Under BITs and through class actions: Subjecting transnational mining corporations to environmental rights in the DRC

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Abstract

Transnational mining corporations have gained an abundance of power and influence that defy 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 enforce the respect for 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 for many Third World states. In these states, these corporations have been able to interfere with law enforcement and accountability through judicial process. Thus, despite violating human rights, they continue to enjoy action with impunity. In response to this, a few attempts have been made to subject these corporations to human rights accountability at an international level. This study examines these attempts and concludes that they are inadequate. Relying on Third World Approaches to Interna-

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tional 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 we term '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 class actions. To critically present this proposition, the study takes as case study of environmental rights violations by transnational corporations that are mining in the Democratic Republic of the Congo (DRC).

Keywords: business and human rights, mining, class actions, local accountability, Bilateral Investment Treaties (BITs), TWAIL

1. Introduction

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 Congo (DRC). In the DRC, alarming cases of violations of environmental rights by transnational mining corporations abound. For instance, the Centre for Research on Multinational Corporations conducted a field study on the operations of China Nonferrous Metal Mining Company in Mabende village 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, these people rely on medicinal plants, which the company has destroyed, yet modern hospitals are out of reach.[4] Another point to note is that the company's effluent waste contaminated community drinking 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]

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1 Jephias Matunhu, 'Poverty and corporate social responsibility in Africa: A critical assessment' 1 *Zimbabwe International Journal of Open and Distance Learning* (2011) 87-88.

2 Anghie Antony, BS Chimni 'Third World Approaches to International Law and individual responsibility in internal conflicts' (2)1 *Chinese Journal of International Law* (2003) 96.

3 L Musas, J Mwema, E Sikyala, A Tumba and C Bwenda, '"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, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want…', 29.

5 Musas, Mwema, Sokyala, Tumba and Bwenda, '…You can go accuse us where you want…', 27.

6 Bread for All, 'Glencore in RD Congo*:* Incomplete due diligence' (2018) 3-4.

However, as these violations are happening, these transnational mining corporations continue to enjoy continued conduct with impunity because of the lack of law enforcement and accountability through the judicial process in the Congolese mining sector. Studies have connected this to the fact that the mining sector is one of the largest and most complex corruption networks in the DRC.[7] To promote environmental protection, the Congolese 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, such documents have technical and confidential aspects which should not be published.[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 – beyond reproach.[13]

Moreover, the power of Parliament and the President to appoint judges[14] and that of the Minister of Justice to initiate and discontinue

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7 Annie Callaway, 'Powering down corruption: Tackling transparency and human rights risks from Congo's cobalt mines to global supply chains', *Enough Project*, October 2018, 2.

8 Congolese Mining Code (No 18/00), Article 1(9), (19).

9 Musas, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want…', 25.

10 Musas, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want…', 24.

11 See generally Musas, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want… '.

12 Congolese Mining Code (No 18/00), Article 28.

13 'Trouble in the Congo: The misadventures of Glencore' *Bloomberg News,* 16 November 2018.

14 Constitution of the DRC (2006), Article 158.

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.

The lack of accountability of transnational mining corporations by judicial process 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 the corporations. Third World states, such as the DRC, have clearly faltered in this regard.

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. These 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.

The life cycle of a mine starts with prospection and exploration, then progresses to development and extraction; building up to closure

15 Code of Judicial Organisation and Competence of 1982, Article 10.

16 Constitution of the DRC (2006), Article 85, Article 156.

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

18 Evelyne Owiye Asaala, 'Corporate criminal liability under the Malabo Protocol: Breaking new ground?' in HJ van der Merwe and Gerhard Kemp, *International criminal justice in Africa*, 2017, Strathmore University Press, Nairobi, 2018, 107, 114.

19 Rome Statute of the International Criminal Court, 1 July 2001, Article 5.

and/or rehabilitation. In this cycle, environmental rights are the ones that are more likely to be threatened or violated by a mining company. However, as noted above, transnational mining companies do not come under the purview of existing enforcement mechanisms.

