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GLOBAL COMMERCE AND HUMAN RIGHTS: TOWARDS AN AFRICAN LEGAL FRAMEWORK FOR CORPORATE HUMAN RIGHTS RESPONSIBILITY AND ACCOUNTABILITY

by

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Thesis submitted in fulfilment of the requirements for the degree of

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DECLARATION

I, **Osuntogun Abiodun Jacob** declare that this thesis is my own, unaided work. I further declare that this thesis has never been submitted for any degree or examination in any university.

Signed:
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Date:
18 November 2015

ABSTRACT

Since the 1970s, when third world countries challenged the market-dominated international trade regime, the United Nations (UN) has been engaging without relent on how to fill the gap in business and human rights governance. The gap exists in countries with relaxed domestic regulatory regimes, where multinational corporations commit human rights violations without regional and institutional mechanisms to hold them accountable. From the draft codes, to the Global Compacts and the UN Draft Norms, the search failed to yield the desired result.

In 2005, another move was made that produced a compendium of UN Guiding Principles on Business and Human Rights (UNGP) which was unanimously endorsed by the UN Human Rights Council (UNHRC) in May 2011. Although it has been argued that the endorsement fills the gap that has been missing in the quest for global corporate accountability, the search continues unabated at the UN forum albeit without the support of some powerful nations for a 'binding international legal instrument' that will regulate the activities of corporations with regard to human rights.

However, while awaiting the outcome of the recent interrogation on the issue, the UNHRC passed a resolution that the implementation of the UNGP should commence. Since Africa is one of the continents greatly affected by this problem, this thesis considers how the African Union (AU) can develop a framework for corporate human rights responsibility and accountability in line with the UNGP. To this end this thesis proposes a mechanism that will engender a proper implementation of the UNGP; it argues that a new treaty process and implementation of the UNGP are simply different sides of the same coin and that they serve the same purpose.

The thesis also considers the adequacy of the existing regulatory framework for corporate human rights accountability in Africa and explores the creation of an appropriate forum for the implementation of the UNGP. Choosing the AU as the suitable forum, this thesis endeavours to examine how some legal and policy-making institutions in the AU can be rejuvenated, overhauled and re-positioned in order to perform effective corporate accountability oversight to support the domestic and sub-regional systems. Furthermore, it attempts to provide possible remedies to victims of corporate human rights violations in Africa.

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ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission of Human and Peoples' Rights (also, the African Commission)
ACJHR	African Court of Justice and Human Rights
ADB	Africa Development Bank
AHSG	Assembly of Heads of State and Government
APRM	African Peer Review Mechanism
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
AU	African Union
BIT	Bilateral Investment Treaty
CCJ	Community Court of Justice
CCL	Corporate criminal liability
CEHURD	Centre for Health Human Rights and Development
CFA	conditional fee agreements
CFPOA	Corruption of Foreign Public Officials Act
Charter, The	African Charter on Human and Peoples' Rights
CHRR	corporate human rights responsibility
COHRE	Centre on Housing Rights and Evictions
CMA	Capital Markets Authority (Kenya)
CNTC	Commission on Transnational Corporations
CPR	civil and political rights
CSO	Central Selling Organization
CSR	corporate social responsibility
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
CTC	Commission on Transnational Corporations
Draft Protocol	Draft Protocol on the Statute of the African Court of Justice and Human Rights
DRC	Democratic Republic of Congo
DRIP	Declaration on the Rights of Indigenous Peoples
EAC	East African Community
EACJ	East African Court of Justice
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EU	European Union
FCPA	Foreign Corrupt Practices Act
FDI	foreign direct investment
GATT	General Agreement on Tariffs and Trade
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IFC	International Financial Corporation
IFI	International Financial Institution
ILC	International Law Reform Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IMT	International Military Tribunal
IOE	International Organisation of Employers
KHRC	Kenya Human Rights Commission
MNC	Multi-national corporation
MRM	Multi-monitoring and Reporting Mechanism
NAP	National action plan
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental organisation
NHRI	National Human Rights Institutions
NNPC	Nigerian National Petroleum Company
NSA	Non-state actors
OAU	Organization of African Unity

OECD	Organization for Economic Cooperation and Development
OEIWG	open-ended intergovernmental working group
OHADA	Harmonization of African Business Law
OHCHR	Office of the United Nations High Commissioner for Human Rights
PRSPs	Poverty Reduction Strategy Papers
PSIA	Poverty and Social Impact Analysis
RAP	regional action plan
REC	regional economic communities
RTD	right to development
SADC	South African Development Community
SAHRC	South African Human Rights Commission
SEC	Social Economic and Cultural rights
SPDC	Shell Petroleum Development Corporation
SRSG	Special Representative of the UN Secretary-General
TIRB	Treaty Implementation and Ratification Body
TRC	Truth and Reconciliation Commission
TRIP	Trade-Related Aspects of Intellectual Property Rights
TVPA	Torture Victim Protection Act
UCTAD	United Nations Conference on Trade and Development
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNGC	United Nations Global Compact
UNGP	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council
US	United States
WGEIEHR	Working Group on Extractive Industries, Environment and Human Rights
WGHR	Working Group on the issue of Human Rights and transnational corporations and other business enterprises
WGIP	Working Group on Indigenous Populations/Communities
WTO	World Trade Organization

