter referred to as the African Charter) which was adopted in 1981. The African Charter is the cornerstone of the human rights architecture in Africa.⁹

In 1999, the idea of the African Union was conceived by African leaders who enunciated the Sirte Declaration which emphasized thus:

calling for the establishment of an African Union, with a view, inter alia, to accelerating the process of integration in the continent to enable it play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they are by the certain negative aspects of globalization.¹⁰

⁵ African Union Website 'AU in a Nutshell', <<http://www.au.int/en/about/nutshell>>

⁶ Olufemi Amao, "The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations", 12 (5) *International Journal of Human Rights* (2008) pp. 761-788.

⁷ Alali Tamuno, *The Legal Roadmap for Environmental Sustainability in Africa: Expansive Participatory Rights and International Environmental Justice* (S.J.D. Dissertation, Pace University, 2011) p. 76.

⁸ African Charter of Human and Peoples' Rights OAU CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 entered into force Oct. 21, 1986.

⁹ For extensive analysis of the impact of the African Charter in Nigeria, generally see Eghosa 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* (2015) pp. 253-270.

¹⁰ AU Website, *supra* note 5. It has been posited that the AU was largely influenced by the European Union model and it has been birthed or intended as a supranational body or institution. See Amao, *supra* note 6, 764. Supranationality 'refers to a situation where an international institution is endowed with powers to take decisions binding on sovereign states either generally or in specific areas of State activity.' ECOWAS, Review of Treaty: Final Report by the Committee of Eminent Persons (1992), 16, paragraph 42. Cited in Chidi Odinkalu, "Forging New Frontiers: ECOWAS Court of Justice in the Protection of Human Rights" in C. Nweze, (ed), *Contemporary Issues on Public International and Comparative Law: Essays in Honour of Professor Christian Nwachukwu Okeke* (2009) 583.

The vision of the AU is expressed in the following statement: ‘An integrated, prosperous and peaceful Africa. Driven by its own citizens and representing a dynamic force in global arena.’¹¹ The AU in comparison with OAU is better suited to promote human rights in Africa.¹² The AU has been said to be more transparent (than the OAU) despite incorporating the provisions of the OAU Charter into its (AU) Constitutive Act.¹³ Thus, the AU recognizes the African Charter as the basis or foundation for the promotion and protection of human rights in Africa.¹⁴ Furthermore, Article 3 of the AU Constitutive Act promotes the principles of good governance, stability and popular participation amongst others. Article 4 of the AU Constitutive Act promotes respect for democratic values, human rights, rule of law and gender equality amongst others. Article 4 (g) of the AU Constitutive Act still retains the non-interference in the internal affairs of member States. However, Article 4(h) recognizes certain instances where the AU can intervene in the internal affairs of Member States. These circumstances include when war crimes, genocide and crimes against humanity are perpetuated in the member States. Also, the AU Constitutive Act provides for the imposition of sanctions on countries that are in breach of AU’s policies and decisions.¹⁵ For example, Egypt was suspended from the AU in 2013 due to the ‘overthrow’ of the democratically elected President Morsi from office which it (AU) considered to be an unconstitutional change of government.¹⁶

¹¹ AU, *supra* note 5.

¹² Generally, see Joseph Isanga, “The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?” 11 *Santa Clara Journal of International Law* (2013) 267-302, 270. The preamble to the AU Constitutive Act provides thus: “Determined to promote and protect human and peoples’ rights”.

¹³ Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001) [hereinafter AU Constitutive Act]. Amao, *supra* note 6. The organs of the AU include the Assembly, Executive Council, the Commission, Permanent Representatives’ Council, Peace and Security Council (PSC), Pan African Parliament, ECOSOCC (the Economic, Social & Cultural Council), the Court of Justice, Specialized Technical Committees and Financial Instructions.

¹⁴ Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria’s Oil Producing Communities* (2014) p. 446.

¹⁵ Amao, *supra* note 6.

¹⁶ Ahramonline Website ‘Egypt to Resume African Union membership after roadmap implemented: AU Chief’ <<http://english.ahram.org.eg/NewsContent/1/64/98711/Egypt/Politics-/Egypt-to-resume-African-Union-membership-after-roa.aspx>> Also see Elin Hellquist, *Regional Organizations and Sanctions Against Members – Explaining the Different Trajectories of the African Union, the League of Arab States, and the Association of*

The AU Constitutive Act does not provide for the explicit control or regulation of MNCs operating in Africa. However, Article 3(d) (i) provides that the AU should promote the roles of African countries in the global economy and defend Africa's common positions on issues relevant to the interests of its people and the continent. Laibuta has argued thus: 'these objectives indicate that African Union members should take a greater collective role in protection of Africa's interest including action against the encroaching multi-national corporations' imperialism in Africa.'¹⁷ In essence, the AU has the broad mandate under its Constitutive Act to compel African States to effectively regulate the activities of MNCs operating in Africa. Arguably, regulation of the activities of MNCs by the AU can be premised on its Constitutive Act. The provision is broad enough to include the regulation of the activities of MNCs by the AU.

Notwithstanding the absence of a regulatory framework on MNCs in the AU Constitutive Act, indirect regulation of their activities can be localised in other AU mechanisms such as the African Commission via the African Charter on Human and Peoples' Rights (African Charter) and regional treaties such as the AU Convention on Preventing and Combating Corruption (AU Anti-Corruption Convention) and the African Convention on the Conservation of Nature and Natural Resources amongst others. The next section of this article will focus on the African Human Rights System. CSOs have played major roles in the evolution of the African Human Rights system.

3. The African Human Rights System

The African Charter is the cornerstone of the African Human rights architecture or system. African human rights system refers to the African Charter, African Commission

Southeast Asian Nations. KFG Working Paper Series, No. 59 (2014), 1-45 < http://www.polsoz.fu-berlin.de/en/v/transforeurope/publications/working_paper/wp/wp59/index.html >

¹⁷ Mugambi Laibuta, *Multi-national Corporations in Human Rights Protection and the Role of the African Union* (LL.M Dissertation, London School of Economics, 2011) p. 26.

and the various human rights instruments adopted by the OAU and AU.¹⁸ Due to the absence of a regional regulatory framework in respect of MNCs in Africa, the African Charter is an example of AU multilateral mechanism or instrument that can be the basis of regulation.¹⁹ For example, the African Commission has given a decision on the activities of oil MNCs and criticised the lack of political will by the government to adequately regulate the activities of oil MNCs in Nigeria.

The next section will be a brief overview of the African Charter. This section will serve as an introduction to the Charter.

3.1. Overview of the African Charter on Human and Peoples' Rights

The African Charter establishes the system for the promotion and protection of human rights in Africa within the framework of the AU (and the OAU before it). It promotes a plethora of human rights such as civil and political, socio-economic and cultural, individual and collective rights.²⁰ The Charter is the first regional mechanism to incorporate the different categories of human rights in a single document.²¹ Notwithstanding, the criticisms or weaknesses of the African Charter,²² it has had a modest yet significant influence on the human rights architecture in Africa and Nigeria is no exception.²³ The African Charter has been accepted widely in Africa with only Morocco (which is not member of the African Union) and South Sudan having not

¹⁸ Obiora Okafor, *The African Human Rights System, Activist Forces, and International Institutions* (2007) p.1

¹⁹ Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (2009) p.109.

²⁰ Manisuli Ssenyonjo (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012).

²¹ *Ibid*

²² See Frans Viljoen, *International Human Rights in Africa* (2nd ed., 2012). Dele Olowu, "The African Charter on Human and Peoples' Rights, Its Regional System, and the Role of Civil Society in the First Three Decades: Calibrating the "Paper Tiger", 31 *Obiter* (2013) pp. 29-48.

²³ Okafor, *supra* note 18. See Ekhatior, *supra* note 9, for an extensive analysis of the contradictions and strengths inherent in the African Charter.

signed up or ratified the African Charter.²⁴ However, Morocco recently re-joined the AU.

The next section of the article focuses on the African Commission which is one of the AU institutions that serves as a basis of regulating the activities of MNCs. Civil Society Organisations (CSOs) have instituted cases against the MNCs and African governments at the African Commission. Thus, next section undertakes a critical analysis of the regulatory paradigm flowing from the decision of the African Commission in respect to the activities of oil MNCs operating in Nigeria.

3.2. The African Commission and the Regulation of MNCs in Africa

The African Commission is a part-time quasi-judicial institution of the AU vested with the tasks of promoting, interpreting and protecting the rights contained in the African Charter.²⁵ The African Commission established by virtue of article 30 of the African Charter is the most significant international (or regional) body for the realization of human rights in Africa. Established in 1987, it monitors human rights developments in all the member States of the AU.²⁶ In essence, the African Commission 'is primarily responsible for monitoring the implementation of the African Charter and the Protocol on the Rights of Women in Africa.'²⁷

Flowing from article 45 of the African Charter, scholars have contended that the African Commission is one strategy that can be used to regulate or control the activities

²⁴ For the comprehensive list of countries that have signed, ratified and acceded to the African Charter. See African Commission on Human and Peoples' Rights website, < <http://www.achpr.org/instruments/achpr/ratification/> >

²⁵ Ssenyonjo, 'An Introduction to the Development of the African Regional Human Rights System: 30 Years after the Adoption of the African Charter on Human and People's Rights' in Ssenyonjo, *supra* note 20.

²⁶ Magnus Killander, 'The African Commission on Human and Peoples' Rights', pp. 235-248 in Ssenyonjo, *supra* note 20. However, the African Commission is not the only human rights body in the AU. See Chidi Odinkalu, 'From Architecture to Geometry: The Relationship Between the African Commission on Human and People's Rights and Organs of the African Union', 35 (4) *Human Rights Quarterly* (2013) pp. 850-869, 850.

