

# GUEST ESSAYS CIVIL SOCIETY & THE PRIVATE SECTOR

## THE AFRICAN EXPERIENCE OF LAND GRABS AND HUMAN RIGHTS VIOLATIONS BY POWERFUL BIG BUSINESSES

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### INTRODUCTION

With seemingly intractable human rights violations and conflicts ranging across Burundi, Central African Republic (CAR), the Democratic Republic of the Congo (DRC), Ethiopia, Mozambique, Nigeria, South Sudan and Zimbabwe, the focus has mostly fallen on the effect of poor political governance on human rights, as opposed to business and human rights. What has become clear over the years from my field of practice is that there is an absence of effective accountability mechanisms on the role of business and commercial interests in violations and abuses of rights. There is an impunity gap that needs to be addressed when it comes to human rights violations and abuses caused by or associated with the role of business and economic enterprise. Many individuals and entities have economic strength that exceeds whole nations in Africa. As the [International Federation for Human Rights](#) (FIDH) has observed:

*“Private actors, in particular transnational corporations, have widely benefited from globalisation and have accumulated tremendous power. However, this power has not been matched with corresponding obligations.”*

The unequal economic power relations between countries and businesses have in many situations translated into ability to manipulate or at least intimidate systems in a way that makes economically strong individuals and entities operate with some

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degree of impunity for their role in contributing to human rights violations. This feeds into the often-stated notion that the law, like a spider's web, only catches the weak.

## EXAMPLES OF VIOLATIONS

Economic players, especially multinational companies that operate across national borders, have gained unprecedented power and influence across the world. There are few effective mechanisms at national or international level to prevent corporate human rights abuses or to hold companies to account. There has been progress towards controlling sovereign human rights abuses, but little progress has been made in holding multinational corporations accountable for the gross human violations that they have been committing. Around the world, hundreds of people are killed each year because of corporations' operations and activities. According to Elizabeth McSheffrey:<sup>2</sup>

*“One of the most difficult aspects of this problem has been finding such abuses, because they happen on a smaller scale to avoid attention, yet can be unbearably difficult for those afflicted.”*

A few case studies are helpful to show the role of business in human rights violations, and the general climate of impunity that is pervading.

### AMADIBA CRISIS COMMITTEE STRUGGLE IN SOUTH AFRICA

The Amadiba Crisis Community in Xolobeni, South Africa is a brave community fighting to protect their rights against the Australian Mining company, Mineral Commodities Limited (MRC), which wants to mine titanium forcibly from Xolobeni, in the face of community resistance. Xolobeni is in Pondoland on the West Coast of South Africa, and the Pondo people have lived there for 1,500 years. The [Amadiba Crisis Committee](#) formed in 2007 to defend human rights and to take a stand against corruption and exploitation.

The Chairperson of Amadiba Crisis Committee and community leader Siphokazi Bazooka Rhadebe was assassinated in March 2016. He was shot eight times by what are believed to be hired assassins. Rhadebe's case, like those of others before him, including community leader Mandoda Ndovela, murdered in 2003, has never been fully investigated and the perpetrators have not been brought to justice. The community has tried to hire the services of private investigators but the costs are prohibitive. The surviving members of the community have taken over the fight to protect their land and heritage despite serious personal risk and danger to their lives.

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<sup>2</sup> 'Rape, killings at Canadian mines raise questions about Liberal promise', Elizabeth McSheffrey, National Observer, 31 October 2016.

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In paying tribute to the Amadiba Crisis Committee, Mr Siphosami Malunga, the Executive Director of the Open Society Initiative of Southern Africa (OSISA), summarises the struggles that are being valiantly fought by communities to deal with what others term as development violations:

*“[ACC activist] Nonhle Mbuthuma and her community remain unfazed in their fight for their rights. She and her community need our solidarity and support because their struggle epitomises that of many others in our continent and the world over powerful political and economic elites ready to use whatever means, including and especially violence, against the powerless people and communities who are the real owners of the resources, for their narrow economic benefit.”*

The killing of land activists is a global phenomenon that the International Commission of Jurists (ICJ) has noted with concern in the recent years. For example, an ICJ legal adviser in Asia was confronted by a community activist in Myanmar whose community was adversely affected by development-based violations. The activist displayed a bullet that was used to kill Khin Win, a local landowner, during a 22 December 2014 protest against the expansion of the mine, entailing the seizure of land in 35 villages. Two other villagers were hurt in the same protest.