An example of an attempt to establish a rights enforcement mechanism based on voluntary sign up by such companies is the Draft Statute on Business and Human Rights that Julia Kozma, Manfred Nowak and Martin Scheinin have proposed.[20] It requires corporations to first declare whether or not they agree to subject themselves to the jurisdiction of the proposed court and to decide which laws should apply to them.[21] This will be highly unlikely to succeed in most instances or simply unhelpful given the profit-centred objectives of transnational corporations.[22]

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.[23] Under the deep sea mining regime under the United Nations Convention on the Law of the Sea (UNCLOS), states are required to enforce environmental standards and it is such host states theselves that are then accountable at the international plane for any violations committed by mining companies that they licence, whether private or state owned enterprises (SoEs).[24] Multilateral treaties such as the Zero Draft and the UNCLOS regime may not help the situation in the DRC because they assume that domestic legal systems are willing and able to

[20] See generally Julia Kozma, Manfred Nowak and Martin Scheinin, 'Statute of the world human rights court-consolidated draft and commentary', 2010, 27.

[21] Statute of the World Human Rights Court (Draft), Article 51.

[22] Jephias Matunhu, 'Poverty and corporate social responsibility in Africa: A critical assessment' 1 *Zimbabwe International Journal of Open and Distance Learning* (2011) 125.

[23] Business and Human Rights Center, 'Ecuador's Revised Draft Treaty; Getting down to business,' 3 September 2019 < https://www.business-humanrights.org/en/blog/ecuadors-revised-draft-treaty-getting-down-to-business/

[24] Humphrey Sipalla, 'Bridging the business and human rights divide with lessons from UNCLOS deep sea mining regime' in Juan Carlos Sainz and others (eds) *Liber amicorum in honour of a modern renaissance man, His Excellency Gudmundur Eiriksson*, University for Peace Press/OP Jindal/Universal Law Publishing, 2017, 14, available on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837671. See generally the United Nations Convention on the Law of the Sea (UNCLOS).

bring accountability through the judicial process on transnational mining corporations.

There have also been attempts to put in place a multilateral treaty-based institution that is directly applicable to transnational corporations without collaborating with a state.[25] However, as John Ruggie notes, they run the risk of being of little or no practical relevance.[26] 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 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?[27]

The Africa Mining IQ has stated that only about 7,000 mining corporations and engineers are currently mining in Africa.[28] 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 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 (not yet in force) may be relevant. It provides for vicarious corporate liability, which is helps in holding mining corporations liable for

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25 See for instance Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, Treaty on Transnational Corporations and Their Supply Chains with Regard to Human Rights, October 2017.

26 See -<https://www.business-humanrights.org/es/node/175772> on 1 March 2019.

27 John Ruggie, 'Business and human rights – Treaty road not travelled' Global Policy Forum, 6 May 2008.

28 See Africa Mining IQ -< http://www.projectsiq.icedev.co.za/mining-companies-in-drc.htm> on 8 August 2019.

the misconduct of their personnel.[29] One of the crimes that it is meant to fight is the illicit exploitation of natural resources,[30] which may cover a wide range of violations of environmental rights. A regional treaty such as a Central African treaty may be even more practical since it would deal with fewer transnational mining corporations than a continental treaty can.

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.[31] In a state such as the DRC, for instance, 20 out of the 24 active transnational mining corporations are not from Africa.[32]

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 judgements against corporations 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 would be globally enforceable.[33] The reason for this is that such an institution

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29 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). See generally, Africa Centre for Open Governance, Kenyans for Peace with Truth & Justice 'Seeking or shielding suspects? An analysis of the Malabo Protocol on the African Court' Africa Centre for Open Governance, November 2016, 10.

30 Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, 27 June 2014, Article 28A.

31 Convention of on Settlement of Investment Disputes between States and Nationals of other States, 19 October 1966, Article 54.

32 See Africa Mining IQ, 'Mining Companies in the DRC'.

33 See Convention of on Settlement of Investment Disputes between States and Nationals of other States, 19 October 1966, Article 54.

would be established by a global treaty.[34] 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. Such a tribunal should conform to the rules of the institution in order for the institution to endorse the judgement of such a tribunal. This would avoid the issues of practicality that one multilateral-treaty-based institution is likely to suffer from in dealing with thousands of transnational mining corporations. More details on how this institution should work are discussed in Section 3 below.