²⁷ Ssenyonjo, *supra* note 25 p.18. See article 45 of the African Charter

of MNCs in Africa.²⁸ However, it 'does not expressly provide for business organisations' duties and responsibilities in human rights protection.'²⁹ Although, article 1 of the African Charter enjoined member States to give effect to the rights, duties and freedoms enshrined therein.³⁰ As it will be highlighted below, the *SERAC* case exemplifies the linkage between human rights and corporate liability as highlighted by the African Commission. The African Commission has elaborated on a range of human rights³¹ including socio-economic rights, women's rights, group rights, indigenous rights and individual rights amongst others. The African Commission has also made a recommendation or elaborated on corporate liability or violations induced by governmental inertia in Nigeria. This was exemplified by the African Commission in its only decision on corporate liability till date, in the *Social and Economic Rights Action Centre & Centre for Economic and Social Rights v. Nigeria* (SERAC Case).³² In this communication, some of the rights that were allegedly violated in Ogoni-land included the rights to a clean and satisfactory environment (article 24), property (article 16) and to the people to attain economic, social and cultural development (article 22) amongst others. The responsibility or the onus of protection and promotion of human rights is on the Nigerian State.³³ The African Commission held that the Nigerian Government and its agencies (and not the MNC) were in violation of the African Charter on Human and Peoples' Rights. However, recommendations by the African commission are non-binding on States.

²⁸ Oshionebo, *supra* note 19; Amao *supra* note 6.

²⁹ Laibuta, *supra* note 17, p. 30.

³⁰ Nigeria has domesticated and incorporated the African Charter vide the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of 1983. The African Human Rights System largely follows the 'state responsibility' principle as developed in international law and state responsibility entails that states are the primary enforcers of human rights. See Amao, *supra* note 6. However, this view of state responsibility in human rights enforcement is changing in Africa due to the impacts of the African Charter in different countries in Africa. Generally, see Okafor, *supra* note 18.

³¹ Generally, see Ssenyonjo, *supra* note 20.

³² Communication No. 155/96(2001)

³³ Laibuta, *supra* note 17.

Furthermore, the African Commission stated that the Nigerian State had failed in its responsibility to regulate the activities of the oil MNCs thereby impacting negatively on the human rights of the Ogoni people.³⁴ This decision by the African Commission was premised on the grounds that the Nigerian government via its agency, the Nigerian National Petroleum Company (NNPC), was a majority shareholder in the joint-venture agreements or in consortium with SPDC (Shell's subsidiary in Nigeria) that has caused environmental degradation and health problems in Ogoni land.³⁵ Furthermore, the military government of Nigeria failed in its responsibility of protecting the people of Ogoniland from the environmental externalities accruing from the activities of SPDC and these negative environmental externalities were never investigated or addressed by the Nigerian government.³⁶ Thus, the African Commission posited that African 'governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetuated by private parties.'³⁷ This decision has contributed to the African Charter control (indirect) of the activities of MNCs in Nigeria. Arguably, this exemplifies the fact notwithstanding that regional institutions do not have direct regulatory authority over MNCs, indirect regulatory control is exemplified by the *SERAC* case.

Also, the African Commission held that the Nigerian government had violated a plethora of rights including life (article 4), non-discrimination, property (article 14), health (article 16), family life (article 18), people to freely dispose of their wealth and resources (article 21) and clean and general satisfactory environment (article 24) as

³⁴ *ibid*

³⁵ *ibid*

³⁶ *ibid*

³⁷ *SERAC case, supra note 32, para 59.*

enshrined in the African Charter.³⁸ Notwithstanding that the right to housing is not expressly enshrined in the African Charter, the African Commission held that the right to housing and food can be extrapolated from a combined reading of articles 14, 16 and 18 of the African Charter. However, only the Nigerian government was held culpable for the environmental degradation in Ogoni-land. Thus, the oil MNCs were beyond the jurisdiction of the African Commission.

This decision by the African Commission exculpating the oil MNCs from corporate liability or accountability in Ogoniland has been the subject of criticisms by scholars.³⁹ For example, Amao argues that '[t]he SERAC decision may therefore be criticised because it was directed solely to the Nigerian state and omitted consideration of the accountability of the non-state actor.'⁴⁰ Also, notwithstanding that many of the duties enshrined in the African Charter refers to natural persons, Oloka-Onyango avers that 'corporate bodies are not denied the exercise of rights that are recognised in international and domestic law.'⁴¹ This view by Oloka-Onyango has been criticised by Oshionebo who contends that: 'it is highly desirable that private actors be made to account for their violations of the African Charter. But such accountability may be better accomplished through an amendment of the Charter rather by a strained interpretation of existing provisions.'⁴²

Notwithstanding the controversies emanating from the recommendation by the African Commission in the *SERAC* case, the decision has been termed 'ground-

³⁸ Oluduro, *supra* note 14, p. 450.

³⁹ Oluduro, *supra* note 14; Joe Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors and the Struggle for Peoples' Rights in Africa", 18 (4) *American University International Law Review* (2003) pp. 851-914.

⁴⁰ Amao, *supra* note 6, p. 773.

⁴¹ Oloka-Onyango, *supra* note 39, p. 910.

⁴² Oshionebo, *supra* note 19, 111. However, Amao, *supra* note 6, p. 773 is in support of Oloka-Onyango's postulations. Also, this sort of interpretation is developing in the European Court of Human Rights (ECHR) where the court has interpreted the provisions of the European Convention on Human Rights in creative ways not envisaged by the framers of the Convention. Generally, see Alastair Mowbray, "The Creativity of the European Court of Human Rights", 5(1) *Human Rights Law Review* (2005) pp. 57-79.

breaking’⁴³ and ‘extraordinary.’⁴⁴ The decision has impacted positively on the MNC regulatory paradigm in Africa. In the area of corporate accountability in Africa by MNCs, the African Commission decision affirms the fact that African governments can be held culpable for failure to regulate the conduct of MNCs operating in their countries.⁴⁵ The decision also accentuates the fact that private actors are capable of violating the provisions of the African Charter.⁴⁶ Thus, the decision ‘raises the possibility that private entities may one day be held liable for rights violations under the Charter.’⁴⁷ Also, the decision sets standards for regulating the extractive sector in Africa.⁴⁸ Thus, by virtue of *SERAC*’s decision, African countries are supposed to fashion out laws to protect its citizenry from violations by private actors and ensure effective compliance (and enforcement) of these laws.⁴⁹ Finally, the decision in the *SERAC* case has been utilised by NGOs as a tool of exerting pressure on African States and MNCs to adhere to corporate accountability.⁵⁰

The next section of the article highlights some AU conventions wherein regulation of MNCs can be implied from their provisions notwithstanding that there is no AU convention that directly regulates the activities of MNCs. The section will also highlight the roles of CSOs in collaborating with AU and its institutions in the regulation of MNCs via the relevant AU conventions.

⁴³ Danwood Chirwa, “A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria”, 3(2) *ESR Review: Economic and Social Rights in South Africa* (2002) pp. 24-27

⁴⁴ Christof Heyns, “The African Regional Human Rights System: The African Charter”, 108 (3) *Penn State Law Review* (2004) pp. 679-702, 691.

⁴⁵ Oshionebo, *supra* note 19.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* p. 112.

⁴⁸ *Ibid.*

⁴⁹ Oshionebo, *supra* note 19.

⁵⁰ See Oshionebo, *supra* note 19. For example, in the late 1990’s *SERAC* successfully petitioned the World Bank’s inspection Panel when a World Bank bankrolled sanitation project did not follow the Bank’s operating guidelines. The project was successfully halted when *SERAC* complained that many people were forcibly evicted from their homes because of the project. See Nsongurua Udombana, “Keeping the Promise: Improving Access to Socioeconomic Rights in Africa”, 18 *Buffalo Human Rights Review* (2012) pp. 135-192, 186-187.

4. AU Conventions and the Regulation of MNCs in Africa

This section of the article will focus on AU mechanisms on the environment and natural resources. The Treaty Establishing the African Economic Community (Abuja Treaty)⁵¹ in articles 58 and 59 enjoins African states to promote a healthy environment and take appropriate actions to ban the importation of hazardous wastes into their countries and across Africa.

Another AU treaty that accentuates environmental protection in Africa is the African Convention on the Conservation of Nature and Natural Resources (Algiers Convention)⁵² which was adopted in September in 1968 under the auspices of the OAU and came into force on 16 June 1969. The convention was the ‘first multilateral instrument for the regulation and protection of the African environment, adopted by independent African states.’⁵³ The Convention was essentially concerned with wildlife and other elements of environmental protection.⁵⁴ This Convention had no effective administrative mechanisms for its implementation; a situation that led to its ineffectual impact in African States.⁵⁵ Article 24 of the Algiers Convention provides for a revision of the convention.⁵⁶ In pursuance of this, the OAU approached the IUCN and UNEP’s Division of Environmental Policy Implementation in 1999 to assist in its revision, reflecting the outcomes of the Rio Conference on Environment and other significant

⁵¹ Treaty Establishing the African Economic Community (Done at Abuja, Nigeria, 3 June 1991), 30 I.L.M. 1241 (1991), < <http://www.au.int/en/content/treaty-establishing-african-economic-community> >

⁵² OAU Doc CAB/LEG/24.1, adopted 15 September 1968.

⁵³ Bolanle Erinosh, “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”, 21 (3) *African Journal of International and Comparative Law* (2013) pp. 378-397 at 383.

⁵⁴ Viljoen, *supra* note 22.

⁵⁵ *ibid*

⁵⁶ Article 24 states: “After the expiry of a period of five years from the date of entry into force of this Convention, any Contracting State may at any time make a request for the revision of part or the whole of this Convention by notification in writing addressed to the Administrative Secretary General of the Organization of African Unity”

developments in the international environmental in the last two decades.⁵⁷ This process culminated in the adoption of a Revised African Convention on the Conservation of Nature and Natural Resources (Revised African Nature Convention) in July 2003.⁵⁸ The Revised Convention provides for a plethora of environmental principles including the right to satisfactory environment enshrined in Article III of the Convention.⁵⁹

An overarching objective of the Revised Convention is the promotion of sustainable development in environmental issues in Africa as exemplified by Article II. The regulation of MNCs can be implied from article XIV (2) (b) of the Convention which provides that African States should ‘ensure that policies, plans, programmes, strategies, projects and activities likely to affect natural resources, ecosystems and the environment in general are the subject of adequate impact assessment at the earliest possible stage and that regular environmental monitoring and audit are conducted.’⁶⁰ Arguably, CSOs can be used to monitor the compliance by States in respect of this provision. Notwithstanding that the provisions of the Revised Convention are geared towards African States or governments, any State that meticulously enforces this provision will have direct regulatory impacts on the activities of MNCs operating within its borders. However, the Convention omits some contemporary environmental principles such as the polluter pays principle and common but differentiated responsibility.⁶¹

⁵⁷ IUCN, 'An Introduction to the African Convention on the Conservation of Nature and Natural Resources', Environmental Policy and Law Paper No. 56, World Conservation Union (2006). Cited in Erinosh, *supra* note 53, p. 385.

