

The African Human Rights System's Response to Corporate Conduct that Harms People and the Environment

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SUMMARY

Corporations possess the economic power and resources to contribute positively to the realisation of human rights. However, they have been linked to human rights abuses, frequently affecting the environment and people residing in close proximity to their operations. This state of affairs challenges the traditional state-centric nature of international human rights law that recognises that the state is the sole actor bound by human rights obligations. While the African human rights system does not overhaul international human rights law by expressly holding corporations accountable for human rights violations, it does recognise their complicity. This article explores the African Commission's integral role in holding states accountable for protecting individuals within their jurisdiction from corporate interference with their right to a healthy environment. Drawing insights from the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (SERAC), the article reveals the African Commission's guidance to states on measures to safeguard the right to a healthy environment. Also, the Commission's proactive stance in offering soft law guidance applicable to corporations is commended as it encourages a culture of accountability. While the African human rights system has made positive strides, the state remains the primary enforcer of corporate accountability, and there is still a great need for multifaceted efforts to foster accountability among corporations operating on the continent.

KEYWORDS: corporate accountability, African human rights system, right to a healthy environment

1 INTRODUCTION

Historically, human rights have been a bulwark against the state but not against non-state actors.¹ States were the sole actors who could potentially

* The author gratefully acknowledges the financial support of the National Research Foundation of South Africa (grant number: UID 138665) through the South African Research Chair in the Law of the Sea and Development in Africa

be bound by human rights law, and thus, only their conduct could lead to responsibility in international law.² However, in this era of globalisation, human rights abuses occur owing to the conduct of a multiplicity of actors.³ This article focuses on corporations' conduct that causes harm to people and the environment because while any company can violate human rights and resist accountability, corporations are more prone to engaging in a broader range of human rights abuses across different contexts. Additionally, owing to their significant power and influence, corporations are more likely to resist, delay, or evade taking accountability for these violations.⁴

An illustrative example is the subsidiary of a multinational corporation that operates the world's second-largest open-cast mine in a rural community. This subsidiary, also the largest private employer in the host state, allegedly discharged toxic matter from the mine into water courses that serve impoverished rural farming communities that use the water courses as their only source of water for themselves, their livestock, and irrigation for their crops. Consequently, nearly 2000 people allege that the repeated release of toxic substances from the mine over approximately 15 years has adversely impacted both their health and farming activities.⁵

This relationship between corporations in the extractive industry and their host communities, marred by human rights violations, is pervasive across the African continent.⁶ These actors and the adverse impact of their conduct

¹ Chirwa and Mbazira "Constitutional Rights, Horizontality, and the Ugandan Constitution: An Example of Emerging Norms and Practices in Africa" 2020 18 *International Journal of Constitutional Law* 1231 1233; see also Steiner *International Law* 3ed (2010) 803. In this article, non-state actors are understood as a heterogeneous crowd that share only the legal fact of not being a state. Papanicolopulu and Rocha "Oceans, Climate Change and Non-State Actors" in McDonald, McGee and Barnes *Research Handbook on Climate Change, Oceans and Coasts* (2020) 196.

² Reinisch "The Changing International Legal Framework for Dealing with Non-State Actors" in Alston (ed) *Non-State Actors and Human Rights* (2005) 78.

³ Vandenhoe "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward" 2013 5 *European Journal of Human Rights* 808; Bilchitz "Corporations and the Limits of State-based Models for Protecting Fundamental Rights in International Law" 2016 23 *Indiana Journal of Global Legal Studies* 143 144 and 148.

⁴ Deva *Regulating Corporate Human Rights Violations: Humanising Business* (2012) 13; see also Joseph "Taming the Leviathans: Multinational Enterprises and Human Rights" 1999 46 *Netherlands International Law Review* 171–203 173, who writes "[t]here is no doubt that [multinational enterprises (MNE)] can and do perpetrate human rights abuses, like probably all entities. The effects of MNE abuse, however, amplified by the inherent power of MNEs".

⁵ *Vedanta Resources PLC v Lungowe* [2019] UKSC 20 par 1.

⁶ See Pegg and Zabbey "Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood Structures in the Niger Delta" 2013 48 *Community Development Journal* 391–405 401; Idemudia, Tuokuu and Essah "The Extractive Industry and Human Rights in Africa: Lessons from the Past and Future Directions" 2022 78 1 *Resources Policy* 1–8; Children of Kabwe "Children of Kabwe: Court Filings" (undated) <https://www.childrenofkabwe.com/court-filings> (accessed 2024-01-02); Business and Human Rights Resource Centre "Zimbabwe: Chinese Mining Companies under the Spotlight for Human Rights Violations of Employees" (21 October 2022) <https://www.business-humanrights.org/en/latest-news/zimbabwe-chinese-mining-companies-under-the-spotlight-for-human-rights-violations-of-employees/> (accessed 2024-01-02); RAID "Tanzania Human Rights Victims File First Ever Legal Case in Canada against Barrick Gold" (2022) <https://raid-uk.org/tanzanian-human-rights-victims-file-first-ever-legal-case-in-canada-against-barrick-gold/> (accessed 2024-01-02); Amnesty

on people and the environment challenge the traditional view of the role of the state as the sole actor bound by human rights obligations.⁷ It presents a dilemma: if the traditional view is correct, then human rights obligations do not apply to these non-state actors.⁸ As a result, they can adversely impact human rights and escape legal liability.⁹ In an attempt to “square this circle”, international human rights law addresses the conduct of non-state actors that may adversely affect human rights indirectly through the obligations of state parties to human rights treaties.¹⁰