**SHELL AND THE BODO COMMUNITY, NIGERIA**

In Nigeria, 15,000 plaintiffs and members of the Bodo community felt aggrieved as a result of two oil spills in the Niger Delta that damaged their land and water in 2008 and 2009 as a result of investment by Shell. They asked for compensation for losses suffered to their health, livelihoods and land, and asked for a court-ordered clean-up of the pollution. The lawsuit against Shell was filed in the London High Court on 23 March 2012.

Shell had made settlement offers to the plaintiffs, of UK£4,000 (approx. US\$5,000), which they refused on the basis that it was too low considering the alleged damages suffered. A preliminary hearing took place from 29 April to 9 May 2014 to consider Shell’s duty to take reasonable steps to prevent spillage from their pipelines, whether from malfunction or from oil theft. The judge ruled on 20 June 2014 that Shell could be held responsible for spills from their pipelines if the company failed to take reasonable measures to protect them from malfunction or oil theft (known as ‘bunkering’). In November 2014, it was revealed that documents produced in the UK High Court suggested that Shell had been warned about the “risk and hazard” of the pipeline before the oil spill. Shell “dismisses the suggestion that it has knowingly continued to use a pipeline that is not safe to operate.”

While the case was expected to go to trial in mid-2015, Shell agreed a UK£55 million (approx. US\$69 million) out of court settlement in January 2015. UK£35 million (approx. US\$44 million) will be split between those impacted on by the spill, who will each receive UK£2,200 (approx. US\$2,800), while UK£20 million (approx. US\$25 million) will go to the community.

This case is important in that it shows that with creativity, public interest litigation can be used to achieve impact in protecting the rights of people affected by business operations, particularly in the extractive sector.

## SHELL AND THE OGALE COMMUNITY, NIGERIA

Over several years there have also been repeated oil spills from Shell's pipelines in Ogoniland which have still not been cleaned up. In 2011 the United Nations Environment Programme (UNEP) [documented](#) the appalling environmental damage and oil pollution in Ogoniland. Its study described public health as seriously threatened by oil spills and stated that environmental restoration of the area could prove to be the world's most wide-ranging and long-term oil clean-up exercise ever undertaken.

At the time, Shell stated that it accepted the findings and the recommendations of the UNEP Report. However, a 2015 investigation by Amnesty International revealed that claims by Shell that it had cleaned up heavily polluted areas were blatantly false. Researchers observed ongoing oil pollution at four locations where UNEP found contamination, including Okuluebu in Ogale, one of the sites included in the legal claim. As [Joe Westby](#), Campaigner on Business and Human Rights at Amnesty International, reports:

*“The Ogale and Bille communities have been hit by multiple Shell spills, threatening their health and drinking water. The UN found groundwater contamination in Ogale was more than 450 times the legal limit – when Amnesty investigators went back four years later, Shell still hadn't cleaned up the pollution.”*

Two Nigerian communities brought separate legal actions against Royal Dutch Shell and its Nigerian subsidiary in 2016. The first claim was brought on behalf of 2,335 people from the Bille Kingdom, a fishing community whose environment has been devastated by oil spills over the past five years, endangering their livelihoods in the process. The second claim was on behalf of the Ogale Community in Ogoniland, which consists of around 40,000 people.

Evidence presented before the court and Amnesty International's years of experience working on the issue show that Royal Dutch Shell, an Anglo-Dutch company, has significant direct involvement with its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd. However, Shell disputed the jurisdiction of the UK court, arguing that the case concerned Nigerian plaintiffs and a Nigerian company. The court ruled that Royal Dutch Shell could not be held responsible for the actions of its Nigerian subsidiary. As [Amnesty International](#) lamented after the court ruling:

*“The UK High Court ruling that the two Niger Delta communities devastated by oil spills cannot have their claims against Shell heard in the UK could rob them of justice and allow UK multinationals to commit abuses overseas with impunity.”*

The UK High Court ruling is dangerous, as it paves the way for impunity for transnational corporations for human rights violations in Nigeria. The company has profited from decades of abuses and environmental destruction in the Niger Delta. Hopefully this dangerous precedent will be overturned, as the communities are expected to appeal.