⁵⁸ Available at: <http://www.au.int/en/content/african-convention-conservation-nature-and-natural-resources-revised-version> (accessed 20 December 2014)

⁵⁹ Erinosh, *supra* note 53.

⁶⁰ Also Article XIV (b) (c) provides that states should “monitor the state of their natural resources as well as the impact of development activities and projects upon such resources”.

⁶¹ Erinosh, *supra* note 53, p. 389.

The next AU Convention in focus will be the Bamako Convention on the Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention) which was adopted in January 1991 and entered into force in April 1998.⁶² The impetus for the Bamako Convention was due to the incessant dumping of hazardous wastes by developed countries into the shores of the developing world especially African countries. Prominent incidents of the dumping of hazardous wastes or harmful wastes by developed countries to African countries include the Koko incident in Nigeria and the Trafigura incident in Cote d'Ivoire amongst others.⁶³ Economic costs and the avoidance of strict environmental regulations in developed countries are some of the reasons why some developed countries dump harmful wastes in the developing world.⁶⁴ Due to the international concerns on the impacts of the dumping of harmful and hazardous wastes in developing countries, the UN adopted the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) in March 1989 and it entered into force in 1992.⁶⁵ However, the Basel Convention did not place a total ban on the international trade in harmful wastes from developed countries. Due to the inadequacies of the Basel Convention, the Bamako Convention was adopted and the Bamako Convention places a total ban on the import of hazardous wastes into Africa.⁶⁶

Furthermore, it has been contended that the provisions of the Bamako Convention influenced the amendment of the Basel Convention to enshrine the total ban of

⁶² < <http://www.au.int/en/content/bamako-convention-ban-import-africa-and-control-transboundary-movement-and-management-hazard> >

⁶³ Generally, see Antonius Hippolyte, "Calls for National Intervention in the Toxic Waste Trade with Africa: A Contemporary Issue in the Environmental Justice Debate", 58 (2) *Loyola Law Review* (2012) pp. 301-324; Olanrewaju Fagbohun, "Regulation of Transboundary Shipments of Hazardous Waste: A Case Study of the Dumping of Toxic Waste in Abidjan, Cote D'Ivoire", 37 *Hong Kong Law Journal* (2007) pp. 831-858.

⁶⁴ Hippolyte *ibid*, Fagbohun *ibid*.

⁶⁵ Viljoen, *supra* note 22.

⁶⁶ *Ibid*, Fagbohun, *supra* note 63.

international harmful wastes trade.⁶⁷ Arguably, regulation of MNCs can be implied in certain provisions of the Bamako Convention. For example, Article 4 (3) (a-e) focuses on the control and regulation of waste generation in Africa. Article 4(3) (b) of the Bamako Convention imposes 'strict, unlimited liability as well as joint and several liability on hazardous waste generators.' Article 1(20) of the Bamako Convention defines a 'generator' as 'any person whose activity produces hazardous wastes, or, if that person is not known, the person who is in possession and/or control of those wastes.' On the basis of the aforementioned provisions, it is the view of this article that officials of MNCs or foreign companies involved in the international waste trade or generation in Africa can be held culpable or accountable for their actions or inactions in this regard.

The precautionary principle is enshrined in the Bamako Convention by virtue of Article 4(3) (f), thus African States are enjoined to prevent the release of harmful substances into the environment. Also, African States are encouraged to engage in co-operation in actualizing the objective of the precautionary principle. By virtue of Article 16 of the Bamako Convention, a Secretariat administers the implementation of the Convention. However, the enforcement of the Bamako Convention rests on individual States and a Conference of Parties (COP).⁶⁸ A major ill afflicting the enforcement paradigm of the Bamako Convention is that 'neither the Secretariat, nor the COP, nor individual parties have the power to undertake independent inspections.'⁶⁹ Notwithstanding the weaknesses of the Bamako Convention, Viljoen

⁶⁷ Viljoen, *supra* note 22.

⁶⁸ Fagbohun, *supra* note 63, p. 847.

⁶⁹ *Ibid.*

contends that it (and other treaties) have occasioned a reduction of flow of hazardous wastes to developing countries.⁷⁰

Understandably, the impacts of the aforementioned conventions have been minimal on environmental protection in Africa. Also, the conventions do not regulate the activities of MNCs directly or explicitly, thus its impact on the activities of MNCs has been negligible. Furthermore, MNCs are major contributors to environmental degradation in Africa as exemplified by the activities of Shell in the Niger Delta. Thus, many African States do not enforce or respect their international commitments.

4.1. AU Anti-Corruption Convention and Multinational Corporations

Corruption is one of the many ills afflicting African States and many MNCs operating in Africa have been heavily tainted by corruption scandals. For example, many MNCs operating in Africa have been involved in bribery and inducement to government officials to actualise or enable them to have access to natural resource agreements or contracts amongst others.⁷¹ Corruption is endemic in Africa and it has undermined the promotion of human rights in the continent.⁷² Thus, to fight the scourge of corruption in Africa, the AU adopted the Convention on Preventing and Combating Corruption (AU Anti-Corruption Convention) in 2003. The AU Anti-Corruption Convention which is 'mandatory and binding'⁷³ entered into force in August 2006.

⁷⁰ Viljoen, *supra* note 22. However, authors such as Hippolyte, *supra* note 63; Erinosh, *supra* note 53 posit otherwise. They argue that the impacts of the Bamako Convention have been minimal on international waste trade flowing into Africa.

⁷¹ For instances of MNCs corruption scandals in Africa, see Olatunde Otusanya, Sarah Lauwo and Gbadegesin Adeyeye "A Critical Examination of the Multinational Companies Anti-Corruption Policy in Nigeria", 1 *Accountancy Business and the Public Interest* (2012) pp.1-52. Similarly, the Report of the High Level Panel on Illicit Financial Flows from Africa (Mbeki Report) UNECA 2014 states that 'Africa is estimated to have lost \$1 trillion in illicit financial flows' from corporations and organised crime rings.

⁷² Viljoen, *supra* note 22, Kolawole Olaniyan. "The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal", 4 (1) *African Human Rights Law Journal* (2004) pp.74-92.

⁷³ Amao *supra* note 6, p. 779.

The Convention is one strategy that can be the basis of MNCs regulation in Africa. The Convention prohibits corruption in the private and public sectors by enjoining States to adopt a plethora of measures including administrative and legislative to tackle the scourge of corruption in Africa. For example, Article 1 defines 'Private Sector' as 'the sector of a national economy under private ownership in which the allocation of the productive resources is controlled by market forces, rather public authorities and other sectors of the economy not under the public sector or Government.' It has been posited that this definition includes all types of private entities including small and medium enterprises, partnerships and MNCs.⁷⁴ Furthermore by virtue of Article 4(1)(e) and (f):

1. This Convention is applicable to the following acts of corruption and related offences:

(e) the 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;

(f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result .

⁷⁴ Indira Carr, "Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?" (2007) 2 *Journal of Business Law* (2007) pp. 111-136 at footnote 37.

Arguably, the above provisions of the Convention can serve as bastions of fighting the scourge of corruption in Africa. Thus, it has been posited that these aforementioned provisions in Article 1 and 4 directly place responsibility on African States to regulate or control the activities of MNCs in the areas covered in the Convention.⁷⁵ Furthermore, Article 5(2) enjoins African States to: ‘Strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force.’ Article 11 of the AU Anti-Corruption Convention also enjoins parties to undertake to:

1. Adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector.
2. Establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of tender procedures and property rights.
3. Adopt such other measures as may be necessary to prevent companies from paying bribes to win tenders.

Article 9 of the AU Anti-Corruption Convention enjoins States to adopt legislative and other mechanisms to improve access to information that is essential in fighting the menace of corruption and other allied offences. Arguably, the enactment of the Freedom of Information Act in Nigeria is in fulfilment of this provision.⁷⁶ Also, Article 19 of the Convention enjoins State Parties to engage in international co-operation with home countries of MNCs in the prevention of corruption. Furthermore, Article 22 of the Convention states that an Advisory Board be established under the auspices of the AU

⁷⁵ Amao, *supra* note 6. This is a major flaw of the Convention because it does not directly deal with bribery of foreign public officers. Also see Nsongurua Udombana, “Fighting Corruption Seriously - Africa’s Anti-Corruption Convention”, 7 *Singapore Journal of International and Comparative Law* (2003) pp. 447-488, 464-5.

⁷⁶ Oluduro, *supra* note 14.

and made up of eleven members elected by the executive council.⁷⁷ A major strength of the AU Anti-corruption Convention is enshrined in Article 12 which enjoins State Parties to work with civil society to promote the convention and participate in its monitoring and implementation.⁷⁸ Arguably, the regulatory impact of Convention on corrupt practices by both public officers and MNCs in Africa has been abysmal.

The AU Anti-Corruption Convention is bedevilled with several pitfalls.⁷⁹ The Convention has been criticized for its widespread reliance on claw-back clauses in some of its provisions.⁸⁰ For example, article 14 provides for the right to a fair trial for those suspected to have committed acts of corruption 'subject to domestic law.' The claw-back clauses in the Convention (similar to those enshrined in the African Charter) have undermined its efficacy by diluting the impacts of the Convention.⁸¹ Furthermore, the Convention focuses on State responsibility and enshrines no provisions for direct liability of MNCs⁸² and this is considered to be a major flaw of the Convention.⁸³ States are expected to regulate the activities of MNCs and many African countries cannot effectively control such activities. Also, a recent AU convention, the AU Convention on Values and Principles of Public Service and Administration calls on African States to enact laws to fight the menace of corruption in Africa.⁸⁴

Notwithstanding the aforementioned criticisms of the AU Anti-Corruption Convention, Nigeria and Kenya have enacted domestic legislations to tackle the menace

⁷⁷ For extensive analysis of the follow up mechanism of the AU Anti-Corruption Convention see Andre Mangu, "Good Governance and Democratic Leadership for an African Renaissance: A Reflection on AU Member States' Compliance with the AUCPCC", 7(2) *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity* (2012) pp.18 -27.

⁷⁸ See Indira Carr and Opi Outhwaite, "Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice" (2011) 44(3) *Suffolk University Law Review* (2011) pp. 615-663, 617.

