Under BITs and Through Class Actions: Subjecting Transnational Mining Corporations to Environmental Rights in the DRC

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Contents

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Declaration

I, Arnold Nciko Wa Nciko, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This study has been submitted for examination with my approval as University Supervisor.

Signed: .....

Dr.J Osogo Ambani

Abstract

In recent times, transnational mining corporations have gained an abundance of powers that few could have foreseen at the institutionalisation of the international human rights regime. Their activities have resulted in dire violations of human rights, especially environmental rights. The international human rights regime has left states with the duty to impose the respect of human rights on all persons, including legal persons such as transnational mining corporations, that are within their respective jurisdictions. However, fulfilling this duty has been a herculean task in many Third World states, in which these corporations have been able to interfere with judicial accountability. Thus, despite violating human rights, they continue to enjoy immunity. In response to this, a few attempts have been made to subject these corporations to human rights at an international level. This study examines these attempts and concludes that they are inadequate. Relying on Third World Approaches to International Law (TWAIL), the study progresses the discussion by proposing an international law mechanism that may subject these corporations to the international human rights regime. This is what it has coined the 'Under BITs and through Class Actions' mechanism. This mechanism entails inserting human rights obligations in bilateral investment treaties (BITs) and enforcing them with the help of the class actions. To critically present this proposition, the study takes as case study environmental rights violations by transnational corporations that are mining in the Democratic Republic of the Congo (DRC).

Key words: Business and human rights, mining, class actions, BITs and TWAIL

List of cases

General Telephone Co v Falcon, United States Supreme Court (1982).

Shain v Armour & Co, *United States District Court for the Western District of Kentucky* (1941)

Legal Instruments

Code of Judicial Organisation and Competence (1982)

Congolese Mining Code (No 18/00)

Constitution of the Democratic Republic of the Congo (2006)

Convention of on Settlement of Investment Disputes between States and Nationals of other States, 19 October 1966.

Federal Rules of Civil Procedure, (2018).

Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, Adopted on 27 June 2014

Rome Statute of the International Criminal Court, 1 July 2001

Statute of the World Human Rights Court (Draft)

United Nations Convention on Law of the Sea

'Zero Draft' Business and Human Rights Treaty

Abbreviations

Bilateral investment treaties (BITs)

Democratic Republic of the Congo (DRC)

International Centre for Settlement of Investment Disputes (ICSID)

International Court of Justice (ICJ)

International Criminal Court (ICC)

Non-Governmental Organisations (NGOs)

Third World Approaches to International Law (TWAIL)

United Nations Convention on the Law of the Sea (UNCLOS)

I. Chapter One: Introduction

i. Background

In this increasingly globalised world, transnational mining corporations have become major actors in the international human rights regime.[1] Their mining operations have had devastating effects on the environment, particularly in Third World states (Latin America, Africa and Asia).[2] One such state is the Democratic Republic of the Congo (DRC). In the DRC, alarming cases of violations of environmental rights by transnational mining corporations abound. For instance, the Center for Research on Multinational Corporations conducted a field study on the operations of China Nonferrous Metal Mining Company in Mabende and found that the spreading of this company's acid spills led to deforestation. Deforestation, in turn, led to the destruction of sources of livelihood of the Mabende people; namely, caterpillars, mushrooms, fruits, small mammals and medicinal plants.[3] Further, its dust pollution caused the Mabende people to suffer from lung diseases; yet, they rely on medicinal plants, which the company has destroyed and modern hospitals are out of reach.[4] Another point to note is that the company's wastes contaminated water, making it 'murky and microbiologically unfit for human consumption'.[5] Glencore Plc and Tiger Resources Ltd, amongst others, have also perpetrated similar violations in Mutanda.[6]

However, as these violations are happening; these transnational mining corporations continue to enjoy immunity because of the lack of judicial accountability in the Congolese mining sector. Many studies have connected this to the fact that the mining sector is one of the largest and complex corruption networks in the DRC.[7] To promote environmental protection, the Congolese

[1] Matunhu J, 'Poverty and corporate social responsibility in Africa: A critical assessment' (1) *Zimbabwe International Journal of Open & Distance Learning*, 2011, 87-88.
[2] Anghie A, 'Third world approaches to international law and individual responsibility in internal conflicts' (2)1 *Chinese Journal of International Law, 2003, 96.*
[3] Musas S, Mwema J, Sokyala E, Tumba A and Bwenda C, '« …You can go accuse us where you want… »: violations of human rights by chinese mining companies established in Democratic Republic of Congo: The case of China Non-Ferrous Métal Mining Corporation at Mabende', SOMO, 2018, 28.
[4] Musas S, Mwema J, Sokyala E, Tumba A and Bwenda C, '« …You can go accuse us where you want… »', 29.
[5] Musas S, Mwema J, Sokyala E, Tumba A and Bwenda C, '« …You can go accuse us where you want… », 27.
[6] Bread for All, 'Glencore en RD Congo*:* Diligence raisonnable incomplète', 2018, 3-4.
[7] Callaway A, 'Powering down corruption: Tackling transparency and human rights risks from Congo's cobalt mines to global supply chains', *Enough Project*, October 2018, 2.

mining code requires mining corporations to publish an environmental impact study and a project environmental management plan.[8] However, China Nonferrous Metal Mining, for instance, has refused to do so. This decision has been backed by government officials as, apparently, publishing such documents has technical and confidential aspects.[9] A provincial mines minister tried to inquire into the environmental situation in Mabende village and China Nonferrous Metal Mining told him 'Go ahead, try to accuse us…'.[10] It is also instructive to note that this company did not conform to Article 281 of the Congolese mining code.[11] Article 281 provides that, in case of environmental violations, the concerned mining company should both compensate the aggrieved parties and rehabilitate the environment.[12] The same disregard of law is also true for other transnational mining corporations such as Glencore Plc, which government officials have portrayed as Caesar's wife _ above suspicion.[13]

Moreover, the power of the parliament and the president to appoint judges[14] and that of the minister of justice to initiate and discontinue prosecutions,[15] as well as presidential state of emergency powers to suspend courts' decisions yet the circumstances leading to a state of emergency are not defined under any law[16] are some of the loopholes in Congolese law that may be used to further the ends of corruption in the mining sector.

ii. Statement of the problem

[8] Article 1(9) (19), *Congolese Mining Code* (No 18/00).
[9] Musas S, Mwema J, Sokyala E, Tumba A and Bwenda C, '« …You can go accuse us where you want… », 25.
[10] Musas S, Mwema J, Sokyala E, Tumba A and Bwenda C, '« …You can go accuse us where you want… », 24.
[11] See generally Musas S, Mwema J, Sokyala E, Tumba A and Bwenda C, '« …You can go accuse us where you want… »'.
[12] Article 28, *Congolese Mining Code* (No 18/00).
[13] 'Trouble in the Congo: The Misadventures of Glencore' < https://www.bloomberg.com/news/features/2018- 11-16/glencore-s-misadventure-in-the-congo-threatens-its-cobalt-dreams> 15 February 2019. Moreover, the power of the parliament and the president to appoint judges (see Article 158 Constitution of the DRC of 2006) and that of the minister of justice to initiate and discontinue prosecutions (Article 10, *Code of Judicial Organisation and Competence* of 1982), as well as presidential state of emergency powers to suspend courts' decisions yet the circumstances leading to a state of emergency are not defined under any law (see Article 85 and 156, Constitution of the DRC of 2006) are some of the loopholes in Congolese law that may be used to further the ends of corruption in the mining sector.
[14] Article 158 *Constitution of the DRC* (2006).
[15] Article 10, *Code of Judicial Organisation and Competence* of 1982.
[16] Article 85 and 156, *Constitution of the DRC* (2006).