CHAPTER 1
INTRODUCTION

1.1 Research background to global commerce and human rights

Corporations and States are the pillars and facilitators of commerce, production and technology in the world knitted together by globalisation.[1] They are the determinant factor behind industrial and economic development of every nation in the world.[2] Corporations have their origins in a particular country, but their operations and networks are not limited by the geographical landscape of their incorporation.[3] They are found everywhere,[4] they affect every facet on earth that even,[5] the sky, could not be their limit as they render services on the air, for example aviation companies. No nation can do without them, thus every nation solicits their presence, irrespective of where they are incorporated. However, on their own, they are comfortable with continents where there is abundance of resources to explore. Not only that,

[1] Grazia Ietto-Gillies 'The Role of Transnational Corporations in the Globalisation Process', in Jonathan Michie (ed) *Handbook of Globalisation* (2003) 139 at144; Joseph E Stiglitz 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities'(2007) 23 A *UILR* 451 at 453.

[2] Emmanuel Bruno Ongo Nkoa 'Does Foreign Direct Investment Improve Economic Growth in CEMAC Countries' (2013) 8 *EJBE* 43 at 48; Nigel Driffield, James H Love & Stefano Menghinello 'The Multinational Enterprise as a Source of International Knowledge Flows: Direct Evidence from Italy' (2010) 41 *JIBS* 350 at 357; Abimbola Babatunde 'Trade Openness, Infrastructure, FDI and Growth in Sub-Saharan African Countries' (2011) 12 *JMPP* 27 at 33; Transnational Corporations and Management Division Department of Economic and Social Development 'Transnational Corporations as Engines of Growth: An Executive Summary' (1992) United Nations Conference on Trade and Development (UCTAD) World Investment Report (ST/CTC/143), available at *http://unctad.org/en/docs/wir1992overview_en.pdf*, accessed on 3 May 2015.

[3] To Kenichi Ohmae MNCs are stateless, see K Ohmae *The Borderless World: Power and Strategy in the Interlinked Economy* (1990) 94; George Modelski 'Transnational Corporations and World Order' in George Modelski (ed) *Transnational Corporations and World Order* (1979) 1 at 1. He notes that they have business concerns and properties in many states.

[4] Frank Rene Lopez 'Corporate Social Responsibility in a Global Economy after September 11: Profits, Freedom and Human Rights' (2003/2004) 55 *MLR* 739 at 740. He noted that 'The United States, via U.S. corporations, has a physical presence in all parts of the world'.

[5] Internet has accentuated the spread of business activities to the nooks and crannies of the globe without much ado. See James Manyika & Charles Roxburgh 'The great transformer: The impact of the internet on economic growth and prosperity' Mckinsey Global Institute (2011). They noted that 'Today two billion are connected to the internet and almost $8 trillion exchange hands through E-commerce'; John Gerard Ruggie 'The Theory and Practice of Learning Networks Corporate Social Responsibility and the Global Compact' (2002) 5 *JCC* 27 at 29. He described the period between '1950s to the present' as 'industrialized world', a period marked with economic expansion all over the globe; Lopez (supra note 4) 740. He explained that 'Countries throughout the world are influenced on a daily basis by activities of these large companies'.

they also embrace a place where inter alia, labour is cheap and profits are higher due to lack of strict labour standards, a phenomenon popularly known as 'race to the bottom'.[6]

Since Africa is rich in natural resources[7] concomitantly, it should become an investment destination to many of such corporations all over the world. Therefore, it is not surprising that large corporations have their presence in Africa, engaging in global commercial enterprises as subsidiaries of their parent companies abroad. They have diversified their inter-organisational business operations in to segments of production and marketing activities spanning joint ventures with states or other local business entities and foreign direct investments in manufacturing or exploration of mineral resources.[8] In addition, they engage in consultancy and market their products through a complex multi-network process in order to reach world markets.[9] According to the report of the United Nations Conference on Trade and Development (UNCTAD), companies from Russia[10] have recently joined the league of corporations from other countries like the United States of America (US),[11] European Union (EU),[12] Canada[13] China[14] and India[15] doing business in Africa.

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[6] Charles Kernaghan 'Behind Closed Doors U.S. Businesses Eye Haiti' in *The U.S. in Haiti* (1996) 31–49, available at *http://www.globallabourrights.org/reports/html-file/abstract-51.html#behind closed doors*, accessed on 23 July 2015; Lopez (supra note 4) 740.

[7] Nigeria is rich in oil; South Africa in gold, platinum group metals, chromium and diamonds; Ghana in gold, cocoa and timber; Angola is rich in diamonds, iron ore and oil; Botswana in diamonds, coal, copper, nickel, gold, soda ash and salt; the DRC in copper, cobalt and Colton; Equatorial Guinea in arable land, gold, oil, uranium, diamond, and Columbite-tantalite, and oil.

[8] See Sumantra Ghoshal & Christopher A Bartlett 'The Multinational Corporation as an interorganizational Network' (1990) 15 *Academy of Management Review* 603 at 604; Health Poverty Action (HPA) 'Honest accounts? The real causes of global poverty' (2014) the report notes that MNCs are 'involved in complex chains of investment through a range of jurisdictions', available at *http://www.healthpovertyaction.org/wp-content/uploads/downloads/2014/07/Honest-Accounts-report-v4-web.pdf*, accessed on 23 July 2015.

[9] For a brief note on meaning and operation of Supply Chain see Organization for Economic Cooperation and Development (OECD) 'Supply Chains and the OECD Guidelines for Multinational Enterprises' *OECD Roundtable on Corporate Responsibility* (2002), available at *http://www.oecd.org/daf/inv/mne/2089098.pdf*, accessed on 23 July 2015.