⁷⁹ Olaniyan, *supra* note 72.

⁸⁰ Oluduro, *supra* note 14. For example, under article 8, state parties are required to establish under their laws an offence of illicit enrichment 'subject to the provisions of their domestic laws'.

⁸¹ Oluduro, *supra* note 14.

⁸² Amao, *supra* note 6, 781.

⁸³ *ibid*

⁸⁴ Viljoen, *supra* note 22.

of corruption.⁸⁵ However, in Nigeria notwithstanding the existence of national laws and bodies on corruption such as the Economic and Financial Crimes Commission (Establishment) Act 2004⁸⁶ and the Corrupt Practices and Related Offences Act 2000,⁸⁷ no MNC or its officials have been held culpable for corruption in Nigeria.⁸⁸ Some cases wherein officials of MNCs were jailed in other countries originated from Nigeria but no successful legal action was instituted by the government against the same MNCs in Nigeria.⁸⁹ In the Halliburton scandal, the company was alleged to have bribed Nigerian officials to influence the award of the contract for the Liquefied Natural Gas plant in Nigeria and heavily fined by several countries⁹⁰ and some of its officials jailed.⁹¹ The Nigerian government filed a charge of criminal conspiracy against Dick Cheney, the former United States Vice President who was the Chairman of Halliburton at that material time. However, the case was withdrawn by Nigerian government when Halliburton accepted to pay a fine of around 250 million dollars.⁹² Thus, Okafor and Olugbuo have argued that:

Yet the fact that the Halliburton trials, which were launched by the Attorney-General of the Federation of Nigeria in early September 2010, are among the

⁸⁵ *ibid*

⁸⁶ Cap E1 LFN 2004

⁸⁷ Cap 359, LFN 2004

⁸⁸ See Otusanya et al, *supra* note 71. Also see Gbemi Odusote, "The Judiciary as a Critical Linchpin in Nigeria's Anti-Corruption Crusade", 34 (2) *Liverpool Law Review* (2012) pp. 123-143 which highlighted corruption cases in Nigeria which involved local politicians. However, under Nigerian law, by virtue of the received English common law, criminal code, penal code and statutes such as Standard Organisation of Nigeria Act CAP S9 LFN 2004 and Oil in Navigable Waters Act CAP 06 LFN 2004 amongst others provides the basis of corporate criminal liability in Nigeria. Generally, see Emem Chioma and Prince Amadi, "A New Dawn of Corporate Criminal Liability in the United Kingdom: Lessons for Nigeria", 2 (1) *African Journal of Law and Criminology* (2012) pp. 86-98, 89 for an analysis of corporate criminal liability in Nigeria. Also, Nigeria is said to be amongst the most corrupt countries in the world and it is presently ranked the 136th most corrupt country according to the Transparency Perceptions Index 2016. Available at: https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table

⁸⁹ See Otusanya et al, *supra* note 71 for an analysis of cases involving MNCs which originated from corruption that took place in Nigeria.

⁹⁰ Obiora Okafor and Benson Olugbuo, "The Economic and Financial Crimes Commission and the Accountability of Corrupt Foreign Actors", 4 (3) *Law and Development Review* (2011) pp.2-29.

⁹¹ John Rudolf, 'Albert Stanley, Former Halliburton Exec, Sentenced in Bribery Scheme' Huffington Post, 2 December 2012 < http://www.huffingtonpost.com/2012/02/24/albert-stanley-halliburton-kbr-bribery-sentence_n_1299760.html >

⁹² Okafor and Olugbuo, *supra* note 90.

first *significant* instances of the EFCC actually filing criminal charges in court against *noncitizen* individuals and corporations for their perpetration of acts of grand corruption in Nigeria is indicative of the fact that it is difficult to conclude that the EFCC has optimized its potential in the specific area of the prosecution of grand corruption perpetrated by foreign actors in Nigeria.⁹³

Flowing from the above analysis, African States have been ineffectual in regulating corrupt acts committed by MNCs and Nigeria is no exception. There have been many impediments accentuating the apparent lack of control by Nigeria over MNCs and their corrupt activities. It appears that the government of Nigeria lacks the political will to regulate MNCs (and their officers) conduct and until the Nigerian State actively and effectively regulates the conduct of MNCs, corruption scandals will not abate.⁹⁴

5. Roles of AU Mechanisms such as NEPAD and APRM in the Regulation of MNCs

This sub-section will highlight AU measures or policies that can be used to ‘regulate’ the activities of MNCs in Africa. The first AU policy in focus will be the New Partnership for Africa’s Development (NEPAD) which is a developmental initiative under the auspices of the AU geared towards Africa’s development.⁹⁵ NEPAD evolved from the New African Initiative (NAI) which was geared towards the economic growth or development of Africa.⁹⁶ The NAI was adopted by the OAU in 2001 but changed to

⁹³ *Ibid*, p. 12. However,” [t]here are other cases in which the EFCC has brought foreigners to court for grand or lesser forms of corruption”

⁹⁴ However, it has been contended that some laws on corruption in Nigeria have been amended to reflect the provisions of the conventions. Generally, see Akeem Bello, “United Nations and African Union Conventions on Corruption and Anti-Corruption Legislations in Nigeria: A Comparative Analysis”, (2014) 22 (2) *African Journal of International and Comparative Law* (2014) pp. 308-33, 317.

⁹⁵ Funmi Abioye, *The Rule of law in English Speaking African Countries: The Case of Nigeria and South Africa* (PhD Dissertation, University of Pretoria 2011) p. 55; Nlerum Okogbule, *An Appraisal of the Mutual Impact between Globalization and Human Rights in Africa* (PhD Thesis, University of Glasgow 2012) p. 102.

⁹⁶ Abioye *ibid*. However, it should be noted that the adoption of NEPAD by African leaders was a culmination of many developmental initiatives including the Pan African Movement (1990); the Lagos Plan of Action (1980-2000),

NEPAD⁹⁷ which ‘was endorsed in October 2001 at the inaugural meeting of the African Union.’⁹⁸ NEPAD was conceived by a cohort of African leaders including Thabo Mbeki of South Africa, Olusegun Obasanjo of Nigeria and Abdoulaye Wade of Senegal.⁹⁹ The major objective of NEPAD is that it ‘is anchored on the determination of Africans [leaders] to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalizing world.’¹⁰⁰

Thus, the major aim of NEPAD is to drive Africa’s development via increased foreign investment¹⁰¹ however, it has been posited by some scholars that NEPAD promotes neo-liberal policies.¹⁰² One of the aims of NEPAD in the mining or extractive industry in Africa is improving the quality of mineral resource information; creating a regulatory framework conducive for the development of the mining sector; establishing best practices that will ensure efficient extraction of natural resources and minerals of high quality; and to harmonize policies and regulations to ensure compliance with operational costs.¹⁰³ Oshionebo argues that NEPAD has sacrificed sustainable development in lieu of foreign investment.¹⁰⁴

Furthermore, it has been contended that NEPAD promotes self-regulation by MNCs in the extractive industries in Africa.¹⁰⁵ This is reflected in the G8/Africa Kanansakis Summit G8 Africa Action Plan¹⁰⁶ where it is stated that the G8 collaborates with African governments and civil society amongst others to address the linkage between armed

the African Charter for Popular Participation for Development (1990) and the Compact for Africa’s Recovery (2000) amongst others. Generally, see Hesphina Rukato, “The New Partnership for Africa’s Development: Past, Present and Future”, 42 (3) *Africa Insight* (2012) pp. 91-103.

⁹⁷ Abioye, *supra* note 95.

⁹⁸ Okogbule, *supra* note 95, p. 102.

⁹⁹ Abioye, *supra* note 95.

¹⁰⁰ Paragraph 1 of the NEPAD Document. Cited in Okogbule, *supra* note 95, p.103.

¹⁰¹ Oshionebo, *supra* note 19.

¹⁰² *ibid.* Chris Landsberg, “The African Union and the New Partnership for Africa’s Development (NEPAD): Restoring a Relationship Challenged?” 12 (2) *African Journal of Conflict Resolution* (2012) pp. 49-71.

¹⁰³ Paragraphs 156 and 157 of the NEPAD Document

¹⁰⁴ Oshionebo, *supra* note 19, p. 108.

¹⁰⁵ *ibid*

¹⁰⁶ < <http://www.mofa.go.jp/policy/economy/summit/2002/africa.html> >

conflict and the exploitation of natural resources in Africa by ‘supporting voluntary controls... and encouraging the adoption of voluntary principles of corporate social responsibility by those involved in developing Africa’s natural resources.’ Furthermore, in Nigeria, NEPAD is a unit or department under the Presidency headed by ‘the Chief Executive Officer of NEPAD Nigeria who is also the Special Adviser to the President on NEPAD.’¹⁰⁷ The relationship or proximity between the Federal government of Nigeria and NEPAD in Nigeria is prone to abuse and invariably affect the independence and transparency of the NEPAD process.¹⁰⁸

5.1. The Roles of the African Peer Review Mechanism (APRM) in Regulating MNCs in Nigeria

This part of the article will highlight the APRM process in Nigeria with emphasis on its regulatory impacts on the activities of oil MNCs operating in the Nigeria. Nigeria has undergone one APRM review process and she is currently preparing for a second review.¹⁰⁹ The APRM was initiated in 2002 and established in 2003 under the auspices of the implementation framework of the NEPAD process.¹¹⁰ Membership of the APRM is open to all member States of the AU.¹¹¹ Under the APRM process, there are four types of review:¹¹² A base review which is the first review conducted within 18 months after

¹⁰⁷ NEPAD Nigeria Website ‘Departments’ < <http://www.nepadaprm.gov.ng/index.php/ct-menu-item-3/ct-menu-item-11> >

¹⁰⁸ See Chris Landsberg, “The African Peer Review Mechanism: A Political Retort on the AU’s Most Innovative Governance Instrument”, 42 (3) *African Insight* (2012) pp. 104-118, 110-113, on how the NEPAD and APRM process was hijacked by South African government officials to the detriment of the participation of CSOs.