## **BLYVOORUITZICHT MINE VILLAGE: THE HUMAN TOLL OF STATE AND CORPORATE ABDICATION OF RESPONSIBILITY IN SOUTH AFRICA**

Blyvooruitzicht Gold Mine in South Africa was once one of the world's richest gold mining concerns. However, it entered into provisional liquidation citing viability concerns, and abruptly halted operation in 2013. It may seem a normal and prudent business decision to liquidate non-performing entities, but when one scratches the surface, this was not the case for the Blyvooruitzicht Gold Mine. According to [FIDH and Lawyers for Human Rights](#), the sudden halting of operations plunged:

*“...thousands of employees and the surrounding community of more than 6,000 people into crisis. The mine operated uninterrupted for more than seven decades including under management by various publicly listed companies.”*

Residents reported a number of significant challenges resulting from the end of operations at the mine and the failure of its previous owners and operators to meet their obligations to manage the associated negative environmental and socio-economic impacts. Continued access to basic services, including water, sanitation and electricity, was also threatened, as prior to provisional liquidation, the mine provided access to all such services. In the aftermath, local government, constitutionally charged with the obligation to ensure such access, contested its responsibility and faced capacity constraints with respect to fulfilling this mandate.

The wholesale lack of environmental measures undertaken at the mine since provisional liquidation means that the residents live on the doorstep of an entirely unrehabilitated, non-operational gold mine. They suffer exposure to radioactive dust (a by-product of gold mining), a complete breakdown of sanitation infrastructure, resulting in raw sewage coursing through the streets, possible water contamination, and an increasing risk of large sinkholes opening in the community at any time.

By initiating insolvency proceedings, rather than pursuing a proper mine closure, the protections that should otherwise have been provided to the village have effectively been eliminated. Indeed, stakeholders appear to believe that South Africa's insolvency laws entirely supplant the relevant mining laws that would otherwise provide such protection. Corporate actors have not fulfilled the relevant obligations and government departments have failed to enforce the law, to facilitate the village's continued access to basic services, and to collaborate across government spheres to help improve the village's living conditions.

## **TALISMAN ENERGY AND THE PRESBYTERIAN CHURCH OF SUDAN**

One important case that establishes corporate liability for serious human rights violations is the case brought about by former residents of Sudan in a [class action](#) against Talisman Energy, Inc. and the Government of Sudan. The case alleges that the company's oil exploration activities have led to

violations of international law, including theft and destruction of property, forced displacement, kidnapping, slavery, rape, war crimes and extrajudicial killings. Talisman moved to dismiss this action on a number of fronts, including lack of jurisdiction, but its motion to dismiss was denied, reinforcing the notion that business can be liable for conduct that results in serious violations of human rights.

## ICJ'S WORK ON BUSINESS AND HUMAN RIGHTS

Since 2008, working as Africa Director for the ICJ, an organisation that is focused on promoting and protecting human rights through the rule of law, we have used the unique legal expertise of the ICJ and its eminent jurists to contribute to the development and strengthening of national and international justice systems on the African continent. As human rights are not self-executing, we have tried to ensure the progressive development and effective implementation of international human rights and international humanitarian law in Africa; secure the realisation of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and access to justice. This is the core mandate of the ICJ.

The ICJ continues working at two levels: first, to clarify, or develop, international human rights standards applicable to business and governments in relation to business activity; and second, to create, or develop, appropriate mechanisms to afford effective redress to those whose rights have been infringed by harmful business conduct.

The ICJ has established an [expert panel](#) of jurists to study and provide guidance on the effectiveness of grievance procedures provided by businesses to address and remedy harm arising from their operations. Many large business enterprises and projects have their own internal procedures and mechanisms to address concerns affecting individuals and local communities that arise from their operations. Known as operational-level grievance mechanisms, these are an integral part of responsible business practices and a way to remedy real or perceived wrongs. However, poor design or implementation of these grievance mechanisms can result in further problems, aggravating the harm to individuals and communities and impacting on the company's or project's sustainability. The conclusions drawn out of this research could well feed into ICJ's contribution towards an effective framework for business and human rights.

In 2016 the ICJ conducted training of a pool of lawyers from East and Southern Africa to develop their capacity and appetite to litigate in appropriate cases where business operations result in violations of human rights. The ICJ hopes to keep working with this pool of litigators to reduce and ultimately eliminate corporate contribution or complicity to human rights violations in Africa.