This article analyses the response of the African human rights system towards non-state actors’ conduct that infringes upon human rights, using corporations as an example of a non-state actor. There are four major parts to the article. The following section situates the discussion within the broader framework of international human rights law. There is a dearth of cases in which the African Commission on Human and Peoples’ Rights (African Commission) has interpreted and applied article 24 of the 1981 African Charter on Human and Peoples’ Rights (African Charter), which is a standalone right of “[a]ll peoples ... [to] generally satisfactory environment favourable to their development”.¹¹ Therefore, the third section focuses on the most instructive decision to date of the African Commission on this right: the *SERAC* decision.¹² This decision is also noteworthy because it illustrates the African human rights system’s approach to human rights violations involving non-state actors. Following an analysis of the impact of the African Commission’s jurisprudence, the article concludes that the buck stops with states to prevent corporate perpetrators of environmental harm and other human rights violations from falling through the system’s cracks and evading accountability.

International “Mozambique: ‘Our Lives Mean Nothing’: The Human Cost of Chinese Mining in Nagonha, Mozambique” (2018) <https://www.amnesty.org/en/documents/afr41/7851/2018/en/> (accessed 2024-01-02).

⁷ Vandenhoe 2013 *European Journal of Human Rights* 808; Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144 and 148; Deva “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” 2003 19 *Connecticut Journal of International Law* 1 1.

⁸ Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144–145.

⁹ Maqakachane “Horizontal Application of the Bill of Rights: Comparative Perspective” 2018 26(2) *Lesotho Law Journal* 7–8.

¹⁰ Shelton and Gould “Positive and Negative Obligations” in Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) 564; Crawford Brownlie’s *Principles of Public International Law* (2019) 630; Kinley and Tadaki “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law” 2003 44 *Virginia Journal of International Law* 937; Steiner “International Protection of Human Rights” in Evans (ed) *International Law* 3ed (2010) 803; Scott “Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights” in Eide, Krause, Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* 2ed (2001) 568–587.

¹¹ The 1981 African Charter on Human and Peoples’ Rights UNTS 1520 245. Adopted 27/06/1981; EIF 21/10/1986.

¹² Communication No 155/96 (2001).

2 INTERNATIONAL HUMAN RIGHTS LAW AND NON-STATE ACTORS

International human rights law has become the dominant frame for international debates on corporate accountability.¹³ Under the old orthodoxy,¹⁴ international human rights law remains state-centric.¹⁵ Within this system, states are the principal decision-makers who engage in negotiations to willingly assume obligations through various treaties.¹⁶ Since World War II, states have committed themselves to ensuring the realisation of the human rights of individuals in numerous international instruments.¹⁷ International human rights law, however, does not simply regulate the relationship between states but also the relationship between a duty-bearing state and rights-bearing non-state actors under its jurisdiction.¹⁸ As a result, in international human rights law, individuals are rights-holders, and states are the primary duty-bearers who assume the obligations that flow from these entitlements.¹⁹ The sole actors who could be bound by human rights law are states, and thus, only their conduct could lead to responsibility in international law.²⁰

The growing power and influence of corporations and their capacity to greatly impact human rights challenge the notion that the state is the sole actor bound by human rights obligations.²¹ Consequently, a non-state actor such as a corporation could potentially adversely impact human rights and evade legal responsibility.²² In some sense, “it would be folly to train our sights only on the traditional target.”²³ Nevertheless, international human rights law has sought to reconcile this challenge to the traditional state-centric approach by addressing the conduct of non-state actors that impair or infringe on human rights indirectly through the obligations of State Parties to human rights treaties.²⁴

¹³ Morgera “Corporate Accountability” in Morgera and Kulolesi (eds) *Research Handbook on International Law and Natural Resources* (2016) 130.

¹⁴ Traditionally understood, international law is primarily a corpus of rules binding states in their relations with each other. Jennings and Watts *Oppenheim’s International Law* 9ed (2008) 4 par 1.

¹⁵ *Ibid.*

¹⁶ Vandenhoele 2013 *European Journal of Human Rights* 804–835 809; Bilchitz 2016 *Indiana Journal of Global Legal Studies* 143–170 146.

¹⁷ Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144.

¹⁸ De Schutter *International Human Rights Law: Cases, Materials, Commentary* (2010) 11; Steiner in Evans *International Law* 803.

¹⁹ Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144.

²⁰ Reinisch in Alston *Non-State Actors and Human Rights* 78.

²¹ Bilchitz *Fundamental Rights and the Legal Obligations of Business* (2022) 59; Grossman and Bradlow “Are we being Propelled towards a People-Centred Transnational Legal Order” 1993 9 *American University Journal of International Law and Policy* 1–25 9; Vandenhoele 2013 *European Journal of Human Rights* 808; Deva 2003 *Connecticut Journal of International Law* 1–57 1.

²² Maqakachane 2018 26(2) *Lesotho Law Journal* 1–27 7–8.

²³ Madlanga “The Human Rights Duties of Companies and Other Private Actors in South Africa” 2018 29 *Stellenbosch Law Review* 359–378 363.