¹⁰⁹ Senator Ireoegbu and Grace Chimezie ‘APRM: Nigeria Ready for a Second Peer Review’, Thisday (online) 18 December 2013 < <http://www.thisdaylive.com/articles/aprm-nigeria-ready-for-second-peer-review/166837/> >

¹¹⁰ APRM Website ‘About APRM’, < <http://aprm-au.org/about-aprm> >

¹¹¹ *Ibid.*

¹¹² According to the APRM Website *ibid.*, on how the APRM review is conducted states thus: “The APRM Review Mission is only one part of the overall Peer Review Process. A typical Review Mission may last for two and a half to three weeks, excluding the preparatory team meetings and the writing of the Country Review Report. The Mission meets with all national stakeholders and Government Departments, Civil Society, including Religious Organizations, Academia, Minorities, Trade Unions, Members of the Judiciary, Parliament and Political Parties; Local Government Representatives, Women’s Organizations, Youth Groups, the Private Sector, including the Informal Sector Business

a country becomes a party to the APRM;¹¹³ The periodic review conducted every two to four years; A member State may request a review outside the framework of the periodically mandated reviews; and finally, early warnings of impending political and economic crisis in a member State may provide the impetus for the conduct or commissioning of a review.

The APRM has been one of the major achievements of the NEPAD process in Africa. NEPAD programmes and projects are divided into six thematic areas; Agriculture and Food Security, Climate Change and National Resource Management, Regional Integration and Infrastructure, Human Development, Economic and Corporate Governance, and Cross-cutting issues (including Gender, Capacity Development and ICT).¹¹⁴ To facilitate the attainment and actualisation of the programmes and projects under NEPAD, a peer review mechanism called the APRM was devised.¹¹⁵ The APRM is voluntary in nature or ‘soft process,’¹¹⁶ however participating countries are committed to adopting ‘appropriate laws, policies and standards, as well as building the necessary human and institutional capacity to ensure that the primary purpose is realised.’¹¹⁷ APRM entails an extensive public participation process led by the government of the country reviewed and culminating in the publication of a National Programme of Action (NPoA) containing objectives and recommendations to guide the stakeholders in the actions required by the civil society, private sector and the government to actualise the vision of the country.¹¹⁸ Thus, the APRM process is actualised through a self-assessment process and constructive dialogue amongst the respective stakeholders.¹¹⁹ The APRM

Federations and/or Operators, Chambers of Commerce, Commercial Banks, Insurance Companies, Professional Bodies - Chartered Accountants, the Legal Profession, etc”

¹¹³ APRM website, *supra* note 110.

¹¹⁴ NEPAD Website ‘About’ < <http://www.nepad.org/about> >

¹¹⁵ Abioye, *supra* note 95, p. 55.

¹¹⁶ Olivier *supra* note 4, p. 114.

¹¹⁷ *Ibid.*

¹¹⁸ *ibid*

¹¹⁹ Andre Mangu, “The African Union and the Promotion of Democracy and Good Political Governance under the African Peer Review Mechanism: 10 Years on”, 6 (1) *African Review* (2014) pp. 59-72.

relies on the use of the Self-Assessment Questionnaire (SAQ) to assist member States in developing or drafting their Preliminary Programme of Action.¹²⁰

The APRM process focuses on four themes in assessing States' compliance with a variety of African and International human rights conventions and standards.¹²¹ The thematic areas enunciated in the APRM Process are democracy and political governance, economic governance and management, corporate governance and socio-economic development. Countries including Ghana, Burkina Faso, Nigeria and Algeria amongst others have participated in the APRM process.¹²² Recently the AU adopted the APRM as the framework for monitoring natural resource sector in Africa.¹²³ This process that commenced in 2010 was to 'streamline the APRM Country Self-Assessment questionnaire and include a section on the governance of extractive industries, could be considered a step in the right direction to develop African-owned schemes for the sector.'¹²⁴ Monitoring of the oil and gas sector is contained in the APRM Country Review Report on Nigeria¹²⁵ (hereinafter Report) which was conducted in October 2008. The report posits that MNCs are responding to pressure from communities and this has reflected in their recent extensive involvement in Corporate

¹²⁰ Olivier *supra* note 4, p. 114. See United Nations Economic Commission for Africa (UNECA) 'Harnessing the African Peer Review Mechanism (APRM) Potential to Advance Mineral Resources Governance in Africa' (2012), < <http://www.uneca.org/publications/harnessing-african-peer-review-mechanism-potential-advance-mineral-resources-governance> > 33 states thus: "[t]he Country Self Assessment Report (CSAR) and the Country Review Report (CRR) comprise a comprehensive assessment of the performance on each of the specific APRM objectives. These findings provide a balanced review of different perspectives and facts as the CSAR voices the perspectives and perceptions of various domestic stakeholders; and the CRM provides an independent and balanced external review of the findings. The National Plan of Action (NPOA) and the Progress Report are prepared by the respective Governments and identify the concrete measures and strategies the country has adopted to improve the management of natural resources."

¹²¹ APRM Website 'Thematic Areas', < <http://aprm-au.org/thematical-areas> >

¹²² For the status of member states in the APRM process, see the United Nations Economic Commission for Africa Website 'Status of Countries', < <http://www.uneca.org/aprm/pages/status-countries> > 33 countries have signed the Memorandum of Understanding acceding to the APRM.

¹²³ Kofi Annan, 'Foreword' in African Progress Panel Report (2013) *Equity in Extractives: Stewarding Africa's Natural Resources for All*, < <http://africaprogresspanel.org/publications/policy-papers/africa-progress-report-2013/> > 6.

¹²⁴ UNECA *Harnessing the African Peer Review Mechanism (APRM) Potential to Advance Mineral Resources Governance in Africa: Issues Paper* (2013) 4.

¹²⁵ APRM Country Review Report No. 8: Federal Republic of Nigeria (June 2009), < <http://aprm-au.org/document/country-review-report-vol-8-nigeria-english-june-2009-0> >

Social Responsibility (CSR) activities.¹²⁶ However, initially oil MNCs contended that they have no legal or moral duty to the oil producing communities beyond the payment of taxes and royalties to government.¹²⁷ Recently, due to intense global pressure and the upsurge in militant and criminal activities in the Niger Delta, oil MNCs have revised their strategies and now engage in community development projects, partnering with NGOs and increased funding of communities development initiatives amongst others.¹²⁸ However, 'stakeholders generally believe that corporations are not doing enough in terms of social investment.'¹²⁹ In Nigeria, there appears to be considerable emphasis on CSR activities of oil MNCs and the report further avers that small and medium sized enterprises (SMEs) and other indigenous companies should also participate actively in the CSR paradigm.¹³⁰

Furthermore, the Report averred that notwithstanding the existence of an environmental regulatory framework in Nigeria, there appears to be insufficient adherence to environmental laws by oil MNCs in Nigeria. Thus, NGOs and the media should continue to apply pressure on oil MNCs to respect environmental laws in Nigeria.¹³¹ Also, the media should continue to expose environmental ills or degradation in Nigeria. Finally, the Report enunciated some recommendations which Nigeria should adhere to. Some of the recommendations include that Nigeria should fully enforce labour laws on the government, trade unions and private sector; raise awareness of environmental matters by relying or using media; and establish a social responsibility

¹²⁶ *Ibid.*

¹²⁷ *Ibid* p. 230.

¹²⁸ APRM Report, *supra* note 125. However, see Eghosa Ekhaton, "Regulating the activities of Oil Multinationals in Nigeria: A Case for Self-regulation", 60 (1) *Journal of African Law* (2016) pp. 1-28.

¹²⁹ APRM *ibid*, p. 233.

¹³⁰ *Ibid*

¹³¹ *Ibid* p. 231.

body or commission whose aim will entail raising the awareness of CSR issues in Nigeria.¹³²

In response to the APRM Report, Nigeria has produced two progress reports enunciating its implementation of the APRM report. In the first progress report,¹³³ the Nigerian government averred that it encourages oil producing communities to engage in dialogue with oil MNCs and government in ensuring the sustenance and implementation of good CSR practices.¹³⁴ Furthermore, the government posited that the proclamation of amnesty for armed militants in the Nigeria Delta has led to a reduction in violent crimes and consolidated existing peace in the Niger Delta.¹³⁵ Also, Chevron Nigeria Limited has launched the Partnership Initiatives in the Niger Delta (PIND) and donated the sum of \$50million in alleviating some of the socio-economic problems in the Niger Delta.¹³⁶ Furthermore, Chevron is collaborating with other stakeholders to develop new strategies for addressing the Niger Delta challenges.¹³⁷

In its second progress report,¹³⁸ the Nigerian government identifies a number of initiatives it has taken to include the establishment of the Legal Aid Council to assist the poorer segments of the society in assessing legal services. Also, the Nigerian government posited that the development of the recent Fundamental Human Rights (Enforcement Procedure) Rules of 2009 has improved access to justice for litigants in human rights enforcement in Nigeria. In the area of CSR, it (Nigerian government) states that the recently developed corporate governance code has brought CSR to more prominence in Nigeria.¹³⁹ Furthermore, the government posits that the new National Tax

¹³² *Ibid* pp. 237-238.

¹³³ Progress Report on Implementation of the National Programme of Action (NPoA) of the Federal Republic of Nigeria: Analysis of the Implementation by FMDAs, 2009 to 2010 Vol II (Main Report) (December 2010).

¹³⁴ First Progress Report *ibid* p. 88.

¹³⁵ *Ibid*, p. 89.

¹³⁶ *Ibid*.

¹³⁷ *Ibid*.

¹³⁸ Nigeria Country Report Part 1: Executive Summary 2013, < <http://aprm-au.org/document/nigeria-progress-report-national-programme-action> > Hereinafter Second Progress Report

¹³⁹ Second Progress Report *ibid*

Policy 'has introduced a fair regime for deductible donations under tax laws to enhance the ability of companies to engage in Corporate Social Responsibility.'¹⁴⁰ Thus, oil MNCs in Nigeria have expanded their scope of CSR into diverse areas such as skills acquisition initiatives, scholarship grants and provision for essential services amongst others.¹⁴¹

The United Nations Commission for Africa (UNECA) in its report on the impact of APRM on mineral resources governance in Africa emphasised the importance of credible public participation in the management of natural resources in the Niger Delta.¹⁴² It further posited that the inhabitants of the Niger Delta appear to be excluded from the management of its natural resources.¹⁴³ Also, UNECA averred in respect of CSR practices of MNCs in the Niger Delta thus:

Ensuring access to state power by the local communities, including minority representation; and utilising public-private partnerships and dialogue between communities and oil companies to support the implementation of Corporate Social Responsibility programmes is critical to support bottom-up development approaches and ultimately will lead to broad-based growth.¹⁴⁴

Thus, this could be one way of MNCs acquiring 'social licence' to operate in the Niger Delta thereby reducing conflicts and entrenching transparency in the management of mineral or natural resources.¹⁴⁵

Arguably, regulation of MNCs can be implied from the NEPAD and APRM processes. Notwithstanding that the aforementioned mechanisms do not expressly provide for the regulation of the activities of MNCs, the analysis in this sub-section accentuates the notion that localisation of regulatory capacity can be extrapolated from

¹⁴⁰ *Ibid*, p. 62.