It has been clear that this effort is absolutely critical towards eradicating impunity in Africa. Impunity in all its forms is at the centre of serious and widespread human rights violations in Africa. It is therefore encouraging to note that some work is slowly being done at the international level to pay attention to addressing this impunity gap.

## GUEST ESSAYS

## CIVIL SOCIETY & THE PRIVATE SECTOR

On 26 June 2014, the United Nations Human Rights Council (UNHRC) adopted [Resolution 26/9](#) establishing an:

*“open ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” (OEIWG) with the mandate to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”*

The ICJ is contributing to this quest towards a convention to regulate the activities of transnational corporations. For example, on [25 October 2016](#), the ICJ convened a roundtable at the second session of the OEIWG. It offered the opportunity to advance significantly the process of establishing an effective treaty that can assist in preventing and addressing business-related human rights abuses.

The ICJ’s work on corporate complicity in human rights violations preceded the work done at the UN on business and human rights. For example, in 2006, the ICJ convened an [Expert Legal Panel](#) to develop the legal and public policy meaning of corporate complicity in the worst violations of international human rights and humanitarian law that amount to international crimes, and produced three ground-breaking publications on corporate complicity. This gave impetus to efforts to move towards a binding international instrument on business and human rights. The ICJ continues to convene meetings of the civil society coalition in support of the development of a binding treaty, which is loosely referred to as the Treaty Alliance.

### UN FRAMEWORK ON BUSINESS AND HUMAN RIGHTS

Before Resolution 26/9 in 2014, the international community also responded to concerns about the impunity gap for business involvement in human rights violations by establishing a group of experts under the leadership of Professor Ruggie to develop principles on business and human rights. This culminated in 2011 with the adoption by the UNHRC of the [UN Guiding Principles on Business and Human Rights](#) (UNGPs). These are a set of guidelines for corporations and governments to regulate and determine who is responsible for addressing human rights violations and abuses by companies and corporations.

International human rights standards have traditionally been the responsibility of governments, aimed at regulating relations between the state and individuals and groups. But with the increased role of corporate actors, nationally and internationally, the issue of the impact of business on the enjoyment of human rights has been placed on the agenda by initiatives such as the development of the UNGPs.

The UNGPs are grounded in the recognition of three key principles:

1. States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
2. The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights;

3. The need for rights and obligations to be matched to appropriate and effective remedies when breached.

Part of the logic behind the UNGPs is that states' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory under customary international law. Therefore states may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse within their territory or state.

The primary weakness of the UNGPs is that they are not legally binding and are voluntary in nature. This makes it possible for corporations that do not respect human rights to ignore them with no consequence.

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## AFRICAN UNION EFFORTS TOWARDS A BUSINESS AND HUMAN RIGHT POLICY FRAMEWORK

Initially the African Commission on Human and Peoples Rights (known as the African Commission for short) dealt with cases involving the impact of business on human rights, mainly through litigation brought about through the communication procedure provided under the African Charter on Human and Peoples' Rights (known as the African Charter). Through this procedure there has been development of excellent jurisprudence by the African Commission to protect human rights during the course of doing business operations.

One case at the African Commission, the Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) vs. Nigeria ([Communication 155/96](#)), challenged the role of the then military government of Nigeria in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). It alleged that business:

*"...operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People."*

It also alleged further the oil exploitation in Ogoniland was done without:

*"regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards... causing numerous avoidable spills in the proximity of villages."*



It concluded by alleging that:

*“the resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems” for the Ogoni people.*

The African Commission found Nigeria to have been in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. It urged Nigeria to:

*“...ensure protection of the environment, health and livelihood of the people of Ogoniland... [to stop] all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory... [to conduct] an investigation into the human rights violations described” in the communication and to prosecute “officials of the security forces, NNPC and relevant agencies involved in human rights violations” as well as to ensure “adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations.”*

There are a number of other cases that the African Commission has dealt with in the area of the impact of business and human rights.<sup>3</sup> However, the African Commission’s decisions are recommendations with a low compliance and implementation rate. In a bid to achieve greater impact, the African Commission established a [Working Group on Extractive Industries, Environment and Human Rights Violations](#) (WGEI) in 2009 to try and develop standards in this area.