The lack of judicial accountability of transnational mining corporations persists even at the international level because international law is state-centric. The international human rights regime does not apply directly to corporations.[17] It has left states with the duty to impose human rights obligations on them. et, Third World states, such as the DRC, have clearly faltered in this regard.

iii. Justification/Significance of the study

The mining operations of many transnational mining corporations in many third worlds (states such as the DRC) result into environmental rights violations. Yet, because of a lack of good political will, many third world states have been unwilling to bring judicial accountability to these corporations. The international human rights regime is state-centric. It does not apply directly to corporations and only expects states to impose human rights obligations on them. It is therefore important to provide a way through which transnational corporations will be held accountable for human rights violations, and environmental rights for the purposes of this study.

iv. Hypotheses

The study shall test the following hypotheses:

1. The mining operations of transnational corporations continue to violate environmental rights in the DRC because of lack of judicial accountability in the Congolese mining sector.
2. Transnational corporations cannot be held accountable for these violations at the international level because international human rights law is state-centric and based on egalitarianism.
3. A creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations.
4. Holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law.

[17] Jochnick C, 'Confronting the impunity of non-state actors: New fields for the promotion of human rights' (21) 1 *Human Rights Quarterly*, 1999, 58-59.

v. Research questions

The study shall attempt to answer the following research questions:

1. Why do the mining operations of transnational corporations continue to violate environmental rights in the DRC?
2. Why can't transnational corporations be held accountable for these violations at the international level?
3. What can be a creative use of international law that can help hold transnational mining corporations accountable for environmental rights violations?
4. What impact will holding transnational mining corporations accountable for environmental rights violations under international law have on international law?

vi. Literature review

Given the state-centric nature of the international human rights regime, there have been attempts at the global level to put in place multilateral-treaty-based institutions to deal with transnational corporate-related human rights violations. They are based either on international criminal law, voluntary compliance, collaboration with domestic legal systems, or are intended to apply directly to transnational corporations. With respect to international criminal law, some international criminal courts have maintained that crimes 'are committed by men, not by abstract entities [such as transnational corporations], and only by punishing individuals who commit such crimes [on behalf of corporations] can the provisions of international law be enforced'.[18] However, classical international crimes, namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression,[19] do not extend to violations of rights that relate to the environment, for instance. Yet, looking at the life cycle of a mine, environmental rights are the ones that are more

[18] Asaala E, 'Corporate criminal liability under the Malabo Protocol: Breaking new ground?' in Merwe V and Kemp G, *International criminal justice in Africa*, 2017, Strathmore University Press, Nairobi, 2018, 107. See also Asaala O, 'corporate criminal liability under the Malabo protocol: Breaking new ground?' 114.
[19] Article 5, *Rome Statute of the International Criminal Court*, 1 July 2001.

likely to be threatened or violated by a mining company.[20] The life cycle of a mine starts with prospection and exploration, then progresses with development and extraction; building up to closure or reclamation.[21]

An example of an attempt based on voluntarism is the Draft Statute on Business and Human Rights that Kozma Julia, Nowak Manfred and Scheinin Martin have proposed.[22] It requires corporations to first declare whether or not they agree to subject themselves to the jurisdiction of the court that it is to establish and to decide on which laws should apply to them.[23] This will be highly unlikely in most instances or simply unhelpful given the profit-centred objectives of most, if not all, transnational corporations.[24]

The Republic of Ecuador has proposed the 'Zero Draft' Business and Human Rights Treaty, which contemplates collaboration with domestic legal systems in order to fight corporate-related human rights violations.[25] The same is true for the United Nations Convention on the Law of the Sea (UNCLOS), which is on deep sea mining.[26] Multilateral treaties such as the Zero Draft and UNCLOS may not help the situation in the DRC because they assume that domestic legal systems are willing to bring judicial accountability to transnational mining corporations.

There have also been attempts to put in place a multilateral treaty-based institution that is alive directly applicable to transnational corporations without collaborating with a state.[27] However, as John Ruggie notes, they run the risk of being of little or no practical relevance.[28] Ruggie notes:

> 'There are 70,000 transnational corporations, with about 80,000 subsidiaries and millions of suppliers... Then there are millions of other national corporations. The existing treaty

[20] See mining life cycle in Veronica N, 'Processing and analysis instructions for platform relevant information'
[21] Seehttps://mail.google.com/mail/u/0/#search/fkariuki%40strathmore.edu/KtbxLxglnpXlBPggjQdwWbmPqVmTsThMJB?projector=1&messageChapterId=0.1
[22] See generally Kozma J, Nowak M and Scheinin, 'Statute of the world human rights court-consolidated draft and commentary', 2010. 27.
[23] Article 51, *Statute of the World Human Rights Court* (Draft)
[24] Jephias Matunhu, 'Poverty and corporate social responsibility in Africa: A critical assessment' (1) *Zimbabwe International Journal of Open & Distance Learning*, 2011,125.
[25] See Business and Human Rights Center,< https://www.business-humanrights.org/en/zero-draft-summary> on 13 December 2018.
[26] Sipalla H, 'Bridging the business and human rights divide with lessons from UNCLOS' deep sea mining regime' in Sainz-Borgo J, *Liber amicorum gudmundur Eiriksson*, University for Peace Press, 2016, 14. See generally the UNCLOS Convention.
[27] See for instance Chapter V of the treaty on transnational corporations and their supply chain with regard to human rights, Global Campaign, 2017.
[28] See -https://www.business-humanrights.org/es/node/175772 on 1 March 2019.

bodies have difficulty keeping up with 192 member states, and each deals with only a specific set of rights or affected group. How would one [multilateral-treaty-based institution] handle millions of corporations, while addressing all rights of all persons?'[29]

The Africa Mining IQ has listed that about only 7 000 mining corporations and engineers are currently mining in Africa.[30] This number may reduce if attention is paid only to transnational mining corporations. Therefore, Ruggie's sentiments, it might be protested, may change if he limits his focus to transnational mining corporations at least at a continental level such as Africa, or at regional level, such as Central Africa, (because it may still be impractical for one global multilateral-treaty-based institution to deal with thousands of corporations). Further, focusing on a continent or region should be done bearing in mind that these corporations may not be violating environmental rights simultaneously.

Following this logic, a continental treaty such as the *Malabo Protocol* may be of relevance. It provides for vicarious corporate liability, which is to help hold mining corporations liable for the misconduct of their personnel.[31] One of the crimes that it is meant to fight is the illicit exploitation of natural resources,[32] which may cover a widespread violation of environmental rights. A regional treaty such as a central African treaty can be even more practical since it will have to deal with fewer transnational mining corporations than a continental treaty could.

One of the shortcomings of any continental or regional treaty-based institution is that its judgements run the risk of remaining abstract since it cannot be enforced against transnational mining corporations whose assets are outside the continent or the region in question.[33] Yet, in a state such as the DRC, 20 out of the 24 active transnational mining corporations are not from Africa.[34]

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[29] Ruggie J, 'Business and human rights – Treaty road not travelled' *Business and Human Rights* on 6 May 2008 -<.https://www.globalpolicy.org/social-and-economic-policy/social-and-economic-policy-at-the-un/un-and- business/32270-business-and-human-rights-treaty-road-not-travelled.html.> 8 August 2019.
[30] See Africa Mining IQ -< http://www.projectsiq.icedev.co.za/mining-companies-in-drc.htm> on 8 August 2019.
[31] The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' is what is referred to as the Malabo Protocol as seen from 'Seeking or shielding suspects? An analysis of the Malabo protocol on the African Court', 10.
[32] Article 28A, *Protocol on Amendments to the Statute of the African Court of Justice and Human Rights*, Adopted on 27 June 2014 (Not yet in force).
[33] See for instance Article 54, *Convention of on Settlement of Investment Disputes between States and Nationals of other States*, 19 October 1966.
[34] See -<https://www.projectsiq.co.za/mining-companies-in-drc.htm> on 5 December 2019.

It seems accurate to conclude that, in a state such as the DRC, an international law mechanism that can subject transnational mining corporations to environmental rights should have two attributes. First, its judgement against a corporation should be globally enforceable (or at least in almost all countries of the world). Second, it should have the capacity to deal with the large number of transnational mining corporations that exist in the world today.