[10] UNCTAD 'The rise of BRICS FDI and Africa' *Global Investment Trends Monitor* (2013), available at *http://unctad.org/en/PublicationChapters/wir2013ch1_en.pdf*, accessed on 24 August 2012. The report notes 'The expansion of Russian transnational companies, (TNCs), in Africa is fairly recent but rapid, reaching $1billion in 2011'.

[11] Most of the US companies in Africa are Cummins Inc, Caterpillar Inc, Harley-Davidson Inc, General Electric Co, Google Inc, Archer Daniels Midland Co and Wal-Mart Stores Inc; U.S. Secretary of Commerce Penny Pritzker was reported to have said 'American companies are in Africa and more American companies want to be in Africa' see United Sates Department of Commerce 'U.S. Secretary of Commerce Penny Pritzker concludes successful Africa trade mission' (2014), available at *http://www.commerce.gov/news/press-releases/2014/05/27/us-secretary-commerce-penny-pritzker-concludes-successful-africa-trad*, accessed on 23 July 2015.

[12] See UNCTAD 'Commodity prices, capital flows and the financings of investment' (2008), available at *http://www.mdg-trade.org/tdr2008_en.pdf*, accessed on 25 July 2015. The report notes that EU, US and Japan are the homes 'to 87 per cent of the top 100TNCs and accounts for 88 per cent of their foreign assets'; Gábor Hunya 'The role of Multinational Companies in international business organisation' (2012) (Challenges for Europe in the World in 2030 Project) European Commission Research Paper where he discusses the role of 27 large multinational companies from the EU.

Ordinarily, prospecting and exploration of mineral resources should facilitate economic development of the nations and people in the territories where such exploration takes place.[16] In the case of Africa, the reverse is the case, there seems to be little or no benefits accruing to Africa commensurable with her vast natural and mineral resources in terms of development.[17] Kofi Anan[18] argues that the abundant natural resource in Africa could have led to 'sustainable economic growth, new jobs and investments in health, education and infrastructure', but unfortunately this is not so. On the contrary, the consequences of 'resource bonanzas' according to him are 'conflict, spiralling inequality, corruption and environmental disasters'.[19] He concludes that the situation in Africa confirms the truth in the cliché that 'striking oil is as much a curse as a blessing'.[20]

Indeed, the management of natural resources and their financial outputs instead of benefiting those countries is globally known as 'resource curse'.[21] However, apart from the

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[13] Dave Dean '75% of the World's Mining Companies are based in Canada' (2013), available at *http://www.vice.com/en_ca/read/75-of-the-worlds-mining-companies-are-based-in-canada*, accessed 27 July 2015.

[14] Andrea Goldstein, Nicolas Pinaud, Helmut Reisen & Xiaobao Chen 'The Rise of China and India what's in it for Africa?' (2006), available at *http://www.oecd.org/dev/36905545.pdf*, accessed on 23 June 2015; Lucy Corkin 'China Emerging Multinationals in Africa' (2007) *TAJ* 21 at 21 (where he explained that from May 2005 to 2006, the number of MNCS from China in Africa rose from the number of 674 to 800), available at *http://www.ccs.org.za/downloads/Publications%20-%20Chinas%20Emerging%20Multinationals%20in%20Africa%20-%20Lucy%20Corkin.pdf*, accessed on 23 July 2015; Chris Aldenab & Martyn Daviescd 'A Profile of the Operations of Chinese Multinationals in Africa' (2006) 13 *SAJIA* 83 at 85.

[15] Harry G Broadman 'China and India Go to Africa New Deals in the Developing World' (2008) 87 *Foreign Affairs*, available at *http://www.foreignaffairs.com/articles/63224/harry-g-broadman/china-and-india-go-to-africa*, accessed on 20 July 2015.

[16] African Development Bank (ADB) & African Union (AU) 'Oil and Gas in Africa' (2009) 92. available at *http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf* accessed on 20 July 2015.

[17] Ibid 92–112; Claude Kabemba 'Myths and Mining: The Reality of Resource Governance in Africa' (2014) Open Society Initiative for Southern Africa (OSISA), available at *http://www.osisa.org/open-debate/economic-justice/regional/myths-and-mining-reality-resource-governance-africa*, accessed on 20 July 2015.

[18] Kofi Annan 'Momentum rises to lift Africa's resource curse' *The New York Times* (4 September 2012), available at *http://www.nytimes.com/2012/09/14/opinion/kofi-annan-momentum-rises-to-lift-africas-resource-curse.html*, accessed on 20 July 2015.

[19] Ibid.

[20] Ibid.