The mandate of the WGEI included, among other aspects is:

*“To examine the impact of extractive industries in Africa within the context on the African Charter on Human and Peoples’ Rights; research specific issues pertaining to the right of all peoples to freely dispose of their wealth and natural resources and to a general satisfactory environment favourable to their development; undertake research on the violations of human and peoples’ rights by non-state actors in Africa; and to inform the African Commission on the possible liability of non-state actors.”*

Existing side by side with the effort of the African Commission to consider the impact of business on human rights is

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<sup>3</sup> See also for example PEN International, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) vs. Nigeria Communications 137/94-139/94-154/96-161/97.

work by the African Union (AU), which is in the process of formulating a policy framework on business and human rights, supported by the European Union (EU). The AU Commission (the AU's secretariat) committed, during the Africa Regional Forum on Business and Human Rights, held in 2014, to develop a framework on implementing the UNGPs in Africa. It is not clear how the AU Commission process feeds into or collaborates with the African Commission process, but in the interactions in which the writer has been involved, there does not seem to be clear collaboration between these two entities, even though they are both organs of the AU.

The AU Commission process, with the help of the EU, seems to focus mainly on the implementation of the UNGPs in Africa. At a meeting in which the writer participated at the Pan African Parliament there was not any mention of the international treaty process in the policy document that the AU Commission was developing, and nor did the meeting seem to take into account the thrust that the African Commission was taking through the WGEIs.<sup>4</sup>

There is a third pillar of work that the AU is trying to develop in order to deal with the issue of the impact of business on human rights. This is through the work around the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights, known as the Malabo Protocol, adopted in June 2014. Through the Malabo Protocol the AU heads of state and government seek to create a regional criminal court that can potentially address the continent's persistent challenges, including the scourge of conflict and impunity. The Malabo Protocol identifies some serious crimes of particular relevance to Africa, such as money laundering and the illicit exploitation of natural resources, that usually play a facilitating role in the commission of some of the more core international crimes.

The serious concern about the Malabo Protocol is that the framing of some of the crimes falls foul of the principle of legality, owing to the vagueness, broadness and wideness of the crimes. There is a need for greater clarity of the crimes so that people can regulate their conduct, because they can predict the consequences of their choices and conduct with certainty. [Amnesty International](#) observed that the way in which the Malabo Protocol identifies terrorism in Article 28G is vague, too wide and dangerous for human rights, as it could be manipulated to restrict human rights. It does not provide sufficient exceptions for lawful and constitutionally protected conduct such as peaceful protest, the use of social media, legitimate agitation for improved service delivery and human rights issues including economic social and cultural rights. The way in which the crime of corruption and unconstitutional change of government among others is worded is also vague, broad and wide, breaching the principle of legality. These are similar conclusions that civil society came to when convened in Pretoria by the Foundation for Human Rights, Lawyers for Human Rights and the Southern Africa Litigation Centre to consider the Malabo Protocol.<sup>5</sup>

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<sup>4</sup> AU Stakeholders meeting at the Pan African Parliament, Midrand, Johannesburg, South Africa to consider a draft AU Commission Policy Business and Human Rights, 16 February 2017.

<sup>5</sup> Meeting of civil society on the Malabo Protocol Convened by the Foundation for Human Rights, Lawyers for Human Rights and Southern African Litigation Centre at the Sheraton Hotel, Pretoria, South Africa, 2017.

Some harmonisation of these three processes seems needed in Africa so that the AU policy on business and human rights is more cohesive, encompassing both the AU Commission's thrust and the African Commission's efforts, as reflected in the outputs from the WGEIs and the jurisprudence that is evolving.

## TOWARDS LEGAL ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

There has been increasing pressure at the UN level to move towards the development of a binding legal instrument on business and human rights. The rationale for this pressure is that the obligation of states to establish an effective legal framework to make business enterprises legally accountable when they cause or contribute to human rights abuses must be considered as among the most important objectives. Addressing the legal responsibility of the potential perpetrators of human rights abuses is also closely linked to the realisation of the right of victims to an effective remedy and reparation. When accountability is ensured, this can constitute a component of reparation, as well as provide for the condition by which remedies may be achieved.