Bilateral investment treaties (BITs) can pave the way for such an international law mechanism. A judgement endorsed by an institution that is meant to administer any disputes arising out of a BIT is to be globally enforceable.[35] The reason for this is that such institution is established by a global treaty.[36] However, the institution administering disputes arising out of a BIT should only do so to a certain extent in order to avoid congesting itself. It should, therefore, set out rules that an *ad hoc* arbitral tribunal should conform to in handling a BIT-related environmental rights violations dispute. To endorse the judgement of such tribunal, the institution must be satisfied that its rules have been conformed to. This is to avoid the issues of practicality that one multilateral-treaty-based institution is likely to suffer from in dealing with thousands of transnational mining corporations.

vii. Research Design

- Chapter II of this study provides a context through which to understand the shortcomings of the state-centric nature of international law in the Congolese mining sector. To achieve this, the Chapter relies on Third World Approaches to International Law (TWAIL). Although the context that the Chapter provides is to generally help examine all the findings of this study, it specifically tests the following hypothesis: 'Transnational corporations cannot be held accountable for these violations at the international level because international human rights law is state-centric and based on egalitarianism'.

[35] See for instance Article 54, *Convention of on Settlement of Investment Disputes between States and Nationals of other States*, 19 October 1966.
[36] See for instance Article 54, *Convention of on Settlement of Investment Disputes between States and Nationals of other States*, 19 October 1966.

- Chapter III argues for inserting in BITs an international law mechanism of enforcing environmental rights against transnational mining corporations. Such mechanism is what this study refers to as the 'Under BITs and Through Class Actions' mechanism. As Chapter III shows, the class action device is an efficient way of affording redress to victims of environmental violations by transnational mining corporations in a state such as the DRC. This Chapter tests the following hypothesis: 'A creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations.
  '
- Chapter IV looks into the impact of inserting human rights (such as environmental rights) obligations in BITs may have on international human rights regime. This Chapter tests the following hypothesis: 'Holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law.'

- Chapter V concludes the discussion. This Chapter restates the initial problem, the research findings and the recommendations for the way forward.

viii. Research Methodology

This study relies on quantitative analysis and literature review to prove its hypotheses. The DRC will be used as a case study to allow the author to focus the discussion. The author will also rely on comparative jurisprudence from the United States of America (USA) and Brazil to suggest a way through which bilateral investment treaties can be use creatively to hold transnational corporations accountable for environmental rights.

ix. Limitations of the Study

This study is limited to transnational mining corporations operating in the DRC and the focus only on environmental rights.

x. Chapter Summary

This Chapter has provided a background to the problem being tackled in this study. It has tested the first hypothesis of this study, which is: 'The mining operations of transnational corporations continue to violate environmental rights in the DRC because of lack of judicial accountability in the Congolese mining sector'.

The Chapter has shown that transnational mining companies do get away with human rights violations because of lack of judicial accountability in the Congolese mining sector. It has also substantiated the fact that international, being state-centric, has also failed to hold these corporations accountable for human rights violations. The Chapter also provided the review of solutions that have suggested in scholarship and demonstrated that they are all inefficient. The Chapter went on to suggest a creative way of using international through bilateral investment treaties in order to hold transnational mining corporations accountable for human rights violations, and specifically environmental rights violations for the purposes of this study. The Chapter has concluded by providing a Chapter breakdown that is intended to demonstrate why recourse should be made to bilateral investment treaties and how they can help bring judicial accountability to transnational mining corporations.

II. Chapter Two: Conceptual Framework

i. Introduction

This Chapter provides a context through which to understand the reason why the state-centric nature of international law does not work in the favour of a Third World state such as the DRC. It demonstrates that this nature of international law presupposes egalitarianism. This is a theory connoting that every state is in a position and willing to impose human rights obligations on all persons, including transnational mining corporations, operating in it. Yet, this has become an elusive task for many Third World states such as the DRC because of lack of judicial accountability in the mining sector. In response to this, the Chapter relies on TWAIL to demonstrate that the state-centric nature of international law fosters imperial states' dominance and economic superiority over Third World states. This, as the Chapter shows, is facilitated by bilateral investment treaties (BITs). BITs only grant rights to transnational mining corporations without imposing on them any corresponding obligations. The Chapter then concludes by calling for a rethinking and restructuring of international law in order to hold transnational mining corporations accountable to environmental rights. This may start by rethinking the structure of BITs.

ii. State-centric nature of international law and TWAIL

Powerful non-state actors; namely, transnational mining corporations, continue to violate environmental rights in Third World states such as the DRC due to lack of judicial accountability in these states.[37] This is fuelled by the fact that these corporations have grown tremendously in power, which has allowed them to interfere with domestic judicial systems. As Jephias Matunhu notes, the combined sales of two hundred of the largest of them are more than the Gross Domestic Product of all the states in the world.[38] Despite this, structure of international law is state-centric,

[37] Lee McConnel, Extracting accountability from non-state actors in international law: Assessing the scope for direct regulation' *Ruteldge: Human Rights and International Law*, 2018, 1.
[38] Matunhu J, 'Poverty and corporate social responsibility in Africa: A critical assessment' 1 *Zimbabwe International Journal of Open & Distance Learning*, 2011, 84.

expecting that only states have the duty to protect their populations from environmental rights violations by transnational mining corporations.[39]

Third World Approaches to International Law (TWAIL) is perhaps the most notable response to this state-centric nature of international law. TWAIL is a school of thought that argues that international law has failed to cater for the needs of the third world. The reason for this, TWAIL advances, is that international law is premised on a history by analogy, which hopes that all states of the world are to achieve liberal nationalism and democratic internal self-determination.[40] This universalisation of international law has worked to subordinate Third World states to economic domination, TWAIL maintains. For this reason, TWAIL sees international law as an accomplice to colonialism, and that this has continued in recent times through the phenomenon of neocolonialism, which has helped imperial states maintain economic superiority over Third World states.[41] It is not surprising, therefore, that many TWAIL scholars advocate for an urgent need to address the interplay between rights and duties, and between international law and economic systems.[42]

Indeed, transnational mining corporations operating in Third World states such as the DRC do carry out their activities in an economic system that only grants them rights without any corresponding duties. This economic system is sustained by way of international instruments known as BITs. BITs are international legal instruments through which two states impose obligations on themselves regarding the treatment of their investors (an investor may be a transnational mining corporation) in each other's territory.[43]

The origin of BITs justifies the claim that they further neocolonialism. They were first designed as a strategic response to the legacy of colonialism in postcolonial states.[44] This legacy is well

[39] Lee McConnel, 'Extracting accountability from non-state actors in international law: Assessing the scope for direct regulation', 6.
[40] Mutua M, 'Savages, victims and saviors: The metaphor of human rights' 42(1) *Harvard International Law Journal,* 2001, 243.
[41] Anghie A, 'Third world approaches to international law and individual responsibility in internal conflicts', *5(1) Journal of Constitutional Research*, 2018, 96.
[42] Mutua M, 'Savages, victims and saviors: The metaphor of human rights', 243.
[43] Jacobs M, 'Transnational corporations and proliferation of bilateral investment treaties: More than a bit influential' 8 (2) *Transnational Corporations Review*, 2016, 93.
[44] Kurtz J, 'The shifting landscape of international investment law and its commentary' 106(3) *The American Journal of International Law*, 2012, 686.