²⁴ Shelton and Gould in Shelton *The Oxford Handbook of International Human Rights Law* 564; Crawford *Brownlie’s Principles of Public International Law* 630; Kinley and Tadaki

Through the state's duty to protect, a state must take measures to ensure third parties do not interfere with the enjoyment of guaranteed rights of individuals in its territory and/or within its jurisdiction.²⁵ Therefore, the state, as the principal duty bearer, is responsible for creating human rights obligations for non-state actors in its domestic legal system.²⁶ This means that the state establishes direct recourse that individuals can take against non-state actors that violate their human rights and imposes on such actors obligations to either refrain from certain conduct (negative obligations) or to take specific measures to uphold guaranteed human rights (positive obligations).²⁷ Regarding the spatial application of a state's duty to protect, it applies to individuals in its territory and/or within its jurisdiction. In other words, this duty does not stop at the limits of a state's territorial borders but may apply to individuals and non-state actors beyond that, provided that the sovereignty of another state is not diminished.²⁸

Prior to discussing the African human rights framework, it is important to acknowledge that attempts to regulate the conduct of corporations with respect to human rights have ranged between soft law and hard law instrument proposals and initiatives. Consequently, for decades, business and human rights have occupied a prominent position on the international community's agenda.²⁹ Various standard-setting initiatives have been proposed and, at times, implemented to address corporations' lack of accountability for human rights violations.³⁰ The first three initiatives were initiated in the 1970s by the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD), and the International Labour Organisation (ILO). However, only the initiatives by the OECD and

"From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" 2003 44 *Virginia Journal of International Law* 931–1023 937.

²⁵ Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 23: The Right to Just and Favourable Conditions of Work (Art 7 of the International Covenant on Economic, Social and Cultural Rights)* (27 April 2016) E/C.12/GC/23 par 59; CESCR *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (10 August 2017) E/C.12/GC/24 par 26.

²⁶ Bilchitz 2016 *Indiana Journal of Global Legal Studies* 145.

²⁷ CESCR *General Comment No 24* par 4.

²⁸ *Ibid*; CESCR *Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights* (20 May 2011) E/C.12/2011/1 par 5–6.

²⁹ Much ink has been spilled on the debates on business and human rights, some key texts in those debates are Deva and Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (2017); De Schutter "Towards a New Treaty on Business and Human Rights" 2016 1 *Business and Human Rights Journal* 41–67; Jägers "UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?" 2011 29 *Netherlands Quarterly of Human Rights* 159–163; Kinley and Tadaki 2003 *Virginia Journal of International Law* 931–1023; Muchlinski *Multinational Enterprises and the Law* (2007); Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" 2001 *Yale Law Journal* 443–545; Mutua "Standard Setting in Human Rights: Critique and Prognosis" 2007 29 *Human Rights Quarterly* 547–630; Ramasastry "Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability" 2015 14 *Journal of Human Rights* 237–259; Bilchitz *Fundamental Rights and the Legal Obligations of Business*.

³⁰ There are numerous standard-setting initiatives that cut across sectors, and it would be impossible to analyse all of them; see MSI Integrity's Report, which analyses about 40 initiatives. MSI Integrity *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (2020).

ILO, namely the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the Tripartite Declaration), were adopted and remain in force.³¹ The UN's Draft Code of Conduct,³² which proposed binding provisions on transnational corporations,³³ was strongly resisted by powerful UN member states and was ultimately never adopted.³⁴

In 1999, the UN launched the Global Compact to provide an international framework for companies to develop and promote global value-based management.³⁵ The Global Compact focuses on cooperation with the business community rather than a confrontational code-of-conduct approach. It encourages best practices and convergence in corporate practices around universally shared values.³⁶ Two decades after its inception, this voluntary, non-legally binding initiative lauds itself as “the world's largest sustainability initiative”.³⁷ In 2011, the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), establishing the most authoritative statement adopted at the UN level of human rights duties of states and responsibilities of companies.³⁸ The principles are widely accepted by business and civil

³¹ The latest updates of the guidelines are available at OECD “OECD Responsible Business Conduct: OECD Guidelines for Multinational Enterprises” (undated) <https://mneguidelines.oecd.org/mneguidelines/> (accessed 2023-12-01). The Tripartite Declaration was amended in 2000, 2006, 2017 and 2022; see further ILO “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy” (24 March 2023) https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (accessed 2023-12-01).

³² Draft United Nations Code of Conduct on Transnational Corporations *International Legal Materials* (1983) 626–640.

³³ Clause 13 of the Draft United Nations Code of Conduct on Transnational Corporations *International Legal Materials* 626–628, provided that: “[t]ransnational corporations should/shall respect human rights and fundamental freedoms in the countries they operate ... [and] should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion.”

³⁴ UN General Assembly *Report of the Economic and Social Council: Note by the Secretary General A/47/446 (15 September 1992)*, Forty-seventh session par 2; UN Economic and Social Council Commission on Human Rights *The Realisation of Economic, Social and Cultural Rights: The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of All Human Rights, in Particular Economic, Social and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject-Matter* (2 July 1996) E/CN.4/Sub.2/1996/12 par 62; Khoury and Whyte *Corporate Human Rights Violations: Global Prospects for Legal Action* (2017) 29–30.

³⁵ Morgera “The UN and Corporate Environmental Responsibility: Between International Regulation and Partnerships” 2006 15 *Review of European Community and International Environmental Law* 93–109 98.

³⁶ *Ibid.*; Kell and Ruggie “Global Markets and Social Legitimacy: The Case for the ‘Global Compact’” 1999 8 *Transnational Corporations* 101–120 104.