In light of the above, Section 2 of this study provides a context to understanding the shortcomings of state-centric international law in the Congolese mining sector. To achieve this, Section 2 relies on Third World Approaches to International Law. Although the context Section 2 provides generally helps to examine all the findings of this study, it specifically tests the following hypothesis: 'transnational corporations cannot be held accountable for violations at the international level because international human rights law is state-centric and based on "egalitarianism"'.

Section 3 argues for inserting an international law mechanism of enforcing environmental rights against transnational mining corporations in BITs. Such a mechanism is what this study refers to as the 'Under BITs and through class actions' mechanism. As Section 3 shows, the class action device is an efficient way of affording redress to victims of violations of environmental rights by transnational mining corporations in a state such as the DRC. This Section 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'.

Section 4 looks into the impact inserting human rights (such as environmental rights) obligations in BITs may have on the international

[34] See Convention on Settlement of Investment Disputes between States and Nationals of other States, Article 54.

human rights regime. This Section tests the following hypothesis: 'holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law in a creative way'. Section 5 concludes the discussion. It restates the initial problem, the research findings and the recommendations for the way forward.

2. 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 accountability through the judicial process in these states.[35] This is fuelled by the fact that these corporations have accumulated tremendous political and economic power, which has allowed them to interfere with domestic judicial systems. As Jephias Matunhu notes, the combined sales of two hundred of the largest transnational corporations is more than the gross domestic product of all the states in the world.[36] Despite this, the structure of international law is state-centric, expecting that only states have the duty to protect their populations from environmental rights violations by transnational mining corporations.[37]

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.[38] TWAIL main-

[35] Lee James McConnell, *Extracting accountability from non-state actors in international law: Assessing the scope for direct regulation* Routledge, 2017, 1.

[36] Jephias Matunhu, 'Poverty and corporate social responsibility in Africa: A critical assessment' 1 *Zimbabwe International Journal of Open and Distance Learning* (2011) 84.

[37] McConnell, *Extracting accountability from non-state actors in international law*, 6.

[38] Makau Mutua, 'Savages, victims and saviors: The metaphor of human rights' 42(1) *Harvard International Law Journal* (2001) 243.

tains that this universalisation of international law has worked to subordinate Third World states to economic domination. For this reason, TWAIL sees international law as an accomplice to colonialism, and that this has continued in recent times through the phenomenon of neo-colonialism, which has helped imperial states maintain economic superiority over Third World states.[39] 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.[40]

Indeed, transnational mining corporations operating in Third World states such as the DRC carry out their activities in an economic and legal system that grants them rights without any corresponding duties. This economic system is sustained by way of international instruments known as Bilateral Investment Treaties (BITs). BITs are international legal instruments through which two states impose obligations on themselves regarding the treatment of their respective nationals who are investors (such as a transnational mining corporation) in each other's territory.[41]

The origin of BITs justifies the claim that they further neo-colonialism. They were first designed as a strategic response to the legacy of colonialism in postcolonial states.[42] This legacy is well 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, the colonialists were faced with what he coined 'the native question': how can a tiny and foreign minority rule over an indigenous majority?[43] The solution was to have a

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39 Anghie and others 'Third World Approaches to International Law and individual responsibility in internal conflicts', 96.

40 Mutua, 'Savages, victims and saviors', 243.

41 Jacobs Michael, 'Transnational corporations and proliferation of bilateral investment treaties: More than a bit influential' 8 (2) *Transnational Corporations Review* (2016) 93.

42 Jurgen Kurtz, 'The shifting landscape of international investment law and its commentary' 106(3) *The American Journal of International Law* (2012) 686.

43 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, Princeton, 1996, 16 and 148.

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.[44] 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.[45]

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.[46] Constitutions granted them control over their domestic judicial systems, allowing them to effectively expropriate even foreign assets without compensation.[47] In the DRC, for example, the late President *Mobutu Sese Seko* converted such assets into political resources for him to reward his loyal disciples.[48]

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 full security and protection against uncompensated expro-

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44 See generally Charles Simkins, 'Agricultural production in the African reserves of South Africa, 1918-1969' 7(2) *Journal of Southern African Studies* (1981).