captured by scholars such as Mahmood Mamdani and Hastings Winston Opinya *Okoth-Ogendo*. In 'Citizen and Subject', Mamdani examines the colonial state and finds that throughout Africa, Belgian, French, British and Portuguese settlers were faced with what he coined 'the native question': 'How can a tiny and foreign minority rule over an indigenous majority?'[45] The solution was to have a civil society for settlers, the citizens; and to tribalise, hence divide, the indigenous majority, the subjects. The citizens lived in fertile lands and greener pastures while the subjects were forced into reserves.[46] Almost all tribes had an imposed indigenous leadership, led by a chief. The imposed chief was appointed by the settlers to reinforce their agenda of extra-economic coercion. They vested in him legislative, judicial and executive authority over his tribe. The fact that his tribe's resources were held in common allowed him to expropriate such resources through an administratively-driven customary law.[47]

Postcolonial African leaders welcomed this colonial enterprise with open arms. Okoth-Ogendo illustrates this in his famous piece 'Constitutions without Constitutionalism'. African leaders, he demonstrated, substituted the settlers' civil society with a bureaucratic minority exerting extra-economic coercion on their states. Just like the settlers did this legitimately through the chief; African leaders found their legitimacy in constitutions.[48] Constitutions granted them control over their domestic judicial systems, allowing them to effectively expropriate even foreign assets without compensation.[49] In the DRC, for example, late President *Mobutu Sese Seko* converted such assets into political resources for him to reward his loyal disciples.[50]

Against the wave of expropriations that were observed in postcolonial states in the 1950s and 1960s, capital exporting states devised BITs in order to afford their nationals investing in Third World states such as the DRC (or Zaire as Mobutu renamed the state) full protection and security, protection against uncompensated expropriation and nationalisation, and fair and equitable

[45] Mamdani M, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, Princeton, 2018, 16 and 148.
[46] See generally for instance Simkins C, 'Agricultural production in the African reserves of South Africa, 1918-1969' 7(2) *Journal of Southern African Studies*, 1981.
[47] Mamdani M, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, 23.
[48] Ogendo O, 'Constitutions without constitutionalism: Reflections on an African paradox' in Greenberg, Douglas, Katz, Stanley N, Wheatley, Steven C, *Constitutionalism and democracy: Transitions in the contemporary world*, Oxford University Press, Oxford, 1993, 67-68.
[49] Ogendo O, 'Constitutions without constitutionalism: Reflections on an African paradox' 71-73. See also Kurtz J, 'The shifting landscape of international investment law and its commentary', 686.
[50] Reno W, 'Sovereignty and personal rule in Zaire' 1(3) *African Studies Quarterly*, 1997, 42.

treatment.[51] In case of any breach of a BIT, the matter was to be brought before the International Court of Justice (ICJ)[52] since domestic judicial systems were compromised.[53] Subsequently, owing to the spectacular adoption of BITs by most states, a significant change was made to their structure. They started affording foreign investors legal standing before international investment arbitral tribunals to pursue cases regarding their treatment by host states.[54]

What remains ironical is the fact that if an investor violates the human rights of the nationals/peoples of the host state, the general trend in investment law thus far is to take the violators to domestic judicial bodies. Yet, the assumption these bodies are not independent in many postcolonial states was the cornerstone upon which BITs were erected.[55] It is not surprising, therefore, that transnational mining corporations investing in states such as the DRC do get away with environmental rights violations.

As international legal instruments, BITs do not impose duties on transnational corporations because egalitarianism forms the basis upon which the international human rights regime has been engineered. [56] Egalitarianism is a theory connoting that all persons, including legal persons such as transnational mining corporations, should be treated equally. Under this theory, a state should therefore impose on these corporations the duty to respect human rights, the same way it does for its own citizens. And, this is by going through domestic courts,[57] which have been unable to bring judicial accountability to transnational corporations mining in a state such as the DRC. There emerges then an urgent need for a new theory to respond to the egalitarian nature of the international human rights regime.

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[51] Kurtz J, 'The shifting landscape of international investment law and its commentary', 686. See also Moses M, *The principles and practice of international commercial arbitration*, Cambridge University Press, Cambridge, 2017, 255-256.

[52] Schwebel J, 'The overwhelming merits of bilateral Investment treaties' 32(2) *Suffolk Transnational Law Review*, 2009, 267.

[53] Lee C and Johnston N, 'Improving reputation bit by bit: Bilateral investment treaties and foreign accountability' 42(3) *International Interactions: Empirical and Theoretical Research in International Relations*, 2016, 429.

[54] Weiler T, 'Balancing human rights and investment protection: A new approach for a different legal order', 430.

[55] Kurtz J, 'The shifting landscape of international investment law and its commentary' 686.

[56] Nien-hê Hsieh, 'Should Business Have Human Rights Obligations?' *Journal of Human Rights*, 2015, 1-2 and 10 (forthcoming)

[57] Nien-hê Hsieh, 'Should Business Have Human Rights Obligations?' 10. This task has been left to states as egalitarianism is a school of thought attaching to states the exclusive duty to protect, respect and remedy human rights.

In the place of the egalitarianism as the cornerstone of the international human rights regime, TWAIL is therefore the framework within which international law should be rethought and restructured in a Third World state such as the DRC. Of relevance to the discussion carried out throughout this study is the second generation of TWAIL scholars; they are people-centric.[58] They advocate for an international law approach that can be used to protect the *peoples* of the Third World such as the Mabende people alluded to in the Introduction of this study. These peoples are to be protected against their states and other international actors. This is because Third World states often act in ways that are against the principles of their peoples.[59] It is in this vein that TWAIL espouse the mantra that unless there is radical rethinking and restructuring of the international legal order, the rights of Third World peoples will remain elusive in significant ways.[60] There then emerges a need to investigate how BITs can be used creatively to bring judicial accountability to transnational mining corporations at the international law level. This study intends to do this through what it has coined the 'Under BITs and Through Class Actions' mechanism, which is tackled in the following Chapter.

iii. Conclusion

This Chapter has argued that the state-centric nature of international law works best to promote the economic domination and superiority of imperial states over a Third World state like the DRC. To justify this argument in the mining sector, the Chapter has demonstrated how BITs, which are international legal instruments that regulate the relationship between a host country and a transnational mining corporation, were devised as a reaction to the legacy of colonialism in postcolonial states. The etiological aim of BITs was to protect the economic interests of capital exporting states without looking at the interests of postcolonial peoples. The reason for this is that there was lack of judicial accountability in postcolonial states to guarantee the security and protection of the economic assets of the nationals of capital exporting states. This is how BITs were devised: to provide an impartial judicial forum where postcolonial states may be compelled

[58] Ramina L, 'TWAIL- 'Third world approaches to international law' and human rights: Some considerations' 5(1) *Revista de Investigações Constitucionais* ,2018, 263.
[59] Anghie A, 'Third world approaches to international law and individual responsibility in internal conflicts', 78 and 82.
[60] Anghie A, 'Third world approaches to international law and individual responsibility in internal conflicts', 261.

to compensate transnational corporations operating in their countries in case they are treated unfairly or their assets are expropriated without compensation. However, BITs failed to cater for the fact that the even the nationals of capital exporting countries could use the lack of judicial accountability in postcolonial states to the detriment of the peoples of postcolonial states. The Chapter has also relied on the second generation of TWAIL scholars who argue that, many a times, third world states do not act in the interests of their peoples. As a result, the Chapter has concluded by arguing that there is a need to rethink the structure of BITs and see whether there is a way to use BITs to hold transnational mining corporations accountable for environmental rights violations in a third world country such as the DRC. Therefore, there is cogency in the argument that BITs are to be rethought in order to help impose human rights obligations on transnational corporations mining in Third World states such as the DRC.