³⁷ United Nations Global Compact “Who We Are” (undated) https://www.unglobalcompact.org/what-is-gc_9 (accessed 2021-02-26); UN “Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles” (undated) <http://www.mas-business.com/docs/global%20compact%20guide.pdf> (accessed 2021-02-25) 4.

³⁸ Human Rights Council for Human Rights and Transnational Corporations and Other Business enterprises A/HRC/RES/17/4 par 1. The UN Guiding Principles are annexed to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. John Ruggie Guiding

society as a practical guide for states and companies to enhance human rights compliance in business activities.³⁹ There has now been a major move, spearheaded by a UN open-ended intergovernmental working group (OEIGWG), towards the development of a legally binding instrument, with the state still as the principal duty-bearer, to regulate transnational corporations and other business entities' activities in international human rights law.⁴⁰ The text of this treaty is still being negotiated.⁴¹ This section outlined the indirect approach of international human rights law in dealing with non-state actors' conduct that threatens or violates guaranteed human rights. The following section examines how this indirect approach is evident in the African human rights system.

3 THE AFRICAN HUMAN RIGHTS SYSTEM

3.1 Overview

The African Charter is the core instrument of the African human rights system. It was adopted under the auspices of the Organisation of African Unity (now the African Union).⁴² To date, almost every member of the African Union has ratified the African Charter.⁴³ In addition to civil and political rights, the Charter recognises economic, social, and cultural rights and collective or group rights.⁴⁴ A distinguishing attribute of the African Charter is that it does not bifurcate human rights according to generations, as was a staple of international law at the time of its drafting and adoption.

Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (21 March 2011) A/HRC/17/31.

³⁹ Deva and Bilchitz *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) xxi–xxii.

⁴⁰ See OHCHR "Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights" (undated) <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally> (accessed 2023-11-27).

⁴¹ For the process and updates on the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises from 2015–2023; see OHCHR <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally>.

⁴² Organisation for African Unity *Charter for the Organisation of African Unity* UNTS 1963 479 39. Adopted 25/05/1963; EIF 13/09/1963; the 2000 *Constitutive Act of the African Union* UNTS 2158 3. Adopted 11/07/2000; EIF 26/05/2001; Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 9; Heyns "The African Regional Human Rights System: The African Charter" 2004 108 *Penn State Law Review* 679 681; see Viljoen *International Human Rights Law in Africa* (2012) 152–212, for a discussion on the African Union human rights architecture.

⁴³ With the exception of Morocco. See African Union "List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights" (2017) https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 2024-01-02).

⁴⁴ It is beyond the scope of this article to discuss the meaning of peoples' rights. See Dersso "The Jurisprudence of the African Commission on Human and Peoples' Rights with respect to Peoples' Rights" 2006 6 *African Human Rights Law Journal* 358 358–381 and Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/03 (2003) 147–162.

The Charter articulates the guaranteed rights as indivisible and interdependent.⁴⁵ Notably, article 24 guarantees a right of “[a]ll peoples to a general satisfactory environment favourable to their development”. The formulation of this environment right as a people’s or collective right is notable because it allows for claims to be brought by groups rather than individuals. This provision may also have significant economic, social, and cultural implications, especially for communities whose physical and economic security is directly dependent on the environment and natural resources.⁴⁶ However, the dearth of case law makes examining the extent of protection that article 24 may offer such communities extremely challenging.

State Parties to the African Charter undertake a composite of negative and positive obligations to respect, protect, promote, and fulfil all of the rights in the instrument.⁴⁷ The obligation to respect requires states to refrain from interfering with the enjoyment of all guaranteed rights.⁴⁸ The obligation to protect obliges states to take measures to protect right-holders against interference from political, economic, and social sources.⁴⁹ In this regard, a state must create and enforce a domestic legal system that protects human rights and adequately responds to claims of violations.⁵⁰ Linked to this duty is the obligation to promote, under which states must ensure individuals enjoy all enshrined human rights by, for instance, promoting tolerance, raising awareness, and building infrastructure.⁵¹ Lastly, the obligation to fulfil requires states to take steps “to move its machinery towards the actual realisation of the [guaranteed] rights”.⁵² This may entail directly providing basic needs like food or resources that can be used to meet basic needs.⁵³

The utilisation of this typology by the African Commission implies that the realisation of each right in the African Charter by a state party may involve duties to respect, protect, promote, and fulfil. Simply put, a state party is not limited to only complying with one specific obligation.⁵⁴ Furthermore, the disaggregation of obligations benefits states in understanding their treaty

⁴⁵ See preambular paragraph 8 of the African Charter.

⁴⁶ Buys and Lewis “Environmental Protection through European and African Human Rights Frameworks” 2022 26(6) *International Journal of Human Rights* 949 960.

⁴⁷ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No 155/96 (2001) par 44. For a different view on the scope of the obligations arising from article 1, see Anyangwe “Obligations of States Parties to the African Charter on Human and Peoples’ Rights” 1998 10 *African Journal of International and Comparative Law* 625–659 629–635; for e.g., *George Iyanyori Kajikabi v The Arab Republic of Egypt* African Commission on Human and Peoples’ Rights Communication 344/07 (7 August 2020) par 251–252, describes the positive and negative obligations imposed by article 18.

⁴⁸ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* *supra* par 45.

⁴⁹ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* *supra* par 46.

⁵⁰ Anyangwe 1998 *African Journal of International and Comparative Law* 630.

⁵¹ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* *supra* par 46.

⁵² *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* *supra* par 47.