[21] Some scholars are of the view that natural resource endowment by countries concomitantly lead to negative results like underdevelopment, poverty, corruption conflicts etc. See for example Jeffrey D Sachs & Andrew M Warner 'The Curse of Natural Resources' (2001) 45 *EER* 827 at 828. They averred that 'Empirical support for the curse of natural resources is not bulletproof, but it is quite strong'. However, many scholars have debunked the so-called evidence of a natural curse inhibiting growth in a rich country with natural resources; see Alan Gelb 'Should Canada Worry about a Resource Curse?' (2014) 7 *School of Public Policy Research Papers* 1 at 3, available at *http://www.policyschool.ucalgary.ca/sites/default/files/research/gelb-resource.pdf*, accessed on 27 July 2015. He argued that 'Natural resources are a potential asset rather than a pre-ordained curse'. This issue requires a vigorous analysis which is beyond the scope of this study. However, for further study on it, see Alan Gelb *Oil Windfalls: Blessing or Curse* (1988) 1–357; Frederick van der Ploeg 'Natural Resources: Curse or Blessing?' (2011) 49 *JEL* 366–420; Naazneen H Barma, Kai Kaiser, Tuan Minh Le & Lorena Viñuela *Rents to*

problem of mismanagement of funds accruing from mineral resources, that expression is majorly a reaction to human rights violations which are committed by states in complicity with corporations in the course of exploiting those resources.

It is no surprise that the attention of the world has been drawn to corporate human rights violations occurring in developing and least developed countries of the world by non-governmental organisations (NGOs) and reputable international organisations.[22] 'Thirty-six of the world's 49 least developed countries are located in Africa',[23] thus, Africa as a continent has a fair if not the largest share from this exposure.

The issue that caught the most attention of the global world from Africa is the Niger Delta of Nigeria and the role of corporations in the gross violation of human rights that occurred in the course of exploring the mineral resources on the Ogoni land.[24] The people of the Niger Delta in Nigeria seem to have suffered the most in the hands of multi-national corporations (MNC) in Africa. Transnational harm against them include brutal exploitation of resources, creation of ecological disasters in Nigeria's Niger Delta, collusion and complicity with the government of the day to commit crimes against the host community and people of Nigeria and the encouragement of militancy and criminality in the region.[25]

Despite a report by the United Nations Environment Programme (UNEP) in August, 2011 stating that pollution resulting from over 50 years of oil exploration in the Niger Delta is too deeply rooted and that it would take 25 to 30 years to clean up the pollution and

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Riches: The Political Economy of Natural Resource Development (2012) 1–217; Lesley Wexler 'Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime' (2009/2010) 31 *CLR* 1717 at 1718. He wrote 'Resource curses occur when an open market and an abundance of natural resources combine to create or exacerbate a governance problem'.

[22] See Steven R Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *YLJ* 443 at 446.

[23] See Parliament of Canada 'Overcoming forty years of failure: A new road map for Sub-Saharan Africa' (2013) Report of the Standing Senate Committee on Foreign Affairs and International Trade, available at *http://www.parl.gc.ca/Content/SEN/Committee/391/fore/rep/repafrifeb07-e.pdf*, accessed on 25 April 2015.

[24] See Jena Martin Amerson 'What's in a Name? Transnational Corporations as Bystanders to the Rule of Law in a Globalized Society' (2011) 85 *SJLR*1 3–4. Describing the role of Shell in Nigeria as that of a bystander; Larisa Wick 'Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria' (2003) 12 *MSJIL* 63 at 67–74; Ariadne K Sacharoff 'Multinationals in Host Countries: Can they be held Liable under the Alien Tort Claims Act for Human Rights Violations?' (1998) 23 *BJIL* 927 at 958–63; Joshua P Eaton 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *BUILJ 2*61 at 264–271; Steve Crawshaw & James Roberts 'Pressure mounts for Nigeria oil ban' *Independent* (13 November1995) 1; John Vidal 'Niger Delta: Shell's Annus Horribilis' *Guardian* (10 November 2010); Human Rights Watch 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (1999), available at *http://www.hrw.org/reports/1999/nigeria/*, accessed 20 May 2015.

[25] Ibid.

catalyse 'a sustainable recovery',[26] many more oil spills with devastating effects have occurred since that time.[27] In spite of those new spills, neither the Federal Government of Nigeria nor the MNCs have made any concrete attempt to implement the UNEP report.

The implication of that lethargic attitude is that there is no end to the problems of corporate human rights violations in the Niger Delta. The MNCs are not ready to follow the path of human rights obligations in the course of their business transaction and exploration in the Niger Delta. As for the government, what other evidence is needed to prove that it may not retreat from the path of complicity with MNCs to the total neglect of its people? Indeed, on 14 December 2012, the Community Court of Justice (CCJ) of Economic Community of West African States stressed in its judgment that the issue of corporate human rights violations in Niger Delta of Nigeria is a continuous one that has not abated.[28]

The problems of MNCs in Nigeria are not confined to the oil and gas sector, one problem or another arises in other sectors as well. In 1996, when an epidemic of bacterial meningitis broke out in the northern part of Nigeria, a pharmaceutical giant, Pfizer used the opportunity to test its antibiotic drugs on the victims of the epidemic as it conducted a drug trial on 200 children. This test led to the deaths of 11 of the children, while many others were irreversibly injured.[29] A similar violation can be discerned in the Democratic Republic of Congo (DRC); where allegations of complicity in gross human rights violations were levied