III. Chapter Three: The 'Under BITs and Through Class Actions' Mechanism

i. Introduction

This Chapter tests the following hypothesis: 'A creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations. As already hinted to in the preceding Chapter, BITs may be use creatively to provide fora in which transnational mining corporations may be held accountable for violation of environmental rights in a country such as the DRC. This Chapter starts by analysing attempts that have been made to use BITs as an international mechanism of holding transnational corporations accountable for human rights violations. The Chapter demonstrates that such attempts may be inefficacious, specifically when it comes to enforcing the judgement that is to be issued by an arbitral tribunal against such corporations. The Chapter then goes on to suggest a creative way in which BITs can be used to bring accountability of environmental violations to transnational mining operating in a country such as the DRC. The Chapter argues that relying on either of the two types of arbitrations that are in vogue today (namely, *ad hoc* and *institutional* arbitration) is inefficacious. In response to this, the Chapter provides for 'borderline cases' of arbitrations which have the features both of an ad hoc tribunal and an institutional tribunal as a solution to this. It concludes by demonstrating

that the class action device can make it practical to hold transnational mining corporations accountable for environmental rights violations in the DRC.

ii. Under BITs

The fact that BITs grant foreign investors protection without imposing on them any corresponding duties has been the subject of many critiques. Some commentators have opined that BITs constitute an actual threat to human rights,[61] and have gone on to argue for the inclusion of a mechanism of enforcing corporate-related human rights violations under BITs.[62] Todd Weiler is one of them. Weiler argues for the creation of *ad hoc* human rights tribunals of the same calibre as the institutional arbitral tribunals (for instance the International Centre for Settlement of Investment Disputes, ICSID) that are currently handling BIT-related disputes. A host state's nationals, who are victims of corporate-related human rights violations, can seek redress in the form of compensation before such *ad hoc* tribunals. He argues further that the compensation to be awarded is enough to constitute an incentive for Non-Governmental Organisations (NGOs) to investigate, prepare and bring an action on behalf of the alleged victims.[63]

There seems to be some weaknesses in Weiler's argument. *Ad hoc* arbitral tribunals do not have an administering institution. As such, they run the risk of either Party to the arbitration delaying the aims of justice by engaging in deliberate obstruction of the arbitral process.[64] It would then seem better to establish and rely on international arbitral institutions specialising in the intersection between human rights and investment law. The advantage of arbitral institutions is that the award they endorse has more credibility. It is also timely and reasonable, and the allows for the arbitrators' fees to be paid without any delay or complication.[65] However, it is virtually impossible for states to agree to fund an arbitral institution for each BIT that they are Party to because of issues

[61] Fry JD, 'International human rights law in investment arbitration: evidence of international law unity', 18 *Duke Comparative & International Law*, 2007, 77.
[62] Cosbey A and Mann H, 'Bilateral investment treaties, mining and national champions: Making it work', International Institute for Sustainable Development, 18th Meeting of the Inter-Governmental Committee of Experts (ICE) "National Champions, Foreign Direct Investment and Structural Transformation in Eastern Africa" Kinshasa, 17-20 February, 2014, ix.
[63] Weiler T, 'Balancing human rights and investment protection: A new approach for a different legal order', 438.
[64] Moses M, *The principles and practice of international commercial arbitration*, 10.
[65] Moses M, *The principles and practice of international commercial arbitration*, 10 and 14.

of resources. The DRC for example is Party to about 17 BITs.[66] Further, any award realised by such institution can only be enforced in the two states that are Party to the BIT yet a transnational mining corporation may decide to keep its assets in other jurisdictions. To avoid this, states have acceded to multilateral treaties, such as the ICSID Convention, establishing one international arbitral institution.[67] As demonstrated in the Introduction of this study, relying on the work of Ruggie, it is difficult for a multilateral-treaty-based institution to have the capacity to regulate the thousands of transnational mining corporations that exist in the world today.

This study sides with arbitral tribunals that Ulrich Schroeter has coined 'borderline cases' of arbitral tribunals. They are neither *ad hoc* nor are they institutional arbitral tribunals; they are a combination of the features of both ad hoc and institutional tribunals.[68] To avoid imposing an unmanageable caseload on an institution such as ICSID while at the same time guaranteeing the enforcement of the 'award' in as many jurisdictions as possible, conventions such the ICSID Convention should provide for rules governing an *ad hoc* arbitral tribunal. Then, while such an ad hoc tribunal shall be established by the Chapteries to the dispute requiring it, its judgement shall be endorsed by an institution such as ICSID for it to be enforceable in all jurisdictions that are Party to a treaty such as the ICSID Convention.

Another weakness to be noticed in Weiler's argument is the lack of clarity on how a case is to get to such an *ad hoc* tribunal. It is not clear which nationals he is referring to. Can any Congolese national, for instance, bring an action before an ad hoc BIT-established tribunal? If the answer to this question is 'yes', then such tribunal will suffer from of a heavy caseload, rendering it of incompetent and feeble authority. One may as wonder: 'where will such Congolese get the resources to get to such a BIT-established tribunal?'. It is not clear also which NGO he is referring to. What will guarantee for example that that NGO serves the interests of the aggrieved Party? There is a need to establish proper safeguards to avoid any opportunistic behaviour on the Chapter of the NGO or any person representing the aggrieved Party. This study proposes the class action

[66] See-<https://investmentpolicy.unctad.org/international-investment-agreements/states/56/congo-democratic-republic-of-the?type=bits> on 4 December 2019.
[67] See -< https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> on 4 December 2019.
[68] Schroeter U, 'Ad hoc or institutional arbitration_ A clear-cut distinction? A closer look at borderline cases' 10 (2) *Contemporary Asia Arbitration Journal*, 2017, 141-142.

device as a solution to this problem how a case is to get to the arbitral tribunal and how an aggrieved person can have adequate representation.

iii. Through class actions

a. Overview

The functioning of the class action device is dealt with in the following SubChapter, but here a brief overview is in order. The class action device is a multiple-parties claim that is brought before a court or a tribunal by someone who has been entrusted with the collective standing of a class of victims.[69] It does not require class members to opt in it because many of them may be too busy with their lives or are just uninformed about their rights. They may not therefore take the trouble of opting in a class action.[70] However, in most cases, each class member remains with the option of opting out before any judgment or settlement binds the class.[71] This promotes the *res judicata* doctrine because when a judgement or settlement is reached, it binds all class members who have not opted out of the class.[72] For avoidance of doubt, a line must be drawn between class actions, as explained above, and the old American 'spurious class actions' and the French '*action en représentation conjointe'*. Spurious class actions and the *action en représentation conjointe* do not promote the *res judicata*. They only bind those class members who have opted in the class action expressly, through a signed document.[73]

The class action device helps a class of victims, which could not have otherwise had the necessary information on their rights, or the resources to file a case.[74] This is achieved through what John Coffee has labelled 'entrepreneurial litigation'.[75] Entrepreneurial litigation refers to a lawyer acting as an independent entrepreneur. They dedicate time and effort and other necessary resources

[69] Gidi A, 'Class actions in Brazil - A model for civil law states' 51(2) *American Journal of Comparative Law*, 2003, 334.
[70] Sherman E, 'Consumer class actions: Who are the real winners?' 56(2) *Maine Law Review*, 2004, 228.
[71] Sherman E, 'Consumer class actions: Who are the real winners?', 228.
[72] Gidi A, 'Class actions in Brazil - A model for civil law states', 334.
[73] Gidi A, 'Class actions in Brazil - A model for civil law states', 96.
[74] Sherman E, 'Consumer class actions: Who are the real winners?', 227.
[75] Coffee J, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 54(877) *The University of Chicago Law Review*, 1987, 877.

to investigate and prepare an action against an alleged abuser of the rights of a class of victims.[76] The lawyer is seen as an entrepreneur and the class action as their private investment. [77] If they lose; they will not get any payment in return. If they win; they will get a significant portion of the compensation that the defendant, a mining company in this case, will pay in damages.[78]