¹⁴¹ *Ibid*.

¹⁴² UNECA, *supra* note 124, p. 36.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*, p. 36.

¹⁴⁵ *Ibid*.

the AU mechanisms. The Nigerian government has averred in its various country reports on the APRM that it has adopted the recommendations (in the APRM report) and localised the reforms in the oil and gas industry in Nigeria. Thus, this article contends that the APRM has had regulatory impacts on the activities of the oil MNCs in the oil and gas industry in Nigeria.

The next sub-section of this article focuses on the Africa Mining Vision. The African Mining Vision is a recent AU initiative wherein MNC regulation can also be implied.

5.2. Africa Mining Vision

The African Mining Vision (which is a Declaration) was adopted by African Heads of State at the February 2009 AU summit following the October 2008 meeting of African ministers overseeing mineral resource development.¹⁴⁶ The African Mining Vision is a holistic attempt by African leaders integrating mining policies at the local, national and regional levels.¹⁴⁷ The African Mining Vision is Africa's attempt in tackling the menace of the paradox of large mineral wealth and prevalence of poverty in many African States.¹⁴⁸ At the local level, the African Mining Vision aims to contribute to development by ensuring that workers and communities benefit from large scale mining activities and also protecting the environment.¹⁴⁹ Also, the mining vision seeks to ensure that African countries should be able to negotiate contracts with mining MNCs that will generate considerable returns and localise local inputs for its activities.¹⁵⁰

¹⁴⁶ African Mining Vision Website 'About Mining Vision', <<http://www.africaminingvision.org/about.html>>

¹⁴⁷ Ibid

¹⁴⁸ Ibid. See the African Progress Panel Report, *supra* note 123, p. 92 where it is contended that '[a]frica has never suffered from "resource curse". What the region has suffered from is the curse of poor policies, weak governance and a failure to translate resource wealth into social and economic progress. The favourable market conditions created by global resource constraints provide no guarantee that the growth of extractive industries will lead to improvements in the lives of people. But if governments seize the moment and put in place right policies, Africa's resource wealth could permanently transform the continent's prospects.'

¹⁴⁹ African Mining Vision website, *supra* note 146.

¹⁵⁰ Ibid

Furthermore, at the regional level, the mining vision seeks to promote the integration of mining into industrial and trade policy.¹⁵¹ Thus, the mining vision is ‘a first and foremost a developmental mining approach that insists that the royal road to growth is through building economic and social linkages that benefit Africa itself.’¹⁵² Also, the African Mining Vision promotes transparency and public participation in the mining industry in Africa.¹⁵³ Furthermore, the mining vision enjoins mining firms to embrace CSR practices to enhance Africa’s development.¹⁵⁴ The African Mining Vision enjoins African States to ‘shift focus from simple mineral extraction to much broader developmental imperatives in which mineral policy integrates with development policy.’¹⁵⁵

One of the flaws of the mining vision is its focus on the mining industry to the exclusion of other extractive industries such as oil and gas sector. Also, the mining vision has not been adopted or implemented by all African states. The AU should re-designate the mining vision as a regional treaty or convention for it to have considerable impact on the activities of foreign and local mining companies operating in Africa.

The AU has established a working group on the extractive industries. The AU working group on extractive industries and its collaboration with CSOs will be focus of the next section.

¹⁵¹ *Ibid*

¹⁵² *Ibid*

¹⁵³ For an extensive analysis of the mining vision, see UNECA *Minerals and Africa’s Development: The International Study Group on Africa’s Mineral Regimes* (2011), <<http://www.uneca.org/publications/minerals-and-africas-development>>

¹⁵⁴ For example, in 2012 the mining company AngloGold Ashanti, launched the African Mineral Skills Initiative (AMSI) as a vehicle for the implementation of the implementation of mining vision with the support of UNECA. Generally, see Chilenye Nwapi, “Realising the Africa mining vision: the role of government-initiated international development think-tanks. 7 (1) *Journal of Sustainable Development Law and Policy* (2016) pp. 158-182, 162.

¹⁵⁵ Annan, *supra* note 123, p. 6. Furthermore, ‘under the auspices of the African Union, the African Development Bank and the United Nations Economic Commission for Africa, an Action Plan for Implementing the Africa Mining Vision (Action Plan) was adopted in December 2011. ‘The aim of the Africa Mining Vision is to improve human rights in Africa’s mineral sector at national, regional and sub-regional levels through specific activities and monitoring’. See Business and Human Rights Guide Book for Human Rights Institutions: Regional Supplement 1: African Regional Frameworks and Standards on Business and Human Rights (2013) <http://www.nanhri.org/wp-content/uploads/2017/02/A-GUIDEBOOK-FOR-NATIONAL-HUMAN-RIGHTS-INSTITUTIONS.pdf>

5.3. Working Group on Extractive Industries, Environment and Human Rights Violations

The Working Group on the Extractive Industries, Environment and Human Rights Violations (Working Group) is one of the special or subsidiary mechanisms created under the authority of the African Commission.¹⁵⁶ Examples of subsidiary mechanisms created by the African Commission include special rapporteurs, committees and working groups.¹⁵⁷ Also, the African Commission determines the mandate and remit of the subsidiary mechanisms and every chairperson of a subsidiary mechanism is expected to present on its activities to the African Commission at each ordinary session of the Commission.¹⁵⁸

The development of the Working Group can be traced to the decision of the African Commission in its 39th Ordinary Session held in Banjul, Gambia, from 11-25 May 2006 wherein it agreed to conduct a study on human right violations by non-state actors (NSAs) in Africa.¹⁵⁹ The major objective of the study was to map out issues for further research which will contribute to the development of the jurisprudence by the African Commission as a basis for holding NSAs liable for violations of the rights enshrined in the African Charter.¹⁶⁰ During the course of the study, the African Commission received a plethora of reports from stakeholders including NGOs and one of the effects of the study was the establishment of a Working Group on the Extractive Industries, Environment and Human Rights Violations by the African Commission at the 46th Ordinary Session, held in Banjul, The Gambia, from 11-25 November 2009 by virtue of

¹⁵⁶ African Commission on Human and People's Rights Website 'Special Mechanisms', <<http://www.achpr.org/mechanisms/>>

¹⁵⁷ *Ibid*

¹⁵⁸ *Ibid*

¹⁵⁹ African Commission Website 'Working Group on Extractive Industries, Environment and Human Rights Violations: About', <<http://www.achpr.org/mechanisms/extractive-industries/about/>>

¹⁶⁰ *Ibid*

Resolution ACHPR/Res.148 (XLVI) 09 (Resolution on the Working Group on Extractive Industries, Environment and Human Rights Violations).¹⁶¹

The mandate of Resolution states thus:

Examine the impact of extractive industries in Africa within the context of the African Charter on Human and People's Rights; [r]esearch the specific issues pertaining to the right of all peoples to freely dispose of their wealth and natural resources and to a general satisfactory environment favourable to their development; [u]dertake research on the violations of human and people's rights by non-state actors in Africa; [r]equest, gather, receive and exchange information and materials from relevant sources, including Governments, communities and organizations, on violations of human and people's rights by non-state actors in Africa; [t]o inform the African Commission on the possible liability of non-state actors for human and people's rights violations under its protective mandate; [f]ormulate recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and people's rights by extractive industries in Africa; [c]ollaborate with interested donors institutions and NGOs, to raise funds for the Working Group activities; [p]repare a comprehensive report to be presented to the African Commission by November 2011.¹⁶²

This report covers the activities of the Working Group in the inter-session period between May and October 2013.¹⁶³ The Working Group collaborated with the Legal Resources Centre¹⁶⁴ to organise a workshop involving various CSOs operating in Southern Africa (South Africa, Mozambique, Zambia and Zimbabwe).¹⁶⁵ This meeting

¹⁶¹ *Ibid*

¹⁶² African Commission Website '46th Ordinary Session: Resolution on Working Group on Extractive Industries

¹⁶³ Pacifique Manirakiza, *Inter-Session Report* 'presented at the 54th Ordinary Session of the African Commission on Human and People's Rights', (2013) < <http://www.achpr.org/sessions/54th/inter-session-activity-reports/extractive-industries/> >

¹⁶⁴ Legal Resources Centre is South Africa's largest public and human rights law clinic which was established in 1979. Generally see Legal Resources Centre Website, < <http://www.lrc.org.za/bn> >

¹⁶⁵ Manirakiza, *supra* note 163.

served as a useful medium for the Working Group members to “interact with relevant stakeholders, share ideas and best practices, which will contribute to the Working Group’s mandate to examine the impact of extractive industries in Africa.”¹⁶⁶ The Working Group conducted research visits to Zambia, Liberia, Tanzania and the Democratic Republic of Congo.¹⁶⁷ Also, the Working Group visited Lonmin Mine in Marikana, South Africa where many miners died in an accident.¹⁶⁸ The report by the Working Group chairperson made a plethora of recommendations. One recommendation is that all stakeholders (including CSOs, African governments, the extractive industry and national human rights institutions) should collaborate especially in the area of the mapping of the extractive industry in Africa which the Working Group is currently engaged in.¹⁶⁹ Other recommendations of the report include that African States yet to adopt the Extractive Industry Transparency Initiative (EITI) should join in order to enhance transparency in the management of revenue derived from mineral resource exploitation.¹⁷⁰ Also, the report enjoins African States to implement decisions of the African Commission and the submission of the periodic reports to the Commission.¹⁷¹ Finally, the report enjoins African States to collaborate with the Working Group especially in the ‘exchange of information and by granting authorization to conduct research and information missions.’¹⁷²

Furthermore, in 2016, due to the lack of reporting guidelines on the extractive industry (which undermines the monitoring of compliance by African countries) in Africa, the African Commission has mandated the Working Group to ‘elaborate reporting guideliness that adequately guide State Parties on the information they should

¹⁶⁶ *Ibid*, p. 6.