[26] UNEP 'Environmental Assessment of Ogoni Land' (2011) UNEP Report, available at *http://www.unep.org/nigeria/*, accessed on 25 May 2014.
[27] Emmanuel Addeh 'Bonga: An oil spill and its many controversies' *Punch* (20 January 2012), available at *http://www.punchng.com/feature/bonga-an-oil-spill-and-its-many-controversies/*, accessed on 20 July 2015; Tordue Salem 'Reps probe Agip Oil spill, want affected communities compensated' *National Mirror* (31 March 2014), available at *http://nationalmirroronline.net/new/2014/03/31/page/5/*, accessed on 20 July 2015; Igoniko Oduma 'Ikarama: One spill too many' *Daily Independent* (3 March 2014), available at *http://dailyindependentnig.com/2014/03/ikarama-one-spill-too-many/*, accessed on 20 July 2015.
[28] *SERAP v The Federal Government of Nigeria* (ECW/CCJ/JUD/18/12).
[29] See Chris Mcgreal 'Nigeria sues Pfizer for £3.5bn over "illegal" child drug trials' *The Guardian* (6 June 2007), available at *http://www.theguardian.com/business/2007/jun/06/medicineandhealth.health*, accessed on 23 June 2015; in fact, so many cases were filed on behalf of the victims against Pfizer over this test. The first case in the US was dismissed on the ground of *forum non conveniens*. See *Abdullahi v Pfizer, Inc*., No. 01 Civ. 8118 (WHP) 2002 WL 31082956, para 12 (S.D.N.Y. Sept. 17, 2002). However when a second case filed in Nigeria to seek redress could not proceed because the case was frustrated and later dismissed, see *Zango v Pfizer International, Inc*. Suit No (FHC/K/CS/204/2001), further actions were brought against the company in the US. At the end, the case was settled with the company agreeing to pay $75 million to the victims; David Smith 'Pfizer pays out to Nigerian families of drug trial victims' *Guardian* (12 August 2011), available at *http://www.theguardian.com/world/2011/aug/11/pfizer-nigeria-meningitis-drug-compensation*, accessed on 23 June 2015; Amy F Wollensack 'Closing the Constant Garden: The Regulation and Responsibility of U.S. Pharmaceutical Companies doing Research on Human Subjects in Developing Nations' (2007) 6 *WUGSLR* 747 at 756–769. Summarising five cases filed over this matter and after a careful analysis of what could be the possible remedy for such corporate human rights violations in the U.S. concluded that option for redress in the US is minimal, at 769.

against Anvil Mining Ltd a Canadian Corporation with headquarters in Australia, resulting in to deaths and disappearance of many persons in Kilwa.[30]

Likewise, in Angola, allegations of human rights violation in the diamond-mining region of the Lundas, especially in the neighbouring communities of Cuango and Xd-Muteba leading to torture and mass murder were made against state officers and diamond companies as accomplices.[31] Similarly in Zimbabwe, Human Rights Watch insists that mining corporations are still violating human rights of the people in Marange District without governmental intervention.[32] Corporations are also directly and indirectly linked to intra state conflicts and civil wars resulting in human rights violations[33] in Sierra Leone,[34] Liberia,[35] Angola,[36] Sudan,[37] Cote D'Ivoire[38] and a host of other African nations that had been or are still in a state of conflict, civil war and anarchy and whose reasons for warfare are associated

[30] The final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2002/1146 (16 October 2002).
[31] Rafael Marques De Morais 'Criminal Complaint lodged against Angolan Generals' (2011), available at *http://www.pambazuka.org/en/category/features/77975*, accessed on 20 July 2015.
[32] Daniel Bekele, the director of Human Rights Watch in Africa was reported calling for reform of Kimberly process in Zimbabwe because it did not stop corporate human rights violations. He said: "The Kimberly process needs to address the on-going human rights abuses in Zimbabwe's Merange fields, and the lack of transparency by mining companies". See Human Rights Watch 'Zimbabwe: Diamond Abuses show need for reforms' (2012), available at *http://www.hrw.org/news/2012/06/04/zimbabwe-diamond-abuses-show-need-reforms*, accessed on 20 June 2015; Ian Smillie 'Blood Diamonds and non-State Actors' (2013) 46 *VJTL* 1003 at 1017–1019. He chronicled a catalogue of human rights violations by the government of Zimbabwe with complicity of the MNCs in Marange.
[33] Global Witness 'Briefing documents – combating conflict diamonds' (2005), available at *http://www.globalwitness.org/pages/en/briefing-documents.ht*, accessed on 20 May 2015.
[34] John L Hirsch *Sierra Leone: Diamonds and the Struggle for Democracy* (2001) 25. Claiming that the business of diamonds prolongs the conflicts); Lansana Gberie 'War and Peace in Sierra Leone: Diamonds, Corruption and the Lebanese Connection' the Diamonds and human Security Project, available at *http://dspace.africaportal.org/jspui/bitstream/123456789/33490/1/6_War-Peace_sierraleone_Eng-Nov2002.pdf?1*, accessed on 23 June 2015.
[35] See Global Witness 'International Timbre Company DHL accused of funding Liberian War' (2009), available at *http://www.globalwitness.org/library/international-timber-company-dlh-accused-funding-liberian-war*, accessed on 20 July 2013; Stephen Ellis *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War* (1999) 90–91. Noting that Charles Taylor sustained the battle with money he got from sale of mineral resources to international buyers and corporations who were not principled.
[36] See Victoria Brittain *Death of Dignity Angola's Civil wars* (1998) 67, 74. Claiming that the insurgents used diamonds to buy arms; Ian Smillie *Blood on The Stone: Greed, Corruption and War in the Global Diamond Trade* (2010) 65; Global Witness 'A Rough Trade – The Role of Companies and Governments in the Angolan Conflict' (1998), available at *http://www.globalwitness.org/sites/default/files/thumbnails/A_Rough_Trade-1.jpg*, accessed on 20 June 2015.
[37] See Department of Foreign Affairs 'Human Security in Sudan: The Report of a Canadian Mission' (2000), available at *http://www.ecosonline.org/reports/2000/Human%20Security%20in%20Sudan.pdf*, accessed on 20 June 2013; Benjamin Bock 'Sudan: Mixing Oil and Blood' (2002) Amnesty International, available at *https://www.google.co.za/webhp?sourceid=chrome-instant&rlz=1C1TSNF_enUS409US409&ion=1&espv=2&ie=UTF-8#q=Human%20Security%20in%20Sudan%3A%20The%20Report%20of%20a%20Canadian%20Mission%E2%80%99*, accessed on 20 June 2015.
[38] Global Witness 'Hot Chocolate: How Cocoa fuelled the conflict in Côte D'ivoire' (2007), available at *http://www.globalwitness.org/sites/default/files/pdfs/cotedivoire.pdf*, accessed on 23 June 2015.