The class action device has been for many decades a United States (US) phenomenon. Few states have adopted it, all of which are in or close to the common law tradition.[79] And it is a very recent development in civil law states,[80] in which Brazil has been at the forefront. This study borrows from the US and Brazilian experiences to propose how the class action device may be transplanted responsibly in BITs. The focus is on environmental rights for two reasons. First, the precise definition of human rights is a hot debate and discussing more than one right will inevitably go beyond the remit of this study.[81] Second, and most important, looking at the life cycle of a mine, environmental rights are the most likely to be threatened or violated by a mining company.[82]

b. Lessons from US and Brazilian class actions

The US class action device is provided for under Rule 23 of the1966 Federal Rules of Civil Procedure. Rule 23 sets out proper safeguards to avoid frustrating judicial economy, and any opportunistic behaviour from the entrepreneurial lawyer.[83] Subsection (a) of the Rule speaks mainly to judicial economy. It contains a four-limb test to be satisfied in order to bring a class action before a court of law. There should be numerosity of class members, commonality of

[76] Coffee J, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 878 and 882-883
[77] Gidi A, 'Class actions in Brazil - A model for civil law states', 369.
[78] Gidi A, 'Class actions in Brazil - A model for civil law states', 369. See also Sherman E, 'Consumer class actions: Who are the real winners?', 224.
[79] Baumgartner S, 'Class actions and group litigation in Switzerland' 27(2) *Northwestern Journal of International Law & Business*, 2007, 308-309.
[80] Gidi A, 'Class actions in Brazil - A model for civil law states', 323.
[81] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1999(4) *Brigham Young University Law Review*, 1999, 1149.
[82] See mining life cycle in Veronica N, *Processing and analysis instructions for platform relevant information*, African Mining Legislation Atlas, 2018.
[83] Kim S, 'Conflicting ideologies of group litigation: Who may challenge settlements in class actions and derivative? 66 *Tennessee Law Review*, 1998, 113.

questions of law or fact, typicality between the class representatives' claims and those of the whole class, and adequacy of representation.[84]

With respect to the numerosity criterion, class representatives must prove that class members are so many that it is impractical to render the traditional joinder of their claims.[85] To meet commonality, they have to prove that class members are so similarly situated that the class can be identified easily.[86] Typicality is close to commonality. It is satisfied when the class representatives and the class as a whole have the approximate cause of harm.[87] Adequate representation speaks to which person(s) should have collective standing on behalf of the class.[88]

Subsection (e) of the Rule aims at curbing any opportunistic behaviour that the entrepreneurial lawyer may be tempted to engage in. This Subsection demands the court's approval before dismissing or compromising a class action. It requires also that notice on the same be sent to all class members,[89] and their approval sought.[90] Susanna Kim captures the opportunistic behaviour that the Subsection is meant to fight:

> 'The [class lawyers] may be tempted to agree to a premature and inadequate settlement, or they may be inclined to reject a perfectly adequate settlement, depending on how much of the settlement offer covers lawyers' fees. There is always a possibility that the [class lawyers] will conspire with the defendant to exchange a small settlement for a large award of [their] fees'[91]

Eduard has also warned that settlements have often been 'sweetheart deals' between the defendant and the class lawyers.[92] However, the requirement of notice has been heavily criticised in the US on the basis that it is not issued in a simplified form for many class victims to make sense of it. Notice should, therefore, be broken down even in the native language of class victims.[93]

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[84] Rule 23 (a), *Federal Rules of Civil Procedure*, (2018).
[85] Hart M, 'Will employment discrimination class actions survive?' *Akron Law Review*, 2004, 815.
[86] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1159.
[87] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1162.
[88] Gidi A, 'Class actions in Brazil - A model for civil law states', 363.
[89] Rule 23 (e), *Federal Rules of Civil Procedure*, (2018).
[90] Rule 23 (e), *Federal Rules of Civil Procedure*, (2018).
[91] Kim S, 'Conflicting ideologies of group litigation: Who may challenge settlements in class actions and derivative?', 124.
[92] Sherman E, 'Consumer class actions: Who are the real winners?', 232.
[93] Sherman E, 'Consumer class actions: Who are the real winners?', 228.

Thus far, one may say fairly that a comparative lawyer should look at the US class action device with interest. Such lawyer should look at it also with suspicion,[94] especially in the enforcement of collective rights such as environmental rights. Rule 23 requirement of numerosity can be met easily in environmental cases. It is evident that all it requires is a large number of victims.

To meet the requirement of typicality and commonality, class members have to be similarly situated in an identifiable class. To meet the typicality requirement in cases of environmental violations, the US experience may be instructive. In the US, class representatives must make a prima facie case of the existence of 'more than a mere occurrence of isolated or 'accidental 'or sporadic [environmental rights violations] acts. It must be established by a preponderance of the evidence that this was the corporation's *modus operandi*.[95]

In cases of environmental rights violations, commonality cannot be met easily because of the differences in the class of victims, some of whom might not have manifested yet full-blown injuries.[96] US jurisprudence on class actions has also cautioned that there may be many differences among class members as to the type of harm that they might have suffered. However, these differences only establish that their positions and claims are not identical; it does not follow that they are not similar. 'Victims may be similarly situated without being identically situated'.[97] But, putting victims in one class mandatorily implies averaging compensation among class members, hence overlooking the merits of individual claims.[98]

A solution to this problem has been sub-classing. Therefore, in cases of environmental violations, where a transnational mining corporation that may have caused different environmental abuses to different groups of people, these people may be subdivided into groups that share like injuries.[99] Sub-classing does not however do away with the problem of mandatory classing altogether. It only renders the differences between the individual claims so minimal.[100] An example of sub-classing is the class settlement on the victims of the holocaust, which was divided into subclasses of Jews,

[94] Sherman E, 'Consumer class actions: Who are the real winners?', 224.
[95] *General Telephone Co v Falcon*, United States Supreme Court (1982).
[96] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1164.
[97] Shain v Armour & Co, *United States District Court for the Western District of Kentucky* (1941). See also Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1161.
[98] Coffee J, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 878.
[99] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1164
[100] Coffee J, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 921.

Jehovah's Witnesses, gypsies, homosexuals and disabled people. These groups experienced different abuses.[101]

What should be considered is the substantive interests that are at stake. Sub-classing may be resorted to in order to provide special treatment to those victims who have already manifested full-blown injuries, bearing in mind that others may manifest injury after a considerable period has elapsed.

Further, a bicentric approach should be taken in enforcing environmental rights, one that protects the environment both for its intrinsic value and when violating it hams human beings.[102] Because, the class members will not be defined, money earned in compensation should cater progressively for those who manifest full-blown injuries and may be used also flexibly and creatively to protect the rights that are equal to those that the class action was advancing. It may for instance fund research and educational projects that are in the interests of the victims.[103]

Also, the fund is to be managed by a human rights NGO for the benefit of restoring a clean and healthy environment. The Brazilian 1985 Public Class Action Act may be instructive here. It provides for a Special Fund Account in Protection of Diffuse Rights, because of the difficulty of distributing individual damages to unknown class members.[104]

To meet the requirement of adequacy of representation, the rules of an institution establishing the arbitral tribunal should set out the standards that an environmental NGO or an entrepreneurial lawyer must meet in order to represent a class of victims. It is particularly important to distinguish between the various forms that a class action may have. *Parens patriae* civil actions are brought by public attorneys and class actions by the members of the class.[105] In the DRC, public attorneys are more likely to face financial or political constraints. Therefore, they may more likely fail to investigate and prepare meritorious cases properly.[106] American scholarship on class actions has shown that class actions are better led by organisations rather than state actors. For instance,

[101] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1156.
[102] Chore T, 'Reconceptualising the right to a clean and healthy environment in Kenya: The need to move from an anthropocentric view to a bicentric view' 4(1) *Strathmore Law Review*, 2018, 71-85.
[103] Gidi A, 'Class actions in Brazil - A model for civil law states', 339.
[104] Gidi A, 'Class actions in Brazil - A model for civil law states', 339.
[105] Gidi A, 'Class actions in Brazil - A model for civil law states', 334-335
[106] Sherman E, 'Consumer class actions: Who are the real winners?', 232.

environmental human rights NGOs have more interest in the subject of litigation rather than in the money as is the case with entrepreneurial lawyers.[107]