⁵³ *Ibid.*

⁵⁴ Coomans “The Ogoni Case Before the African Commission on Human and Peoples’ Rights” 2003 52(3) *International and Comparative Law Quarterly* 749 753.

obligations. This aids them in assessing whether their actions, policies, and practices conform with the obligations set out in the Charter. State parties must adopt necessary measures to give effect to the rights, duties, and freedoms enshrined in the Charter. If a state fails to ensure the rights in the Charter, this may constitute a violation regardless of whether the state or its agents are not the immediate cause of the violation.⁵⁵

State parties can be held accountable for violations of the African Charter through complaints brought before the African Commission or the African Court on Human and Peoples' Rights (African Court). The African Commission provides mechanisms for inter-state and individual communications and a state reporting procedure.⁵⁶ The individual communications procedure provides the clearest possibility of holding state parties accountable for their commitments under the African Charter.⁵⁷ Through this procedure, individuals and non-governmental organisations (NGOs) can bring matters against one or more states before the Commission.⁵⁸ Without a "victim" requirement, the complainants are not obligated to show that they are directly affected by the alleged breach.⁵⁹ Moreover, it is not even necessary for the party filing a complaint to be a citizen of or be registered in a state that is a state party to the Charter or in the state against which the communication is made.⁶⁰ Consequently, NGOs based in other states are also permitted to bring matters before the Commission.⁶¹ Generally, the findings of this quasi-judicial body are regarded as recommendatory and thus not legally binding.⁶² This may explain the relationship between the African Commission and State Parties, which is mired by defiance, with the latter facing the slightest consequences for non-compliance with the African Commission's recommendations.⁶³

⁵⁵ *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* Communication No 207/1997 (2001) par 42.

⁵⁶ Art 47–54, 55–59, 62 of the African Charter.

⁵⁷ Viljoen *International Human Rights Law in Africa* 300.

⁵⁸ Art 55 of the African Charter.

⁵⁹ Centre for Human Rights *Guide to the African Human Rights System* (2021) 24.

⁶⁰ Centre for Human Rights *Guide to the African Human Rights System* 25.

⁶¹ See *Amnesty International v Zambia* Communication No 212/98 (1999) and *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* *supra*.

⁶² Viljoen "From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Right System at the African Commission's 25 Year Mark" 2013 17 *Law, Democracy and Development* 298 301; however, see Viljoen and Louw "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation" 2004 48 *Journal of African Law* 1–22 who argue these findings may be viewed as legally binding; Viljoen *International Human Rights in Africa* 339; Murray *The African Commission on Human and Peoples' Rights and International Law* 54–55.

⁶³ Okoloise "Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights" 2018 18 *African Human Rights Law Journal* 27 28; Viljoen and Louw "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004" 2007 101 *The American Journal of International Law* 1–34 12; see also Viljoen *International Human Rights Law: Six Decades after the UDHR and Beyond* (2010) 411–430; Viljoen *International Human Rights in Africa* 414.

In 1998, a Protocol to the African Charter established the African Court.⁶⁴ The relationship between the African Commission and the African Court is not settled as the Protocol establishing the court merely states that the latter body will “complement the protective mandate of the African Commission”.⁶⁵ An avenue through which the court accomplishes this is when the African Commission concludes a case on the merits and determines that a state party to the Protocol establishing the court has violated the African Charter. If the state fails to comply with the Commission’s findings, the African Commission may refer the case to the African Court. This route is only applicable if the individual or NGO has first submitted a communication to the African Commission and the state alleged to be in breach of the Charter has ratified the Protocol establishing the court.⁶⁶ Like the African Commission, individuals may submit cases directly to the African Court but only if the state has made a declaration under article 34(6) of the Protocol establishing the court. However, NGOs must have observer status to submit complaints to the African Court.⁶⁷

In 2008, the African Court of Justice and Human Rights was created based on the need for efficiency and cost-effectiveness in the regional judicial system.⁶⁸ Once its founding Protocol comes into force, this new court will replace the African Court and the Court of Justice of the African Union.⁶⁹ However, it remains to be seen how the African Court of Justice and Human Rights will take up the contentious jurisdiction and advisory functions of the latter two bodies.⁷⁰ While the decisions of the African Court are legally binding, this judicial body faces resistance from State Parties, which

⁶⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (1998/2004). Adopted 10/06/1998; EIF: 25/01/2004; see Fennell and Andoni *The African Court on Human and Peoples’ Rights: Basic Documents* (2014), for a short history of the court and the basic documents related to the operations of the court.

⁶⁵ Art 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights; Murray *The African Commission on Human and Peoples’ Rights and International Law* 28; see Centre for Human Rights *Guide to the African Human Rights System* 64–64 which sets out further aspects of the relationship between the African Court and the African Commission.

⁶⁶ Art 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights and Rule 39(1) of the African Court of Human and Peoples’ Rights: Rules of Court (2020); Centre for Human Rights *Guide to the African Human Rights System* (2021) 24.

⁶⁷ Art 5(3) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

⁶⁸ Art 2 of the Protocol on the Statute of the African Court of Justice and Human Rights. Adopted 1/07/2008 EIF: not yet; Ouguergous “The African Court of Justice and Human Rights” in Yusuf and Ouguergous (eds) *The African Union: Legal and Institutional Framework* (2012) 120.