with unlawful and illegal extraction of mineral resources in their countries, as well as the struggle for power with the main purpose of controlling such mineral resources.[39]

With respect to wars over diamonds in Africa, three million people were killed; many other millions were also left crippled, while the 'economies of Angola, the Congo and Côte d'Ivoire' were paralysed.[40] Other common human rights violations by MNCs in Africa are that of environmental pollution in the mining sector,[41] and the use of Africa as a dumping ground for toxic waste.[42]

This awareness by the international community that corporations can violate human rights has led to a crucial global debate on the exercise of corporate power and especially its association with allegations of human rights violations either unilaterally or in complicity with states. The challenge is how to compel corporations to obey human rights obligations and to make them accountable for violations of human rights.

Three things make that challenge a difficult task to overcome. First, the nature of corporate management; traditionally, and even legally, corporate management has been structured to respect only the interest of shareholders by making as much profit[43] as possible

[39] Lucinda Saunders 'Rich and rare are the gems they war: Holding De Beers accountable for trading Conflict Diamonds'(2000) 24 *FILJ* 1402–1476 at 1406 noting that insurgents in Africa were fuelled by diamonds; Global Witness 'Rich Man Poor Man: Development diamonds and poverty diamonds: The Potential for Change in the Artisanal Alluvial Diamond fields of Africa'(2004) A partnership project between Global Witness and Partnership Africa Canada (PAC), available at *http://www.globalwitness.org/sites/default/files/import/RichManPoorManenglish.pdf*, accessed on 28 July 2015; Smillie op cit note 36 at 1003–1007 discussing how African dissidents financed themselves through profits made from business dealings with corporations.

[40] See Smillie op cit note 36 at 3 & 195. Commenting the impacts of diamond on the wars 'These wars might or might not have happened without diamonds, but they would never have been so brutal, would never have taken so many lives, would never have attended the destruction of so much infrastructure and humanity had there never been diamonds'.

[41] For a discussion of this, see, DK Twerefou 'Mineral Exploitation, Environmental Sustainable Development in EAC, SADC and ECOWAS Regions' (2009) *ATPC* 79 Project of Economic Commission for Africa (ECA), available at *http://www.uneca.org/sites/default/files/publications/79.pdf*, accessed on 20 July 2015; Emeka Polycarp Amechi 'Poverty, Social-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and realization of the Right to Environment' (2009) 5 *LEAD* 109–129; Colin Noy Boocock 'Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa' (2012) OECD Report, available at *http://www.oecd.org/countries/zimbabwe/1819582.pdf*, accessed on 20 June 2015.

[42] See Amnesty International 'The toxic truth about a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire', available at *http://www.amnestyusa.org/sites/default/files/afr310022012eng.pdf*, accessed on 26 June 2015; Basel Action Network 'The Digital Dump: Exporting Re-Use and Abuse to Africa' (2005) A project of Earth Economics, available at *http://ban.org/library/TheDigitalDump.pdf*, accessed on 23 June 2015; Chukwuka N Eze 'The Bamako Convention on the Ban of the Import into Africa and the Control of the Trans boundary Movement and Management of Hazardous Wastes within Africa: A Milestone in Environmental Protection?' (2007) 15 *AJICL* 208–229.

[43] See R Clark *Corporate Law* (1986) 17–19, 688, 690; Jonathan R Macey 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' (1991) 21 *SLR* 23 at 26.

to share as dividends. Therefore, subjecting companies to human rights obligations goes against traditional corporate expectations. The second is the effect of traditional international law. It is the main duty and responsibility of states to ensure corporate accountability within their territories. Regulatory regime for corporations at the international level is not envisioned because corporations are not subject to duties and liabilities under the classical theory of law.[44] The emphasis is on the states as 'primary duty bearers' and not on the corporations. The states have the responsibility and jurisdiction to determine disputes that occur within their territories.[45] In the opinion of the International Court of Justice: '[t]he State where the violation has occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system'.[46] The negative implication of the concept of state responsibility is that it creates a vacuum with regard to corporate accountability at the international level. As Claire Cutler argues, the 'Westphanlian-inspired notions of state-centricity, positivist international law, and "public" definitions of authority are incapable of capturing the significance of non-state actors like transnational corporations'.[47] Thirdly, is the inability or unwillingness of some states to effectively discharge their responsibility with respect to regulation of corporations.