The requirement of Rule 23, Subsection (e), giving notice to the victims before the class representatives can dismiss or compromise a class action case is virtually impossible to achieve with respect to environmental rights cases.[108] The arbitral tribunal should be consulted on this. However, notice should still be issued to those that may be identified through reasonable effort.[109]

Class actions have a significant impact on the behaviour of corporations as they necessitate changes in these corporations' policies, practices or designs. This may prevent any malpractice in the future,[110] hence bring about structural changes in law and institutions. Because they give victims an opportunity to bring to the fore any unjust treatment in that they might have been experiencing in their home states. Class actions provide a 'constructive context for victims to 'tell their story', applying pressure on domestic legislatures to respond with legislation against repressive regimes…'[111] This may bring about judicial reforms in a state such as the DRC.

iv. Conclusion

This Chapter has tried to show how BITs can be used creatively to bring accountability for environmental rights violations to transnational corporations operating in a state such as the DRC. It has demonstrated that the class action device and 'borderline cases' of arbitration are relevant in this regard. The class action device involves 'entrepreneurial litigation'. This entails having a lawyer who acts as an independent entrepreneur invest time, money and other resources to investigate and prepare an action against an alleged abuser of the rights of a class of victims. The Chapter has shown that such any class action brought with respect to adjudicating environmental rights by a transnational mining corporation shall not be entertained through an ad hoc arbitral tribunal. The reason for this is that many states where a transnational mining company has assets are not under the obligation to enforce awards given an ad hoc tribunal. An institutional arbitral

[107] Gidi A, 'Class actions in Brazil - A model for civil law states', 370.
[108] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1168-1169.
[109] Rutherglent G, 'Title 7 class actions' 47(688) *The University of Chicago Law Review*, 1980, 670.
[110] Sherman E, 'Consumer class actions: Who are the real winners?', 232.
[111] Johnson K, 'International human rights class actions: New frontiers for group litigation', 3 *Michigan State Law Review*, 2004, 656.

tribunal cannot remedy this because of the inability of a single global institution to deal with the thousands of transnational corporations operating in the world today. The only viable solution to this problem that the author could find is to use 'borderline cases' of arbitration, which have the features of both an ad hoc and an institutional arbitral tribunal.

IV. Chapter Four: Under BITs and Class Action, Impact on International Law

i. Introduction

This Chapter tests the following hypothesis: 'Holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law.' The Chapter looks into the impact that subjecting transnational mining corporations to the respect of environmental rights under BITs and through class actions will have on international law. It demonstrates that if transnational corporations are to be held accountable to environmental rights at the international level under BITs and through class actions, there is a need to rethink BIT-related disputes as matters falling within the sphere of private law; they should be considered as part of public law because the violations of environmental rights are matters of general public importance and transcend the parties involved. This implies providing the public with access to arbitral tribunal proceedings, which are traditionally held private. Further, the Chapter makes and justifies the claim that enforcing environmental rights under BITs and through class actions may provide a solution to the difficulty of enforcing group rights such as environmental rights. It concludes by urging that international law be restructured in such a way that takes cognizance of the particular circumstances Third World states such as the DRC instead of being premised on history by analogy.

ii. Discussion

James Fry, like many others, has maintained that international investment arbitrations are not appropriate fora for human rights adjudication. Fry argues that the majority arbitrators are not well versed with international human rights law because their background is informed by the private international sphere. He goes on to argue that arbitrators rely on philosophies and skills that depart

significantly from those of public international law, where human rights fall.[112] He has also stated that there already exist many fora before which human rights grievances can be addressed.[113]

In response to this, Weiler has argued that it is not a herculean task to constitute a bench of arbitrators that are well versed with a certain area of human rights such as environmental rights.[114] After all, the parties before an arbitral tribunal have the choice to decide on which arbitrators are to constitute an arbitral tribunal.[115]

Further, the discussion in this study has shown clearly that bringing accountability to transnational mining corporations calls further consideration of the international human rights regime. Fry's second criticism would lose its strengths on the accounts that the international human rights mechanisms that are in place to impose human rights obligations on corporations have proven to be inefficacious in states such as the DRC. The following observation by Kathryn Boyed may lend support to this:

> 'Enforcement of human rights has been the obsession of proponents in the twentieth century; some have questioned the existence of the rights altogether when there are no measures for enforcing them. Indeed, it is well accepted in rights theory that where there is no remedy for a claim of right, the existence of the correlative right is tenuous at best'[116]

It is along these lines that Ruggie maintains that international corporate accountability will never come to fruition 'without standing international human rights law on its head'.[117]

Enforcing environmental rights under BITs and through class actions may therefore be a milestone towards filling in the gap that has existed for a long time between the international human rights regime and transnational corporations. Resorting to arbitration, which should allow for discovery,[118] is important because it will guarantee enforcement of an arbitral judgment by

[112] Fry J, 'International human rights law and investment arbitration: Evidence of international law unity', 110-111.
[113] Fry J, 'International human rights law and investment arbitration: Evidence of international law unity' 111.
[114] Weiler T, 'Balancing human rights and investment protection: A new approach for a different legal order', 438.
[115] Moses M, *The principles and practice of international commercial arbitration*, 1.
[116] Boyd K, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1182.
[117] See -<https://www.business-humanrights.org/es/node/175772> on 1 March 2019.
[118] Moses M, *The principles and practice of international commercial arbitration*, 4-5.

enforcing it in jurisdictions in which these corporations have assets.[119] In most instances, these jurisdictions are not the party to the BIT. It is instructive to note that such corporations abide by the laws of developed states, which impose stringent legal obligations.[120] This situation changes when they carry their businesses to Third World states which have 'weak' mechanisms of enforcing human rights.[121]

Being in a joint venture with a state-owned mining corporation or another private mining corporation should not help these corporations avoid liability for environmental rights violations. In case of a joint venture, the rules of liability as they relate to production-sharing contracts should apply, and their enforcement should be the responsibility of the investor.[122]

There is a further point to be considered. Arbitration are usually meant to be private. However, environmental rights violations being matters of general public importance, the public domain should be in a position to access the arbitral proceedings.[123] This trend is already taking shape within the field of investment law where transnational corporations only enjoy rights without any corresponding obligations and it should be a welcomed contribution in terms of holding transnational mining corporations accountable for environmental rights violations.[124] The ripple effect of this will be to build confidence and jurisprudence in an area of law where transnational mining corporations can be held accountable for environmental rights violations at an international law level.[125] It is said that 'the term *jurisprudence* denotes a body of learning built up from a

[119] Moses M, *The principles and practice of international commercial arbitration*, 258.
[120] Tebello Thabane, 'Weak extraterritorial remedies: The Achilles heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles' *African Human Rights Law Journal*, 2014, 43.
[121] Sophie Schiettekatte, 'Do we need a world court of human rights: Filling in the gaps for TNC responsibility' Published Masters Thesis, Universiteit Gent, 2015-2016, 43.
[122] Charltons, 'Advising resource companies' -< https://charltonsnaturalresources.com/en/members-affiliations/14-charltons-boutique-hong-kong-solicitors/advising-resource-companies> on 5 July 2019.
[123] See Trevelyan L, 'International arbitration: A time of change', *International Bar Association: The Global Voice of the Legal Profession*, 27 October 2017 -< https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=aeef2580-8dfc-4d90-8639-8605de0f346a> on 5 December 2019.
[124] See Trevelyan L, 'International arbitration: A time of change', *International Bar Association: The Global Voice of the Legal Profession*, 27 October 2017 -< https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=aeef2580-8dfc-4d90-8639-8605de0f346a> on 5 December 2019.
[125] See Trevelyan L, 'International arbitration: A time of change', *International Bar Association: The Global Voice of the Legal Profession*, 27 October 2017 -< https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=aeef2580-8dfc-4d90-8639-8605de0f346a> on 5 December 2019.

number of judicial pronouncements on a particular issue resulting in a coherent principle or set of principles.'[126]

The enforcement of collective rights such as the right to a clean and safe environment are in themselves problematic in the face of human rights law. This is due to the fact that human rights stem from 'the inherent dignity of the human person'. As such, it may be argued, any rights that can only be enjoyed in the solidarity of a community are not human rights.[127] Enforcing human rights under BITs and through class actions should therefore be a welcomed contribution to addressing this pathology that inheres the international human rights regime.