¹⁶⁷ Manirakiza, *supra* note 163.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*, p. 11.

¹⁷⁰ Manirakiza, *supra* note 163.

¹⁷¹ *Ibid*.

¹⁷² *Ibid*, p. 12.

incorporate in their periodic report.’¹⁷³ However, the Working Group is yet to fully develop the guidelines.

Thus, the Working Group is certain to have a direct impact on the regulation of the activities of MNCs in Africa in the near future.

5.4. Roles of CSOs in the AU Mechanisms

CSOs play immeasurable role in the evolution of many AU mechanisms (including conventions). This part of the article will briefly highlight the roles of CSOs and factors that limit the impacts of CSOs in some of the AU mechanisms. Generally, many initiatives have been negatively influenced by the lack of adequate civil society participation. For instance, States compliance with the African Charter on Human and Peoples’ Rights (African Charter)¹⁷⁴ have been minimal.¹⁷⁵ Furthermore under the procedure of the African Court of Human and Peoples Rights, individuals do not have direct access to the court.¹⁷⁶

The African Charter on Democracy, Elections and Governance (ADC) which entered into force in 2012¹⁷⁷ promotes the principles of human rights, democracy and governance.¹⁷⁸ The ADC is said to be ‘the first binding regional instrument adopted by member States of the African Union (AU) that attempts to comprehensively address all

¹⁷³ African commission on Human and Peoples’ Rights 364: Resolution on Developing Reporting Guidelines with Respect to the Extractive Industry – ACHPR/Res. 364 (LIX) 2016
<http://www.achpr.org/sessions/59th/resolutions/364/> .

¹⁷⁴ African Charter of Human and Peoples’ Rights OAU CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 entered into force Oct. 21, 1986.

¹⁷⁵ Stacy-Ann Elvy, “Theories of State Compliance with International Law: Assessing the African Union’s Ability to Ensure Compliance with the African Charter and the Constitutive Act”, 41 (1) *Georgia Journal of International and Comparative Law* (2012) pp. 75-155, 155 posited that the problems include “limited exercise of political will, failure to timely. And uniformly impose sanctions, state reporting failures, and inadequately drafted governing instruments-in order to effectively resolve new and ongoing Crises”.

¹⁷⁶ Ekhatior, *supra* note 9.

¹⁷⁷ African Charter on Democracy, Elections and Governance ratification table
<<http://www.achpr.org/instruments/charter-democracy/ratification/>>

¹⁷⁸ Andre Mangu, “African civil society and the promotion of the African Charter on Democracy, Elections and Governance”, 12 (2) *African Human Rights Law Journal* (2012) pp. 348-372, 350.

of the elements necessary for the establishment of liberal democracies'.¹⁷⁹ By virtue of Article 27 (2) of the ADC, States are enjoined to commit themselves in '[f]ostering popular participation and partnership with civil society.' However, there is no synergy of CSOs in the ADC process, and the roles CSOs should play especially in the monitoring of the ADC.¹⁸⁰ CSOs can also raise the awareness of ADC amongst Africans, partake in its implementation and its popularisation amongst African countries.¹⁸¹ Arguably under the ADC, CSOs do not have formal channels to participate and are marginalised from the process. This is an issue that has been receiving the AU's attention,¹⁸² thus a valuable opportunity was missed when CSOs failed to play a meaningful role in the ADC.

A major objective of NEPAD is 'to eradicate poverty and to place countries, individually and collectively, on a path of sustainable growth and development, and at the same time to participate actively in the world economy and politics.'¹⁸³ However, NEPAD has been criticised for the negligible participation of civil society in the NEPAD process.¹⁸⁴ Some scholars aver that officials of NEPAD were willing to incorporate CSO participation in its activities, however, CSOs were reluctant to collaborate or partner with NEPAD.¹⁸⁵ Thus, it has been posited that African CSOs have been 'poorly organised to take these challenges.'¹⁸⁶

¹⁷⁹ Stacy-Ann Elvy, "Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance", 27(1) *Emory International Law Review* (2013) pp. 41-116.

¹⁸⁰ Generally, see Mangu, *supra* note 178, pp. 369 -370.

¹⁸¹ *Ibid*, pp. 367-368.

¹⁸² African Union Website 'Advocacy Workshop on the Ratification, Domestication and Implementation of the African Charter on Democracy, Election and Governance Kicks Off' Press Release 22nd April 2014, <<http://pa.au.int/en/content/advocacy-workshop-ratification-domestication-and-implementation-african-charter-democracy-el>>

¹⁸³ The New Partnership for Africa's Development (NEPAD) October 2001 (Abuja Nigeria). Cited in Rukato, *supra* note 96, p. 92.

¹⁸⁴ Rukato *Ibid*

¹⁸⁵ *Ibid*, p. 95

¹⁸⁶ Chris Landsberg, "Reflections on the African Union after Decade One", 42 (3) *Africa Insight* (2012) 1-12, p. 10.

The last AU initiative that will be highlighted is the APRM. The APRM is ‘viewed as an important instrument to nudge African States in the direction of democratisation, seen as important for development.’¹⁸⁷ Unlike, the NEPAD, CSO participate in the APRM process actively.¹⁸⁸ Thus, ‘despite the many problems faced by CSO participating in the APRM process a good start has been made in the process to restore good governance practices.’¹⁸⁹ However, the APRM process is voluntary and not every African country has signed up to it. Nigeria has signed up to this mechanism.

However, CSOs have had a positive impact on the activities of some AU initiatives or mechanisms. Thus, there are several examples of CSOs contributing to governance in human rights – fundamental and socio-economic and natural resources management. With regards to human rights, CSOs have been at the forefront of utilising the African Commission in holding African governments responsible for human rights violations¹⁹⁰ including socio-economic ones. Also, in the sphere of management or control of resources, CSOs in Africa have been at the forefront of holding government culpable for environmental degradation in African States.¹⁹¹

The AU has espoused many initiatives and mechanisms but implementation has been a major concern as previous initiatives have shown that amongst other issues, active participation of civil society (including citizens) is a necessary prerequisite for the successful implementation of the AU initiatives. This article will adopt the treatise of Professor Landsberg who averred thus:

¹⁸⁷ Landsberg, *supra* note 102, p. 105.

¹⁸⁸ For an extensive analysis of the roles of CSO in the APRM process see Olivier, *supra* note 4.

¹⁸⁹ Olivier, *supra* note 4, p. 124.

¹⁹⁰ CSOs have played major roles in the development of the African human rights paradigm. Generally, see Olowu, *supra* note 22.

¹⁹¹ The *SERAC* case was filed by CSOs.

...the real strength and success of the AU, NEPAD and other continental initiatives will be determined by the extent to which they empower people and create opportunities for them to improve their lives. In future, the AU, NEPAD, APRM, PAP and other structures, institutions and programmes will continue to be tested on the basis of the impact they have on the lives of ordinary African citizens. Indeed, if they wish to build their credibility in the eyes of the African populace at large, they will have to begin to show that they can be sources for the betterment of their lives – not just economically, although this is very important – but also in the human rights, peace-making, peacekeeping and democratic governance realms.¹⁹²

6. Conclusion

This article has highlighted the potential of regional institutions in regulating the activities of MNCs in Africa. This has been partially successful notwithstanding the lack of explicit regulatory framework in the AU mechanisms or initiatives. This article has argued that the regulation of MNCs in Africa can be extrapolated from many AU mechanisms such as the African Commission on Human and People's Rights, NEPAD, APRM and AU conventions. However, significant gaps remain. One way of regulating the activities of MNCs in Africa is for the AU to have a binding regional treaty that will directly regulate the activities of MNCs in Member States.¹⁹³

¹⁹² Landsberg, *supra* note 186, p. 10.

¹⁹³ However, there is no binding treaty or framework regulating the activities of MNCs in international law. In the international sphere, the preferred approach is the 'soft' law which mainly 'consisting of the adoption of voluntary guidelines for businesses'. Lonel Zamfir, *Towards a Binding International Treaty on Business and Human Rights*. European Parliamentary Research Service (July 2017) pp. 1..[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2017\)608636](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)608636) The most notable international soft law mechanism is the UN Guiding Principles on Business and Human Rights. Other soft law mechanisms include the UN Global Compact, OECD Guidelines for Multinational Enterprises, the ISO 26000 Guidance Standard on Social Responsibility and the International Labour Organisation's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

There have been plethora of suggestions in addressing the regulatory gaps on the regulation of MNCs in the international and regional spheres.¹⁹⁴ These include international tribunal or court to try corporations¹⁹⁵, World Court of Human Rights¹⁹⁶, International Arbitral Tribunal¹⁹⁷, extending the remit of the International Criminal Court to include MNCs¹⁹⁸, proposed binding international treaty¹⁹⁹ and the adoption of the Malabo Protocol in June 2014 in Africa which extended the jurisdiction of the proposed African Court of Justice and Human Rights (African Criminal Court) to include corporate criminal responsibility.²⁰⁰

Recently, there have been increased appetite by the AU, civil society and African states in trying to regulate the activities of multinationals in Africa.²⁰¹ For example, activities of African CSOs in promoting enforceable mechanisms in regulating MNCs²⁰², the adoption of the Malabo Protocol by AU and activities of the Working Group geared towards the development of guiding principles on MNCs.²⁰³ This paper also proposes the development of a binding international treaty by the AU based on the erstwhile UN norms to regulate the activities of MNCs in Africa.

¹⁹⁴ International Commission of Jurists (ICJ), *Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises* (October 2016) pp 1-45, 6-7.

¹⁹⁵ ICJ *ibid*; Luis Gallegos, L. & Daniel Uribe, "The Next Step against Corporate Impunity: A World Court on Business and Human Rights?" 57 *Harvard Law Review* (2016) pp. 7-10.