The concept of state responsibility should have been more appropriate, if all states are equally endowed to regulate the activities of corporations with regard to human rights obligations and accountability. However, this is not the case, the growth of MNCs, the dangling carrot of foreign investments and corporate managerial financial power to induce those in authority have crippled the regulatory power of some states, particularly African

[44] See Wolfgang Kaleck & Miriam Saage-MaaB 'Corporate Accountability for Human Rights Violations Amounting to International Crimes, the Status Quo and its Challenges' (2010) *JICJ* 699 at 710. He notes that 'Since states are the principle addressees of international law, none of the human rights-related complaint procedures within the UN system has the mandate to monitor the activities of corporations as such. With the exception of the International Criminal Court (ICC), the international level also does not provide a venue to hear complaints about individual corporate officers'; Guido Acquaviva 'Subjects of International Law: A Power-based Analysis' (2005) 38 *VJTL* 1 at 42; Surya Deva 'Human Rights Violations by Multinational Corporations and International Law: Where to From Here?' (2003) 19 *CJIL* 1–57 at 1. Noting that 'the conventional international framework for protection of human rights is state centric'; PK Menon 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine' (1992) 1 *JTLP* 151 at 154; Ian Brownlie *Principles of Public International Law* (1999) 57–68; Antonio Cassese *International Law* (2005) 71–150; Martin Dixon *Textbook on International Law* (2007) 111–141.

[45] Ibid, see Martin Dixon at 174. He noted that 'as a general rule, the jurisdiction of a state within its own territory is complete and absolute'.

[46] *Interhandel (Switz. v. U.S.)* 1959 ICJ para 6, 27. (Preliminary Objections Judgment of 21 March).

[47] A Claire Cutler 'Critical Reflections on the Westphalian Assumptions of International Law and Organizations: A Crisis of Legitimacy?' (2001) 27 *RIS* 133–150.

countries.[48] For example, the vast economic resources of the MNCs have outgrown that of many states[49] and exports by their subsidiaries 'are estimated to account for about a third of total world exports of goods and services'.[50] It is obvious that states in Africa have not been able to discharge this responsibility relating to corporate accountability effectively because of the non-existence, or the inadequacy of regulatory frameworks for corporate accountability and a desire to attract, maintain and retain foreign investments that appear to have been accomplished at the expense of corporate human rights obligations.

Therefore, the major problem, which of course is interwoven with many issues, is the problem of states in ensuring corporate accountability within their territories. Admittedly, proposals have been made by scholars that will address the problem of incapacity of states in the absence of a multilateral enforcement mechanism for corporate accountability.[51] Notable of such propositions is the extension of the jurisdiction of the International Criminal Court (ICC) to accommodate non-state actors,[52] entrenchment of corporate human rights accountability regime at the World Trade Organization (WTO)[53] and the need for home states of the MNCs to take strict regulatory measures in ensuring corporate accountability of their home-based corporations with regard to corporate human rights obligations abroad.[54] In this thesis, it will be argued that most of the proposals are not feasible and the remaining option for African states is to take their destiny into their own hands.

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[48] Sarah Anderson 'Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have unleashed a New Era of Corporate Power and What to do about it' (2007) at 21 noting that investment rules 'cripple governments' power', available at *https://www.foodandwaterwatch.org/images/water/world-water/bank-policy/ICSID_print.pdf*, accessed on 20 May 2015.

[49] M Sornarajah *The International Law on Foreign Investment* 3 ed (2010) 5.

[50] UNCTAD 'World Investment Report' (2009), available at *http://unctad.org/en/docs/wir2009_en.pdf*, accessed 20 July 2015.

[51] In Chapter 6, the study will discuss the visibility of proposals made by different scholars to address corporate human rights violations.

[52] Joanna Kyriakakis 'Corporations and the International Criminal Court: The Complementarity objection stripped bare' (2007) *CLF* 115–151. He allays the fears of scholars opposing extension of ICC jurisdiction to corporations by considering their arguments in the first instance and later considers why the objectives and operation of the ICC statute support the extension; Andrew Clapham 'Extending International Criminal Law beyond the Individual to Corporations and armed opposition groups' (2008) 6 *JICLJ* 899–926; Michael J Kelly 'Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities' (2010) 24 *EILR* 671, 689. Noting 'if a company can be held criminally liable for degrading the environment, then why can't that same company be held criminally liable for complicity in genocide?'

[53] Ernst-Ulrich Petersmann 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002)13 *EJIL* 621–650; see also Philip Alston 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002)13 *EJIL* 815–844; Ernst-Ulrich Petersmann 'Taking Human Dignity, Poverty and Empowerment of Individuals more Seriously: Rejoinder to Alston' (2002) 13 *EJIL* 845–851; Robert Howse 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 *EJIL* 651–659.

[54] Surya Deva 'Corporate Human Rights Violations: A Case for Extraterritorial Regulations' in Christoph Luetge (ed) *Handbook of the Philosophical Foundations of the Business Ethics* (2013) 1077 at 1078.

Regarding the jurisdiction of the ICC, it presently covers four kinds of crimes which are genocide, crimes against humanity, war crimes, and aggression[55] committed by natural persons.[56] It can be argued that since the subsequent paragraphs in Article 25 merely refer to 'person' without any specification as to the type of the person concerned be it artificial or natural, the drafters of the Rome Statute envisaged the possibility of extending the jurisdiction of the court to cover non-state actors in corporate criminal liability.[57] In the past, the US Military Tribunal at Nuremberg in holding the officers of IG Farben guilty of crimes committed on behalf of the company noted that 'conversely one may not utilise the corporate structure to archive an immunity from criminal responsibility for illegal acts which he directs, counsels, aids or abets'.[58]

In spite of the evolution and steady growth of individual responsibility for international criminal law, it is obvious that the ICC jurisdiction does not cover criminal liability of corporations.[59] Even, in the Nuremburg case, the Tribunal admitted lacking jurisdiction to try corporate entities.[60] The African Union's (AU) position on ICC is very clear in that it is discriminatory in its approach in prosecuting African leaders as opposed to other leaders from other continents, with the same history and backlash of heinous crimes in their territories.[61] Against that backdrop, Eric Colvin and Jessie Chella argue that the ICC

[55] Article 5 of the Rome Statute provide that 'the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole'.