⁶⁹ Art 2 of the Protocol on the Statute of the African Court of Justice and Human Rights; the Protocol requires 15 ratifications to enter into force and it currently has 8, <https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf> (accessed 2021-08-08); see also Dugard, Du Plessis, Maluwa and Tladi *Dugard’s International Law: A South African Law* 5ed (2018) 831, for a discussion on the additional protocol adopted to expand the criminal division of the African Court of Justice and Human Rights.

⁷⁰ Ouguergous in Yusuf and Ouguergous *The African Union: Legal and Institutional Framework* 120.

dampens any optimism that its judgements will improve states' compliance with treaty obligations.⁷¹ The following section examines how the African Commission dealt with non-state actors implicated in the communications brought before it. As previously stated, the emphasis is on African Commission jurisprudence, which rendered the most significant decision regarding the right to a healthy environment.

3.2 The African Commission and non-state actors

While the African Charter does not impose direct human rights obligations on non-state actors, the African Commission has recognised the fact that non-state actors can commit human rights abuses.⁷² In the face of allegations of human rights abuses by non-state actors, the African Commission has emphasised the state's duty to protect. The first complaint considered on the merits that implicated a non-state actor was *Commission nationale des droits de l'Homme et des libertés v Chad*.⁷³ The complainants argued that government agents committed violations and that "the State had failed to protect the rights in the Charter from violation by other parties".⁷⁴ The state claimed that "it had no control over violations committed by other parties".⁷⁵ The African Commission held Chad responsible for violations of the African Charter for failing "to provide security and stability in the country, thereby allowing serious and massive violations of human rights".⁷⁶ The Commission emphasised that the immediate cause of the violation need not be the state or its agents.⁷⁷ This rationale was echoed in *Amnesty International v Sudan*.⁷⁸ The Commission held that although thousands of other executions in Sudan were not the work of government forces, the government still bore "a responsibility to protect all people residing under its jurisdiction".⁷⁹

Before turning to the *SERAC* decision, it is worth noting that the African Commission, through its Working Group on Extractive Industries,

⁷¹ Viljoen 2013 *Law, Democracy and Development* 301; Viljoen and Louw *The American Journal of International Law* 32; see Daly and Wiebusch "The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court" 2018 14 *International Journal of Law in Context* 294–313.

⁷² *Sudan Human Rights Organisations, Centre on Housing Rights and Evictions v The Sudan* Communication No 279/03, 296/05 28th Session AAR Annex (Nov 2009–May 2019) par 148; *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication 245/02 par 141 and 143; *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* *supra* par 55, 58 and 61.

⁷³ Communication 74/92 (1995); SAIFAC "The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights Systems" (2010) <https://media.business-humanrights.org/media/documents/f6d9723bf8058ce0ee910577a969a61d3fc88b90.pdf> (accessed 2022-09-25) 15.

⁷⁴ *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 18.

⁷⁵ *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 19.

⁷⁶ *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 22.

⁷⁷ *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 20.

⁷⁸ Communication No. 48/90, 50/91, 89/93 (1999).

⁷⁹ *Amnesty International v Sudan* *supra* par 50.

Environment and Human Rights in Africa (the Working Group on EIEHR), has asserted that article 27 of the African Charter, which sets out duties of individuals, provides a clear legislative basis for direct obligations of business enterprises towards rights holders.⁸⁰ Article 27(2) of the African Charter obligates individuals to exercise rights “with due regard to the rights of others”.⁸¹ Therefore, “if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies.”⁸² The Working Group on EIEHR further explains that, on this basis, the State Reporting Guidelines on Articles 21 and 24 clarify the obligations of business enterprises.⁸³ While recognising that states are the primary duty bearers under the African Charter, business enterprises may also have negative and positive obligations towards rights holders.⁸⁴

Business enterprises have a direct negative obligation based on the principle of “do no harm” or, in its positive formulation, the principle of due diligence.⁸⁵ In this regard, business enterprises must be vigilant in clearly understanding the nature and impact of their activities, “take the required measures for preventing their activities from having adverse human rights impacts, and put in place mechanisms for rectifying any negative human rights impacts arising from their activities or actions”.⁸⁶ To determine the extent of the impact of their activities, these enterprises ought to conduct human rights impact assessments, which consider the rights of vulnerable people and groups and appropriately consult those groups and individuals.⁸⁷ If breaches occur because of business enterprises’ activities or actions, all administrative, civil, and criminal responsibilities must ensue.⁸⁸ In addition, business enterprises must ensure that the activities or actions undertaken on their behalf or for their benefit do not interfere with or cause harm to

⁸⁰ African Commission on Human and Peoples’ Rights “Advisory Note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises” (undated) <https://www.achpr.org/public/Document/file/English/Advisory%20note%20Africa%20Group%20UN%20Treaty.ENG.pdf> (accessed 2022-10-04) 4.

⁸¹ Art 27(2) of the African Charter reads, “[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

⁸² African Commission on Human and Peoples’ Rights <https://www.achpr.org/public/Document/file/English/Advisory%20note%20Africa%20Group%20UN%20Treaty.ENG.pdf> 4.

⁸³ *Ibid.*

⁸⁴ African Commission on Human and Peoples’ Rights “State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment” adopted in May 2018.

⁸⁵ African Commission on Human and Peoples’ Rights “State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment” par 57.

⁸⁶ African Commission on Human and Peoples’ Rights “State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment” par 58.