¹⁹⁶ ICJ *supra* note 194; Julia Kozma *et al*, A World Court of Human Rights- Consolidated Draft Statute and Commentary (May 2010) pp. 1-28. <http://cadmus.eui.eu/handle/1814/20880>

¹⁹⁷ ICJ *ibid*; Claes Cronstedt *et al*, *An International Arbitration Tribunal On Business & Human Rights – Reshaping The Judiciary* (April 2014) <https://business-humanrights.org/en/pdf-an-international-arbitration-tribunal-on-business-human-rights-reshaping-the-judiciary-version-three>

¹⁹⁸ Martin-Joe Ezeudu, "Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court." 11 (1) *African Human Rights Law Journal* (2011) pp. 23-56. Kamil Omoteso & Hakeem Yusuf, "Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism." 13 (1) *Critical Perspectives on International Business* 13.1 (2017) pp. 54-71.

¹⁹⁹ ICJ *supra* note 198; Zamfir *supra* note 193.

²⁰⁰ Joanna Kyriakakis, "Article 46C: Corporate Criminal Liability at the African Criminal Court"(2017) pp. 1-42. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970864

²⁰¹ Kyriakakis *ibid*

²⁰² 'Declaration of the African Coalition for Corporate Accountability (ACCA)' (November 2013), which has been endorsed by 89 organisations from 28 countries across Africa <http://www.accahumanrights.org/en/>. Kyriakakis *supra* note 200 p.3

²⁰³ African Commission *supra* note 173.

Africa has been the epicentre of the devastating effects of the activities MNCs and hence '.... transnational corporations operating primarily out of the global North have enjoyed de facto impunity for human rights abuses related to their global business activities, particularly those in the global South'.²⁰⁴ Thus, there is ample justification for the amendment to the Malabo Protocol by the AU. Article 46C is entitled 'Corporate Criminal Liability' and the proposed regional court shall have jurisdiction over legal persons, with the exception of states.²⁰⁵ Corporations are subject to the jurisdiction of the proposed court under the following grounds. These include 'corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.'²⁰⁶ Also, a policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.'²⁰⁷ Furthermore, 'corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.'²⁰⁸ Finally, 'knowledge may be possessed within a corporation even though the relevant information is divided between the corporate personnel.'²⁰⁹ Arguably, these provisions on corporate criminal responsibility will enable African states to respond 'more effectively to challenges posed by corporations.'²¹⁰ Notwithstanding that the protocol is yet to be ratified, however, there is impetus for a regional criminal court in Africa. Some African countries have withdrawn from the ICC and they are clamouring for an African Criminal Court.²¹¹ The

²⁰⁴ Joanna Kyriakakis 'Corporate Criminal Liability at the African Criminal Court Briefing Paper', (2016) pp.1-11 http://www.africancourtresearch.com/wp-content/uploads/2016/07/Kyriakakis_Briefing-Paper_-ACRI-2016-Meeting.pdf

²⁰⁵ 46C (1) Malabo Protocol

²⁰⁶ 46C (2) Malabo Protocol

²⁰⁷ 46C (3) Malabo Protocol

²⁰⁸ 46C (4) Malabo Protocol

²⁰⁹ 46(4) Malabo Protocol

²¹⁰ Matiangai Sirleaf, "The African Justice Cascade and the Malabo Protocol." *International Journal of Transitional Justice* 11 (1) (2017) pp.71- 91.

²¹¹ Manisuli Ssenyonjo, "State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia." 28 (3) *Criminal Law Forum* (2017) pp.1-57.

Malabo Protocol needs 15 ratifications by African states to become operational. Presently, it has 10 (ten) country signatures and 0 (zero) ratifications.²¹² African states should endeavour to ratify the Protocol in earnest to enhance the corporate criminal liability paradigm in Africa. The proposed African Criminal Court is the first international court with direct jurisdiction over MNCs and an exemplar of the phrase ‘African solutions to African problems.’²¹³

Furthermore, in 2016, due to the lack of reporting guideliness on the extractive industry (which undermines the monitoring of compliance by African countries) in Africa, the African Commission has mandated the Working Group on Extractive Industries, Human Rights and Environment to ‘elaborate reporting guideliness that adequately guide State Parties on the information they should incorporate in their periodic report. The Chairperson of this Working Group (Solomon Ayele Dersso) in September 2017, organised a second expert consultative meeting on the ‘Drafting of Guidelines for State Reporting on Extractive Industries, Human Rights and the Environment.’²¹⁴ The draft Principles and Guidelines on State Reporting on Extractive Industries, Human Rights and Environment was reviewed by internal and independent experts.²¹⁵ The draft has been presented for further stakeholder’ consultation at the 61st

²¹² Table of Countries who have signed and ratified the Malabo Protocol

[https://au.int/sites/default/files/treaties/7804-sl-](https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf)

[protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf](https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf)

²¹³ ‘African solutions to African problems is when ‘African states must look inward for it developmental needs rather than on the Global North’. See Zekeri Momoh, "African solutions to African problems: A Critical Appraisal." *Journal of African Union Studies* 5 (1) (2016) pp. 39, 62.

²¹⁴ Solomon Dersso Inter-Session Activity Report (May 2017-October 2017) Presented to the Ordinary Session of the African Commission on Human and Peoples’ Rights http://www.achpr.org/files/sessions/61st/inter-act-reps/289/eng_comm_dersso_inter_session_ar_61st_os.pdf

²¹⁵ *Ibid*

Ordinary Session of the African Commission.²¹⁶ Also, the aim of the policy is to localise the UN Guiding Principles and advance guidance for businesses operating in Africa.²¹⁷

However, this policy is 'soft law' centred and 'raises questions about whether the policy will ever be implemented.'²¹⁸ In essence, soft law has not been successful in preventing corporate human rights abuses. Notwithstanding these shortcomings, the policy focuses on major issues not limited to land grabs and environmental pollution.²¹⁹

Furthermore, this article advocates for the development of a binding regional treaty to regulate the activities of MNCs under the auspices of the AU. For example, the African Commission Working Group on Extractive Industries, Human Rights and Environment can be mandated by the AU to develop the treaty alongside its work on the reporting guidelines on MNCs. There is already an appetite by African states for a binding international treaty regulating the activities for MNCs. For example, African states voted for the recent resolution that UN Human Rights council should establish a working group to negotiate the feasibility of a binding international treaty regulating activities of the MNCs.²²⁰ Also, the Malabo Protocol is a further proof that African states will be willing to develop a binding treaty.

This paper advocates that the erstwhile UN norms should be the basis of any treaty that will be developed by the AU. There have been many attempts by the UN to develop a binding treaty. In 2003, a Working Group on the Working Methods and Activities of TNCs developed a set of draft Norms on the Responsibilities of Transnational

²¹⁶ Dersso *supra* note 214. Also the Working Group is in the process of 'finalizing the Background Study on Extractive Industries and Environment in Africa.' Dersso *ibid*, p. 5.

²¹⁷ Romola Adeola, *Why the African Union must press ahead with a Business and Human Rights Policy*, *The Conversation* (2017) <http://theconversation.com/why-the-african-union-must-press-ahead-with-a-business-and-human-rights-policy-75712>

²¹⁸ *Ibid*

²¹⁹ Adeola *ibid*

²²⁰ John Ruggie, "The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty." *IHBR Commentary* 8 (2014) pp. 1-8.

Corporations and Other Business Enterprises with Regard to Human Rights (Norms).²²¹ The norms “embody moral and political commitments of governments and corporations and represent standards of law in development (or soft law)”.²²² Also, the Norms sets out positively a list of human rights obligations expected of companies and also sets out the several ways of monitoring and enforcement.²²³ Notwithstanding that the norms were non-binding, they were formulated in treaty-like manner.²²⁴ The norms contained provisions focusing on non-discrimination, right to security, right of workers and respect of national sovereignty amongst others. Thus, the norms contained provisions mandating MNCs to respect a plethora of international human rights obligations. The norms also provided for remedy in cases of violations committed by MNCs.²²⁵ Due to the ‘hard law’ nature of the Norms, it was rejected by MNCs and businesses.²²⁶ Also, as a consequence of the sustained resistance and rejection by the corporate interests, the UN Human Rights Commission declined to adopt the Norms. Thus, the ‘main reason for their failure is considered to be the fact that they were imposing obligations directly on corporations rather than the state’.²²⁷

This paper avers that the norms should be adopted as the basis of any proposed treaty on MNCs by the AU. The proposed AU treaty should apply to both national and international companies in Africa to avoid accusations of bias and discrimination (the UN norms also applied to both national and MNCs). For example, African states acceding to the treaty will be duty bound to make sure that both national and

²²¹ Pierre Thielbörger and Tobias Ackermann. "A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?" *Indiana Journal of Global Legal Studies* 24(1) (2017) pp. 43-79.

²²² Engobo Emesch *et al*, "Corporations, CSR and Self Regulation: What lessons from the global financial crisis?" 11(2) *German Law Journal* (2010) pp. 230-250, 242.

²²³ Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability* (2004) pp. 1-35 <https://www.amnesty.org/en/documents/ior42/0002/2004/en/>

²²⁴ Thielbörger & Ackermann *supra* note 221.

²²⁵ Zamfir *supra* note 193.

²²⁶ Ekhatior *supra* note 128, p. 9.

²²⁷ Zamfir *supra* note 193, p.3

international corporations are properly regulated. Opponents or critics of this might contend that regulating MNCs by AU will act as a dis-incentive in attracting FDI to the continent. As I have argued elsewhere, a well regulated industry will attract more investors than a poorly regulated sector.²²⁸

Furthermore, the treaty should focus on issues like remedies, access to justice, expected due diligence by companies and remedial mechanisms. Some of these concepts can be localised in existing AU mechanisms such as the African Charter on Human Rights (especially articles 21 which focuses on the right to free disposal of wealth and natural resources and 24 which is on right to a general satisfactory environment in Africa), African Commission and the proposed amendment to the Malabo Protocol. Also, the AU should provide CSOs with the powers to monitor and enforce the treaty. This will by-pass the conundrum inherent in the regulation of MNCs wherein different subsidiaries are registered in various countries and reliance on domestic regulation of such entities

In conclusion, any potential binding AU treaty on regulation of MNCs should operate within the existing international (including AU) pluralist regulatory framework consisting of African Charter on Human and Peoples' Rights, African Commission, NEPAD, APRM, Working Group, soft law and national law amongst others. In essence, if the institutions of the AU actively promote good governance, the incidence of corporate irresponsibility might be reduced on the continent.

²²⁸ Eghosa Ekhaton, "Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation" 21 *Annual Survey of International and Comparative Law* (2016) pp. 43, 48-49, 93.