45 Mamdani, *Citizen and subject*, 23.

46 HWO Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on an African paradox' in Douglas Greenberg, Stanley N Katz, Melanie Beth Oliviero and Steven C Wheatley, *Constitutionalism and democracy: Transitions in the contemporary world*, Oxford University Press, Oxford, 1993, 67-68.

47 Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on an African paradox', 71-73. See also Kurtz, 'The shifting landscape of international investment law and its commentary', 686.

48 William SK Reno, 'Sovereignty and personal rule in Zaire' 1(3) *African Studies Quarterly* (1997) 42.

priation and nationalisation, and fair and equitable treatment.[49] In case of any breach of a BIT, the matter was to be brought before the International Court of Justice (ICJ)[50] since domestic judicial systems were compromised.[51] 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.[52]

What remains ironical is that if an investor violates the human rights of the nationals or 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 that these bodies are not independent in many postcolonial states was the cornerstone upon which BITs were erected.[53] It is not surprising, therefore, that transnational mining corporations investing in states such as the DRC get away with environmental rights violations.

As international legal instruments, BITs do not impose duties on transnational corporations because the international human rights regime has been engineered on the basis of egalitarianism.[54] 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

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49 Kurtz, 'The shifting landscape of international investment law and its commentary', 686. See also Margaret L Moses, *The principles and practice of international commercial arbitration*, Cambridge University Press, Cambridge, 2017, 255-256.

50 Stephen Schwebel, 'The overwhelming merits of bilateral investment treaties' 32(2) *Suffolk Transnational Law Review* (2009) 267.

51 Chia-yi Lee and Noel P Johnston, 'Improving reputation BIT by BIT: Bilateral investment treaties and foreign accountability' 42(3) *International Interactions* (2016) 429.

52 Todd Weiler, 'Balancing human rights and investment protection: A new approach for a different legal order' 27(2) *Boston College International and Comparative Law Review* (2004) 430.

53 Kurtz, 'The shifting landscape of international investment law and its commentary', 686.

54 Nien-hê Hsieh, 'Should business have human rights obligations?' *Journal of Human Rights* (2015) 1-2 and 10.

duty to respect human rights, the same way it does for its own citizens. This is by going through domestic courts,[55] which have been unable to hold to account transnational corporations mining in states 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.

In the place of egalitarianism as the cornerstone of the international human rights regime, TWAIL is 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 that are people-centric.[56] 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 people 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 people (they could therefore be accomplices with transnational corporations).[57] It is in this vein that TWAIL espouses 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.[58] There then emerges a need to investigate how BITs can be used creatively to bring accountability by judicial process to transnational mining corporations in international law. 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 Section.

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55 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.

56 L Ramina, 'TWAIL - Third World Approaches to International Law and human rights: Some considerations' 5(1) *Revista de Investigações Constitucionais* (2018) 263.

57 Anghie and others, 'Third World Approaches to International Law and individual responsibility in internal conflicts', 78 and 82.

58 Anghie and others, 'Third World Approaches to International Law and individual responsibility in internal conflicts', 261.

3. The 'Under BITs and through class actions' mechanism

The fact that BITs grant foreign investors protection without imposing on them any corresponding duties has been the subject of much critique. Some commentators have opined that BITs constitute an actual threat to human rights,[59] and have gone on to argue for the inclusion of a mechanism of enforcing corporate-related human rights violations under BITs.[60] Todd Weiler argues for the creation of *ad hoc* human rights tribunals of the same calibre as the investment arbitral tribunals (for instance those under 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, would seek redress before such *ad hoc* tribunals. He further argues that the compensation awarded should be enough to constitute an incentive for non-governmental organisations (NGOs) to investigate, prepare and bring an action on behalf of the alleged victims.[61]

There are some weaknesses in Weiler's argument. Such *ad hoc* arbitral tribunals do not at present 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.[62] 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 awards they endorse have more credibility. They are also timely and reasona-

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59 James D Fry, 'International human rights law in investment arbitration: evidence of international law unity' 18 *Duke Comparative and International Law* (2007) 77.

60 Aaron Cosbey and Howard Mann, 'Bilateral investment treaties, mining and national champions: Making it work', Background paper for the Ad Hoc Experts Group Meeting: Bilateral Investment Treaties and National Champions; 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, International Institute for Sustainable Development Report.