⁸⁷ *Ibid.*

⁸⁸ African Commission on Human and Peoples’ Rights “State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment” par 59.

protected rights.⁸⁹ This indirect negative obligation means that should these activities or actions result in curtailment or interference with guaranteed rights, there must be repercussions for the business enterprise of an administrative, civil, and or criminal nature.⁹⁰

The Working Group identified two sets of positive obligations that business enterprises may bear. The first set relates to a range of fiscal and transparency requirements arising from business enterprises' operations.⁹¹ For example, business enterprises must disclose the financial terms of agreements relating to license fees, taxes, customs duties, royalties, and shares due to the state in terms of the contract and the applicable laws in that state.⁹² The second set of positive obligations arises from the social and economic impacts of the operations of business enterprises on a host community as well as the land and natural resource rights of the affected people.⁹³ In their business operations, these entities should adequately consult and inform the affected community regarding all activities or decisions that may significantly impact the communities.⁹⁴ Additionally, when implementing such activities, people's concerns must be considered, and the requisite cautionary measures must be taken to mitigate such impacts.⁹⁵ In this regard, business enterprises must carry out environmental, social, and human rights impact assessments before undertaking any actions that may adversely affect a local community, with the participation and representation of the affected community.⁹⁶

Business entities also have positive obligations to contribute to the development needs of their host communities based on the social and economic impacts of their operations and their power.⁹⁷ For an enterprise in the extractive sector, the scope of these obligations may include:

"supporting community-based employment and economic diversification to reduce reliance on the extractive industries as the sole source of income, educational, health, agricultural or pastoral development projects, as well as providing access to mine facilities and infrastructure. [Also], once the extractive operations have come to an end, to support the transition of affected people to reliance on alternative livelihoods".⁹⁸

⁸⁹ African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 62.

⁹⁰ *Ibid.*

⁹¹ African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 63.

⁹² *Ibid.*

⁹³ African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 64.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 65.

⁹⁸ *Ibid.*

The Working Group on EIEHR emphasised that the above obligations are legal obligations and not merely a social responsibility of business enterprises.⁹⁹ As an example of best practice, the Group cited several provisions of South Africa's Mineral and Petroleum Resources Development Act (MPRDA), which require a mining company to submit a social and labour plan in their application for mining rights.¹⁰⁰ Although the Working Group's elaboration of positive and negative obligations does not bind State Parties to the African Charter, it further disaggregates state obligations into guidance that enables states to implement the necessary measures to safeguard the rights enshrined in articles 21 and 24 for those under their jurisdiction. Furthermore, it is improbable that these obligations are subject to horizontal justiciability before the African Commission. However, complainants may attempt to compel corporations to comply with these obligations by initiating legal proceedings against the state for failing to regulate and enforce compliance with the obligations.

3.3 The *SERAC* decision

In the celebrated *SERAC* decision, the Commission implicated a corporation in the violation of human rights through the state's duty to protect.¹⁰¹ The complaint in *SERAC* was lodged by two NGOs,¹⁰² on behalf of the Ogoni people; they alleged that through the state oil company, the Nigerian National Petroleum Company (NNPC), the military government of Nigeria was a majority shareholder in a consortium with the Shell Petroleum Development Corporation (SPDC).¹⁰³ The communication alleged that this oil consortium exploited oil reserves in Ogoniland in a manner that contaminated the environment, thus causing environmental degradation and health problems for the Ogoni communities.¹⁰⁴

Specifically, it was alleged that the Nigerian government played a direct role in the air, water, and soil contamination that negatively impacted the health of the Ogoni communities. It also neglected to protect the Ogoni communities against the harm caused by the consortium and instead employed its security forces to facilitate damage. In addition, the government failed to provide or permit studies of potential or actual environmental and health risks caused by the oil consortium.¹⁰⁵ Finally, the government disregarded the concerns of Ogoni communities regarding oil development and prohibited environmental organisations and scientists from entering

⁹⁹ *Ibid.*

¹⁰⁰ See s 23(h), 24(3), 25(2), 28(2) and 85(3) of the Mineral Resources and Petroleum Development Act 28 of 2002.

¹⁰¹ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra.*

¹⁰² The Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). See *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 49.

¹⁰³ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 1.

¹⁰⁴ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* see generally par 1–9.

¹⁰⁵ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 5 and 50.

Ogoniland to conduct such research. In response to the protests, the government resorted to massive violence and executed Ogoni leaders.¹⁰⁶ It was argued that this conduct constituted violations of several rights, including article 16 (right to health), article 21 (right of peoples to dispose of their wealth and natural resources freely), and article 24 (right of people to a satisfactory environment) of the African Charter.¹⁰⁷ The section focuses on the Commission's handling of the right to a healthy environment and the scope of the state's obligation to protect arising from article 21.

The Commission held that the right to a healthy environment enshrined in article 24 of the African Charter obliges states to refrain from directly threatening the environment of their citizens, for instance, through practices, policies, or legal measures.¹⁰⁸ Additionally, states must "take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources."¹⁰⁹ These measures must include

"ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environment and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development of decisions affecting their communities".¹¹⁰

The Commission focused on providing procedural steps that State Parties must take to comply with their obligations under article 24. These measures are supposed to protect the environment and human rights in a mutually reinforcing manner, as evidenced by the fact that a right to a clean and safe environment is closely linked to economic and social rights insofar as the environment affects the quality of life and safety of the individual.¹¹¹ The

¹⁰⁶ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* supra par 5.

¹⁰⁷ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* supra par 10; art 18 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women. Adopted 11/07/2003; EIF: 25/11/2005, entrenches a right for women to live in a healthy and sustainable environment.