The most pressing need for action is to make remedies to provide available and effective redress to those who suffer harm as a result of the acts or omissions of business enterprises. This has been made a priority area by civil society groups, including the [ICJ](#), and also international organisations. There is currently no general international legal regime on corporate liability for human rights abuses, although it has been asserted in litigation under the Alien Tort Claims Act in the USA that general international law (the 'law of Nations') already provides a subject matter basis for corporate criminal and civil liability.

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) Article 3(4) is the only human rights treaty that provides expressly for the legal accountability (criminal, civil or administrative) of legal entities, including business corporations.<sup>6</sup> There are also several conventions adopted within the framework of the Council of Europe that provide for legal liability of legal persons. These include the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health; the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; the Convention on Action Against Trafficking in Human Beings; and the Convention on Cybercrime. These Conventions have the advantage of addressing business as legal persons with their own rights and obligations, as well as recognising the importance of the individual criminal responsibility of company managers and directors. At the same time, they

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<sup>6</sup>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002: Article 3.

generally adopt a flexible system of legal responsibility for these legal persons (including criminal, civil or administrative law) that is better adapted to the diverse approaches and traditions of national legal systems.

Civil society, under the Treaty Initiative led by FIDH and the International Network for Economic, Social and Cultural Rights (ESCR-Net), makes [10 key proposals](#) for the treaty on business and human rights. These deal with:

*“...critical issues like the primacy of human rights over trade and investment laws, the scope of the treaty and how the treaty might address the international human rights responsibilities of corporations.”*

They also address:

*“...vital issues like participation and access to information, human rights due diligence, extraterritorial obligations corporate criminal liability and the critical issue of access to justice.”*

It is not going to be an easy process, but it is well underway, and in October 2017, Ecuador, supported strongly by South Africa, is expected to share the first draft of a treaty in Geneva.

## CONCLUSION

The article has considered the role that business and economic enterprise have played in contributing to violations of human rights, and the impunity gap that currently exists. It acknowledges that business activities are very important for the development of societies and individuals as well as the realisation of several rights, including to decent work, adequate standards of living and the right to health. But the reality in Africa is that institutions of checks and balances as well as for the legal protection of human rights, such as courts and constitutional commissions, are weak. Political institutions are also generally not sufficiently developed to create situations of political and economic governance that allow the state to have effective oversight to foster the accountability of business and economic behaviour as it affects human rights.

Unregulated business activities and unaccountable businesses can have negative impacts on human rights, such as human rights abuses, which in some cases may amount to criminal offences. There is need to continue building the growing consensus on asserting the human rights responsibilities of business and the existing obligations of states to protect against the human rights abuses business can cause.

## RECOMMENDATIONS

In looking forward, the need is to ask what roles different players could have towards shaping a binding legal instrument on business and human rights. Some of the actions could include the following:

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1. As part of their duty to protect against business-related human rights abuses, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when abuses occur within their territory or jurisdiction, those affected have access to effective remedy.
2. Some harmonisation of the processes taking place at the African Commission and the AU Commission seems needed in Africa so that the AU policy on business and human rights is more cohesive between the AU Commission's thrust and the African Commission's efforts, as reflected in outputs from the WGEIs and the evolving jurisprudence.
3. More research and documentation of the impact of business on human rights is needed to inform evidence-based lobbying and advocacy for policy and practice change.
4. There is need for programmes for human rights defenders (HRDs) to extend more effective protection to HRDs in the business and human rights field, and to local leaders who resist development-driven violations at the local level.
5. Governments and civil society need to carry out awareness programmes that address environmental and other social-related problems in areas where there are suspected business violations of human rights.
6. Governments must promulgate laws that require businesses to carry out and file with appropriate authorities human rights due diligence analysis before they are allowed to operate.
7. Civil society could develop and deploy capacity to carry out environmental and human rights impact assessment for business operations in order to inform evidence-based advocacy initiatives for redress and corrective measures.
8. Civil society must develop and deploy capacity to investigate issues of human rights violations by corporate entities and report to appropriate authorities, including national human rights commissions, regional economic communities and regional and international bodies.
9. Civil society must develop and deploy capacity to carry out strategic litigation in appropriate cases where business is involved in violations and abuse of human rights.
10. Civil society must develop and deploy capacity to study and carry out social audits on the effectiveness of grievance procedures provided by businesses to address and remedy harm arising from their operations.
11. Civil society under must keep advocating for the Treaty Initiative's 'Ten Key Proposals for the Treaty' to inform the treaty on business and human rights.