61 Weiler, 'Balancing human rights and investment protection: A new approach for a different legal order', 438.

62 Margaret L Moses, *The principles and practice of international commercial arbitration*, Cambridge University Press, Cambridge, 2017, 10.

ble and allow for the arbitrators' fees to be paid without any delay or complication.[63] However, it is impossible for states to agree to fund a bilateral arbitral institution for each BIT that they are party to because of limited resources. The DRC for example is party to about 17 BITs.[64] Further, only the two states that are party to the BIT can enforce any award realised by such an institution 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.[65] However, as demonstrated in the Introduction of this study, 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 the 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.[66] 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 parties 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

63 Moses, *The principles and practice of international commercial arbitration*, 10 and 14.

64 See, UNCTAD Investment Policy Hub, 'International Investment Agreements Navigator; Congo'.

65 See ICSID, 'Database of ICSID Member States'< https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> on 4 December 2019.

66 Ulrich Schroeter, 'Ad hoc or institutional arbitration – A clear-cut distinction? A closer look at borderline cases' 10(2) *Contemporary Asia Arbitration Journal* (2017) 141-142.

answer to this question is 'yes', then such a tribunal will suffer from a heavy caseload, rendering its authority feeble. One may as well wonder: where will such a Congolese get the resources to approach such a BIT-established tribunal? It is not clear also, which NGO he is referring to. What will guarantee, for example, that such an NGO serves the interests of the aggrieved party? There is a need to establish proper safeguards to avoid any opportunistic behaviour on the part of an NGO or any person representing the aggrieved party.

This study proposes the class action device as a solution to this problem: how a case would get to the arbitral tribunal and how an aggrieved person would have adequate representation.

3.1 Through class actions

3.1.1 Overview

The functioning of the class action device is dealt with in detail in the following subsection, but a brief overview is in order here. 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.[67] 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 to a class action.[68] However, in most cases, each class member remains with the option of opting out before any judgment or settlement binds the class.[69] This promotes the *res judicata* doctrine because when a court reaches a judgement or settlement, it binds all class members who have not opted out of the class.[70] For the 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 con-*

[67] Antonio Gidi, 'Class actions in Brazil - A model for civil law states' 51(2) *American Journal of Comparative Law* (2003) 334.

[68] Edward Sherman, 'Consumer class actions: Who are the real winners?' 56(2) *Maine Law Review* (2004) 228.

[69] Sherman, 'Consumer class actions: Who are the real winners?', 228.

[70] Gidi, 'Class actions in Brazil - A model for civil law states', 334.

jointe'. Spurious class actions and the *action en représentation conjointe* do not promote the *res judicata* principle. They only bind those class members who have opted in the class action expressly, through a signed document.[71] Spurious class actions and the *action en représentation conjointe* are not the ones advocated for in this study.

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.[72] This is achieved through what John Coffee has labelled 'entrepreneurial litigation'.[73] Entrepreneurial litigation refers to a lawyer acting as an independent entrepreneur. They dedicate time and effort and other necessary resources to investigate and prepare an action against an alleged abuser of the rights of a class of victims.[74] The lawyer is seen as an entrepreneur and the class action as their private investment.[75] 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.[76]

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.[77] It is a very recent development in civil law states,[78] among 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 into BIT-based disputes. The focus is on environmental rights for two reasons. First, the precise definition of human rights is a hot debate and discussing

71 Gidi, 'Class actions in Brazil - A model for civil law states', 96.

72 Sherman, 'Consumer class actions: Who are the real winners?', 227.

73 John Coffee, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 54 *The University of Chicago Law Review* (1987) 877.

74 J Coffee, 'The regulation of entrepreneurial litigation', 878 and 882-883.

75 Gidi, 'Class actions in Brazil - A model for civil law states', 369.

76 Gidi, 'Class actions in Brazil - A model for civil law states', 369. See also E Sherman, 'Consumer class actions: Who are the real winners?', 224.

77 Samuel Baumgartner, 'Class actions and group litigation in Switzerland' 27(2) *Northwestern Journal of International Law and Business* (2007) 308-309.