¹⁰⁸ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* supra par 52. The African Court also confirmed the right to a healthy environment in *African Commission on Human and Peoples' Rights v Republic of Kenya* Application No 006/2012 (26 May 2017) par 199.

¹⁰⁹ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* supra par 52; in delimiting the scope of the right to a healthy environment in the Inter-American human rights system, the Inter-American Court quoted the African Commission with approval; see Inter-American Court of Human Rights *Advisory Opinion OC-23/17 The Environment and Human Rights (State Obligations in Relations to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (15 November 2019) par 61.

¹¹⁰ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* supra par 53.

¹¹¹ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* supra par 1, 2 and 52.

Commission found Nigeria in breach of article 24 because, in this case, the measures were not taken, thus leaving the victims with no protection.¹¹²

Despite the apparent involvement of a non-state actor in the oil consortium, the Commission's decision focused on the state's duty to protect its citizens from damaging acts emanating from private parties. Turning to the violation of article 21, it was found that governments must protect their citizens through appropriate legislation and effective enforcement and protect them from damaging acts that private parties may perpetrate.¹¹³ The Commission then concluded that despite the Nigerian government's obligation to protect, this government had given "the green light to private actors", specifically oil companies, "to devastatingly affect the well-being of Ogonis".¹¹⁴

As mentioned earlier, the African Commission, through the Working Group on EIEHR, further elaborates on the obligations of a state party to the Charter in specific relation to business entities arising from article 24 in the State Reporting Guidelines on that article. In a positive sense, the African Commission guides states by further disaggregating their obligations into measures that the state can implement to realise article 24. These measures also provide a yardstick for rights-holders or other interested parties to assess a state's practices, policies, or measures to determine if there is a threat or actual violation of their enshrined right to a healthy environment. In a negative sense, the African Commission's jurisprudence is not binding on states. This reality diminishes the impact of the *SERAC* decision and the subsequent soft law guidance.

Another disheartening conclusion regarding the *SERAC* decision is that the decision was handed down more than two decades ago. The Commission has not dealt with article 24 rights in a similar expansive manner, perhaps lending credence to the view that the right to a healthy environment in the African context is largely aspirational, offering little practical benefit in securing effective environmental protection. This conclusion is alarming because the extractive industry is the backbone of many African economies.¹¹⁵ Consequently, the interaction between people, corporations, and the environment is inevitable, resulting in devastating effects for people and the environment. Moreover, if states fail to implement and enforce the required measures to uphold the rights articulated in article

¹¹² *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 54.

¹¹³ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 57. To substantiate its reading of a positive obligation into article 21, the Commission cited itself in *Commission nationale des droits de l'Homme et des libertés v Chad* and the Inter-American Court's decision in *Velasquez-Rodriguez v Honduras* (Forced Disappearance and Death of Individual in Honduras) 1989 28 *International Legal Materials* and the European Court of Human Rights' decision in *X and Y v The Netherlands* Application No. 8978/80 European Court of Human Rights (26 March 1985).

¹¹⁴ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 58; furthermore, the Commission also held that in the context of the right to food, the Nigerian government had allowed private oil companies to destroy food sources and through terror has created significant obstacles for the Ogoni people to try feed themselves. *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 61.

¹¹⁵ Buys and Lewis 2022 *International Journal of Human Rights* 969.

24, corporate perpetrators will continue to act without facing any consequences.

On a more positive note, the African Court can address this compliance issue by fulfilling its mandate to complement the protective mandate of the African Commission. This may occur if a state fails to comply with the African Commission's recommendations; that state may be referred to the African Court for a binding and enforceable decision on the matter. A foreseeable hurdle to this avenue is that not all African Union members are party to the Protocol establishing the Court. As a result, complaints against states that are not party to the Protocol establishing the Court can only end at the African Commission. Furthermore, with few states allowing direct access to the African Court through the article 34(6) declaration, the Court's role is further constrained.

4 CONCLUSION

Globalisation has expanded the capacity of corporations to cause environmental harm and impact the lives of individuals. The African human rights system has recognised this complex relationship between corporations, host communities, and the environment, which has been marred by human rights violations. While historically, states have been the primary duty-bearers, the growing power of corporations necessitates reconsidering this paradigm. But while the debate regarding whether the dominant framework for corporate accountability, international human rights law, needs an overhaul is a topic for another article, this one demonstrated how the African human rights system holds the state responsible for protecting individuals under its jurisdiction against corporate interference with their right to a healthy environment. The *SERAC* decision showed how the African human rights system permits victims to hold the state responsible for violations perpetrated by a corporation. Although the African Commission refrained from imposing direct obligations on the corporation, it did not shy away from acknowledging its complicity in human rights violations.

In *SERAC*, the African Commission also provided guidance on the measures state parties must take to protect individuals' and peoples' right to a healthy environment. These measures include independent scientific monitoring, publicising environmental and social impact studies before major industrial projects, monitoring hazardous activities, providing information to affected communities, and allowing meaningful public participation. At a minimum, victims are left without protection if these measures are not taken. Furthermore, under the auspices of the Working Group, the African Commission proactively provides guidance that applies to corporations on the positive and negative obligations they bear under article 24. Although these obligations are formulated as soft law, states may incorporate them in their domestic law, thus creating binding, direct obligations on corporations. In light of these findings, the African human rights system has taken progressive steps to foster a culture of accountability among corporations operating on the continent. However, the primary enforcer of this accountability remains the state.