All claims of the universality of the international human rights regime ought to be approached with caution and trepidation.[128] The current international order tends to give meaning to contemporary realities of Third World peoples through history by analogy. As a result, such reality is dehistorised because dissuaded from a context and a process that have led to it.[129] The aim has been fitting comfortably into an abstract universalism.[130] The international human rights regime has sided with this on the question of the legal accountability of transnational mining corporations. It is of universal practice to subject transnational mining corporations to human rights through domestic legal systems, irrespective of whether or not they are more likely to be compromised by these corporations.

iii. Conclusion

To sum up, this Chapter has tried to demonstrate that transnational mining corporations can be subjected to human rights at the international level under BITs and through class actions. This proposition implies rethinking the very foundation of the international law, specifically international investment law. International investment law has been traditionally considered as falling under the private sphere. As such, the public is not having access to investment-related arbitral proceedings. However, if human rights such as environmental rights are to be enforced at

[126] Zuckerman A, 'Super Injunctions—Curiosity-Suppressant orders undermine the rule of law: Injunctions; interim injunctions; secrecy; transparency' (29) 2 *Civil Justice Quarterly*, 135.
[127] Johnson K, 'International human rights class actions: New frontiers for group litigation'.
[128] Mutua M, 'Human rights in Africa: The limited promise of liberalism' 51(1) *Journal of African Studies*, 2008, 19.
[129] Mamdani M, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, 12-13.
[130] Mamdani M, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, 13.

the international level via the medium of BITs, there is a need to make the proceedings entertained by a BIT-established tribunal open to the public. This may be relevant for the sake of transparency and building jurisprudence as far as holding transnational mining corporations accountable for environmental rights is concerned.

V. Chapter V: Conclusion and Recommendations

i. Introduction

This Chapter provides the Conclusion of the whole study. It has four objectives. First, it starts by restating the initial problem that this study intended to solve. Second, it provides the four main hypotheses that it has developed in the aim of solving the problem under study. Third, the Chapter brings to the reader's attention the findings that this study has arrived at on these hypotheses. Fourth, recommendations on the way forward in directing future research.

ii. Initial problem

This study started by demonstrating the need to hold transnational mining corporations operating in the DRC to account under international law for environmental rights violations. This need was occasioned by the lack of judicial accountability in the DRC mining sector. The author demonstrated that transnational corporations are not directly held accountable for such violations under international law because international law is state-centric. International law expects states to impose the respect of environmental rights on transnational mining corporations, a task that has become elusive for many Third World states such as the DRC.

iii. Hypotheses

The following four hypotheses were guiding the study in addressing the above problem. First, that the mining operations of transnational corporations continue to violate environmental rights in the DRC because of lack of judicial accountability in the Congolese mining sector. Second, that transnational corporations cannot be held accountable for these violations at the international level because international human rights law is state-centric and based on

egalitarianism. Third, that a creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations. Fourth, that holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law.

iv. Findings

a. That the mining operations of transnational corporations continue to violate environmental rights in the DRC because of lack of judicial accountability in the Congolese mining sector

With regard to the first hypothesis, that the mining operations of transnational corporations continue to violate environmental rights in the DRC because of lack of judicial accountability in the Congolese mining sector, this study has found that this is true because of corruption that pervade the mining sector in the DRC. Further, this is coupled up by the fact that there are many loopholes in Congolese law that threaten the independence of the judiciary.

b. That transnational corporations cannot be held accountable for these violations at the international level because international human rights law is state-centric and based on egalitarianism

With regard to the second hypothesis, that transnational corporations cannot be held accountable for these violations at the international level because international human rights law is state-centric and based on egalitarianism, this study relied on TWAIL to make a case for a departure from this state-centric nature of international law. The second generation of TWAIL scholars argue that many a times Third World states do not promote the rights of their peoples. As such, international law should respond to this by holding any violator of these peoples' rights accountable at an international level.

c. That a creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations

With regard to the third hypothesis, that a creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations, this study made first an inquiry into why holding these corporations accountable at global, continental or regional level can be inefficacious.

At the global level, the study found that one institution such as a world court for transnational corporations will be of little relevance because such an institution will lack the capacity to deal with all environmental rights disputes related to such corporations. The reason for this is for instance the fact that there exist between 70,000 and 80,000 transnational corporations operating in the world today. However, this number may reduce significantly if one focuses only on environmental rights violations by transnational mining corporations in a continent or a region. In the DRC for example, there exist about 24 active transnational mining corporations (at the time of the writing of this study). Hence, following this logic, a continental or regional court for transnational mining corporations may be in a position to deal with environmental rights disputes related to a transnational corporation at a continental or regional level.

Despite the cogency displayed by the proposition of a continental or regional court, the author noticed a weakness in it. The study demonstrated that any judgement issued by a continental or regional court may only be enforceable in the continent or the region to which such a court is related. This is due to the fact that any country that is not party to a treaty establishing such continental or regional court is not under any legal obligation to enforce such judgement. This may be, for instance, by freezing the assets of the corporation against which a judgement has been issued. To illustrate this, 20 out of the 25 transnational mining companies operating in the DRC are nationals from countries that are outside Africa. In response to this, the author inquired into whether and how transnational mining corporations operating in a country such as the DRC can be held accountable at a bilateral level, with the help of BITs. This inquiry raised questions such as whether any Congolese national, for instance, can just bring a case before a BIT-contemplated arbitral tribunal. Will he or she have the resources to do so? How will adequate representation be guaranteed?

As an answer to all these questions, the study has proposed the class action device. The class action device involves 'entrepreneurial litigation'. This entails having a lawyer who acts as an independent entrepreneur invest time, money and other resources to investigate and prepare an action against an alleged abuser of the rights of a class of victims. The lawyer is seen as an entrepreneur and the class action as their private investment. As such, they face a lot of incentives to embark on class actions and to handle it with care.

It is instructive to note that this shall not be done through an ad hoc arbitral tribunal because many states where a transnational mining corporation has assets may not be under the obligation to enforce awards given by an ad hoc tribunal. Neither shall it be done through an institutional arbitral tribunal. In as much as an institutional arbitral tribunal can enforce its judgment in all states that are parties to the treaty establishing that tribunal, it may face the issues of practicality. This is especially true when it comes to regulating the conduct of the thousands of transnational corporations operating in the world today. To remedy this, the author has suggested 'borderline cases' of arbitral tribunals, which have the features of both ad hoc and institutional arbitral tribunals. Under these types of tribunals, ad hoc arbitral tribunals may adjudicate the disputes concerning the violations of environmental rights by a transnational corporation. Then, their judgments may be enforced by a global institution such as ICSID established by a global treaty for it to be enforceable in almost all countries in the world.

d. Holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law

With regard to the fourth hypothesis, that holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law, this study has demonstrated that subjecting transnational mining corporation to environmental rights in an international forum implies rethinking the very structure of international law. As Ruggie maintained, international corporate accountability will never come to fruition 'without standing international human rights law on its head'. This study has, though in a modest way, made an attempt to stand international law on its head. This entails for instance dealing with BIT-related

issues as a matter falling within the realm of public law and not investment law. The reason for this is that environmental rights violations are a matter of public interest.

v. Directing future research

This study has focused exclusively on the violations of environmental rights on transnational mining corporations operating in the DRC. DRC being a Third World state, this study may be applicable to any Third World state lacking judicial accountability in its mining sector. The study may be also helpful in directing research towards the violations of other human rights by any type of transnational corporation. Such rights include, but are not limited to, employment and fair labour practices, and the rights of indigenous peoples.

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