78 Gidi, 'Class actions in Brazil - A model for civil law states', 323.

more than one right will inevitably go beyond the remit of this study.[79] Second, and most importantly, looking at the life cycle of a mine, environmental rights are the most likely to be threatened or violated by a mining company.

3.1.2 Lessons from US and Brazilian class actions

The US class action device is provided for under Rule 23 of the 1966 Federal Rules of Civil Procedure. Rule 23 sets out proper safeguards to avoid frustrating the judicial economy, and any opportunistic behaviour from the entrepreneurial lawyer.[80] Subsection (a) of the Rule mainly speaks 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 numerous class members, commonality of questions of law or fact typicality between the class representatives' claims and those of the whole class, and adequacy of representation.[81]

With respect to the numerosity criterion, class representatives must prove that class members are so many that it is impractical to have the traditional joinder of their claims.[82] To meet commonality, they have to prove that class members are so similarly situated that the class can be identified easily.[83] Typicality is close to commonality. It is satisfied when the class representatives and the class as a whole share in the approximate cause of harm.[84] Adequate representation speaks to which person(s) should have collective standing on behalf of the class.[85]

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79 Kathrin L Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 4 *Brigham Young University Law Review* (1999) 1149.

80 Sussana Kim Ripken, 'Conflicting ideologies of group litigation: Who may challenge settlements in class actions and derivative? 66 *Tennessee Law Review* (1998) 113.

81 [US] Federal Rules of Civil Procedure, (2018), Rule 23(a).

82 Melissa Hart, 'Will employment discrimination class actions survive?' *Akron Law Review* (2004) 815.

83 Boyd, 'Collective rights adjudication in US courts', 1159.

84 Boyd, 'Collective rights adjudication in US courts', 1162.

85 Gidi, 'Class actions in Brazil - A model for civil law states', 363.

Rule 23(e) aims at curbing any opportunistic behaviour that the entrepreneurial lawyer may be tempted to engage in. This provision demands the court's approval before dismissing or compromising a class action. It also requires that notice on the same be sent to all class members,[86] and their approval sought.[87] Susanna Kim Ripken captures the opportunistic behaviour that the provision 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.[88]

Edward Sherman has also warned that settlements have often been 'sweetheart deals' between the defendant and the class lawyers.[89] 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.[90] Thus far, although one may say that a comparative lawyer should look at the US class action device with interest, such lawyer should also look at it with suspicion,[91] especially in the enforcement of collective rights such as environmental rights.

Rule 23's 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

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86 Federal Rules of Civil Procedure, (2018), Rule 23(e).

87 Federal Rules of Civil Procedure, (2018), Rule 23(e).

88 Kim, 'Conflicting ideologies of group litigation: Who may challenge settlements in class actions and derivative?', 124.

89 Sherman, 'Consumer class actions: Who are the real winners?', 232.

90 Sherman, 'Consumer class actions: Who are the real winners?', 228.

91 Sherman, 'Consumer class actions: Who are the real winners?', 224.

rights violation) acts. It must be established by a preponderance of the evidence that this was the corporation's *modus operandi*.[92]

It is difficult to meet commonality in cases of environmental rights violations, because of the differences in the class of victims, some of whom might not have manifested full-blown injuries.[93] US jurisprudence on class actions has also cautioned that there may be many differences as to the type of harm class members might have suffered. However, these differences only establish that their positions and claims are not identical, however, it does not follow that they are not similar. 'Victims may be similarly situated without being identically situated'.[94] Putting victims in one class mandatorily, however, implies averaging compensation among class members, hence overlooking the merits of individual claims.[95]

A solution to this problem has been sub-classing. Therefore, in cases of environmental violations, where a transnational mining corporation may have caused different environmental abuses to different groups of people, these people may be subdivided into groups that share similar injuries.[96] Sub-classing does not, however, do away with the problem of mandatory classing altogether. It only renders the differences between the individual claims minimal.[97] An example of sub-classing is the class settlement on the victims of the Holocaust, whereby victims were divided into sub-classes of Jews, Jehovah's Witnesses, gypsies, homosexuals and disabled people. These groups had experienced different abuses.[98]

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92 *General Telephone Co v Falcon*, 457 United States Supreme Court 147 (1982).

93 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1164.

94 *Shain v Armour and Co*, United States District Court for the Western District of Kentucky 40 F. Supp. 488 (1941). See also Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1161.

95 Coffee, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 878.

96 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1164

97 Coffee, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 921.

98 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1156.

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 one that protects human beings from the violation of the environment.[99] Since class members will not be defined, money earned in compensation should cater progressively for those who manifest full-blown injuries and may also be used 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.[100]

In addition, the fund should be managed by a human rights non-governmental organisation (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.[101]

To meet the requirement of adequacy of representation, the rules of the 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.

In the DRC, public attorneys are more likely to face financial or political constraints. Therefore, they are more likely to fail in investigation and in the proper preparation of meritorious cases .[102] American scholarship on class actions has shown that class actions are better led

[99] Timonah Chore, '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.

[100] Gidi, 'Class actions in Brazil - A model for civil law states', 339.

[101] Gidi, 'Class actions in Brazil - A model for civil law states', 339.

[102] Sherman, 'Consumer class actions: Who are the real winners?', 232.

by organisations rather than state actors. Environmental rights NGOs, for instance, have more interest in the subject of litigation rather than in the money as is the case with entrepreneurial lawyers.[103]

The requirement of Rule 23(e), giving notice to all the victims before the class representatives can dismiss or compromise a class action case may be virtually impossible to achieve with respect to environmental rights cases.[104] The arbitral tribunal should be consulted on this. However, notice should still be issued to those that may be identified, at the 'class level' through reasonable effort.[105]

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 malpractice in the future,[106] hence bringing about structural changes in law and institutions. This is because class actions give victims an opportunity to bring to the fore any unjust treatment that they may 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…'.[107] Such pressure may bring about judicial reforms in a state such as the DRC.

4. Impact on international law

This Section tests the following hypothesis: 'Holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law.' The Section looks into the impact that subjecting transnational mining corporations to the respect of environmental rights through BITs

103 Gidi, 'Class actions in Brazil - A model for civil law states', 370.

104 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1168-1169.

105 George Rutherglen, 'Title 7 class actions' 47(688) *The University of Chicago Law Review* (1980) 670.

106 Sherman, 'Consumer class actions: Who are the real winners?', 232.

107 Kevin R Johnson, 'International human rights class actions: New frontiers for group litigation', 3 *Michigan State Law Review* (2004) 656.

and class actions will have on international law. It demonstrates that if transnational corporations are to be held accountable for environmental rights at the international level through BITs and class actions, there is a need to rethink BIT-related disputes as matters falling within the sphere of private law. BITs 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 the arbitral tribunal proceedings, which are traditionally kept private. Further, the Section makes and justifies the claim that enforcing environmental rights through BITs and 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 cognisance of the particular circumstances of Third World states such as the DRC instead of being premised on history by analogy.

James Fry, like many others, has maintained that international investment arbitrations are not appropriate fora for human rights adjudication. Fry argues that the majority of arbitrators are not well versed with international human rights law because their background is informed by the private international law 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.[108] He has also stated that there already exist many fora before which human rights grievances can be addressed.[109]

In response to this, Weiler has argued that it is not a herculean task to constitute a bench of arbitrators that are well versed in a certain area of human rights such as environmental rights.[110] After all, the parties before an arbitral tribunal have the choice to decide on which arbitrators will constitute an arbitral tribunal.[111]

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108 Fry, 'International human rights law and investment arbitration', 110-111.

109 Fry, 'International human rights law and investment arbitration', 111.

110 Weiler, 'Balancing human rights and investment protection: A new approach for a different legal order', 438.

111 Moses, *The principles and practice of international commercial arbitration*, 1.

Further, the discussion in this study has clearly shown that bringing accountability to transnational mining corporations calls for further consideration of the international human rights regime. Fry's second criticism would lose its strength on account of the international human rights mechanisms that are in place to impose human rights obligations on corporations that have proven to be inefficacious in states such as the DRC. The following observation by Kathryn Boyd 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.[112]

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'.[113]

Enforcing environmental rights through BITs and 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,[114] is important because it will guarantee enforcement of an arbitral award by enforcing it in jurisdictions in which these corporations have assets.[115] In most instances, these jurisdictions are not the party to the BIT. It is instructive to note that such corporations generally abide by the laws of developed states, which impose stringent legal obligations.[116] This situation changes when they carry their businesses to Third World states which have 'weak' mechanisms for enforcing human rights.[117]

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112 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1182.

113 See Ruggie, 'Business and human rights – Treaty road not travelled'.

114 Moses, *The principles and practice of international commercial arbitration*, 4-5.

115 Moses, *The principles and practice of international commercial arbitration*, 258.

116 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.

117 Sophie Schiettekatte, 'Do we need a world court of human rights: Filling in the gaps for TNC responsibility' Master's Thesis, Universiteit Gent, 2015-2016, 43.

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 these corporations.[118]

Further, arbitration is usually meant to be private. However, environmental rights violations being matters of general public importance, the public should be in a position to access the arbitral proceedings.[119] This trend is already taking shape even within the field of investment law where transnational corporations enjoy rights only, without any corresponding obligations. It should be a welcomed contribution in terms of holding transnational mining corporations accountable for environmental rights violations.[120] 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 the international law level.[121]

It is said that 'the term *jurisprudence* denotes a body of learning built up from a number of judicial pronouncements on a particular issue resulting in a coherent principle or set of principles.'[122] The enforcement of collective rights such as the right to a clean and safe environment is in itself problematic in the regime of human rights law. This is because 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.[123] Enforcing human rights

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118 Charltons, 'Advising resource companies' < https://charltonsnaturalresources.com/en/members-affiliations/14-charltons-boutique-hong-kong-solicitors/advising-resource-companies> on 5 July 2019.

119 See Lucy Trevelyan, 'International arbitration: A time of change', *International Bar Association: The Global Voice of the Legal Profession*, 27 October 2017.

120 See Trevelyan, 'International arbitration: A time of change',

121 See Trevelyan, 'International arbitration: A time of change'.

122 A Zuckerman, 'Super injunctions - Curiosity-suppressant orders undermine the rule of law: Injunctions, interim injunctions, secrecy, transparency' (29) 2 *Civil Justice Quarterly* (2010) 135.

123 Johnson, 'International human rights class actions: New frontiers for group litigation'.

under BITs and through class actions should therefore be a welcome contribution to addressing this pathology that inheres the international human rights regime.

All claims of the universality of the international human rights regime (which is state-centric) ought to be approached with caution and trepidation.[124] The current international order tends to give meaning to contemporary realities of Third World peoples through history by analogy. As a result, such realities are de-historised, dissuaded from the context and processes that have led to it.[125] The aim has been fitting comfortably into an abstract universalism.[126] 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 they are more likely to be compromised by these corporations.

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

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124 Makau Mutua, 'Human rights in Africa: The limited promise of liberalism' 51(1) *Journal of African Studies* (2008) 19.

125 Mamdani, *Citizen and subject*, 12-13.

126 Mamdani, *Citizen and subject*, 13.

5. Conclusion and recommendations

This conclusion 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 the study has developed in the aim of solving the problem under study. Third, it brings to the reader's attention the findings that this study has arrived at on these hypotheses. Fourth, it provides recommendations on the way forward in directing future research.

5.1 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 is occasioned by the lack of accountability by judicial process in the DRC mining sector. The study 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.

5.2 Findings

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

With regard to the first hypothesis, this study has found that this is true because of corruption that pervades the mining sector in the DRC. Further, this is coupled by the fact that there are many loopholes in Congolese law that threaten the independence of the judiciary.

5.2.2 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, 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 often Third World states do not promote the rights of their peoples. As such, international law should respond to this by holding any violator of rights of people accountable at the international level.

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

This hypothesis resulted first into an inquiry 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 would be of little relevance because such an institution would 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 study 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 state 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 of non-African countries. In response to this, the study 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-established 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, investing 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. Their judgments may then be enforced by

a global institution such as ICSID established by a global treaty for it to be widely enforceable.

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

Finally, with regard to the fourth hypothesis, this study has demonstrated that subjecting transnational mining corporations to environmental rights in an international forum implies rethinking the very structure of international law. As John 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.

5.3 Directing future research

This study has focused exclusively on the violations of environmental rights by transnational mining corporations operating in the DRC. The DRC being a Third World state, this study may be applicable to any Third World state lacking 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.