[56] Ibid Article 25(1). It provides that the court has jurisdiction over natural person in accordance with its enabling statute.

[57] Adam McBeth *International Economic Actors and Human Rights* (2010) 309, 323; But note that Article 25(1) restricts ICC jurisdiction.

[58] In *re Krauch and Others (IG FarbenTrial)* 1948 15 ILR 668 para 678.

[59] Article 25(1) of the Rome Statute; See Jordan Sundell 'Ill-Gotten gains: The Case for International Corporate Criminal Liability' (2011) *MJIL* 648 at 649. Noting 'Until recently, international criminal law has largely ignored the actions of corporations'; Harmen Van der Wilt 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *CJIL* 43–77 at 44. Claiming that 'Both objections of principle and practical difficulties have so far impeded the acceptance of criminal corporate liability by the creators of international criminal tribunals'; Johanna Kyriakakis 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code' (2007) 5 *JICJ* 809–806 at 810. Stating that currently there is lack 'lack of criminal accountability of corporations at an international level'; Nora Gotzmann 'Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute' (2008) 1*QLSR* 36, 51.

[60] See *IG FarbenTrial* op cit note 58 at 678. The Tribunal comments that 'the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings'; William Schabas 'War Economies, Economic Actors and International Criminal Law' in William Schabas *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (2008) 517. He also notes that 'the jurisdiction of the International Criminal Court is confined to "natural persons". Corporate bodies and legal persons were excluded from the Rome Statute for essentially practical reasons'.

[61] See AU 'Decision on the Abuse of the Principle of Universal Jurisdiction – Doc' (2009) (Assembly /AU/11 (XIII) Assembly/AU/Dec.243 (XIII) Rev.1); AU 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court' (ICC) Doc. Assembly/AU/13(XIII) all adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009,

will be justified in its trial of African leaders for human rights violations if only the court embarks on further trials of MNCs that are complicit of the same crimes. For them, if this is not done, the legitimacy of the ICC can be questioned.[62] The question of legitimacy of the ICC with regard to AU's criticism[63] is not within the scope of this study but suffice to say that the issue has been adequately addressed by many scholars.[64]

With regard to the question of extension of the jurisdiction of the ICC, the proposition is no doubt laudable, although it is not a panacea to the endless search for multilateral mechanisms for the enforcement of corporate human rights obligations in international law. Apart from the fact that the Rome Statute must be amended to include the extension, the likelihood of a stiff barrier to such an amendment[65] from developed states that are homes to large MNCs might not make such a laudable effort feasible.[66] In addition, even if the court was to have jurisdiction over corporate entities, the court could only deal with a limited number of cases [67] and there is no certainty that criminal law approach alone without more could solve all the problems of corporate human rights violations.[68]

The same barrier is to be expected from the WTO with regard to the proposal for inclusion of corporate accountability in its efficient regulatory multilateral trade

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available at *http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf*, accessed on 20 July 2015.

[62] See Eric Colvin & Jessie Chella 'Multinational Corporate Complicity: A challenge for International Criminal Justice in Africa' in Vincent O Nmehielle (ed) *Africa and the Future of International Criminal Justice* (2012) 297–318, 318.

[63] While it is true that since its inception in 2002, eight cases that have been investigated so far by the Office of the Prosecutor (OTP) relate to crimes committed in Africa, it is also important to note that the requests for investigation of three of the cases were brought at the instance of the Africans themselves and at the instance of the security council of the UN. The OTP has received allegations of crimes against some other countries, apart from Africa, but it is still making some preliminary investigations, on those allegations in order to decide whether to commence investigation on them. See I think that It is essential for the OTP to speed up the process of preliminary investigation and commence investigation on those that it deems fit in order to debunk the insinuation of the AU; See ICC Forum website 'African Question: is the ICC targeting Africa inappropriately?', available at *http://iccforum.com/africa*, accessed on 20 June 2015.

[64] Many scholars discussed this issue in Nmehielle (ed) op cit note 62.

[65] Proposal to include corporations was actually suggested by France but was not adopted to avoid further complications and difficulties that had been the hallmarks of the negotiations, see Ole Kristian Fauchald & JO Stigen 'Corporate Responsibility before International Institutions' (2009) 40 *GWILR* 1025 at 1038; William Schabas 'General Principles of Criminal Law' (1998) 6 *EJCCCJ* 400–428.

[66] These corporations though are multinational have their headquarters in developed states where they pay tax and contribute to their developments. Consequently, most of the governments of those states have made the issue of protecting them against gross human rights violations they committed abroad their agenda. Example is Bush administration in the US. See for example, Stephen Labaton 'Businesses seek protection on legal front' *The New York Times* (29 October 2006), available at *http://www.nytimes.com/2006/10/29/business/29corporate.html?_r=1&oref=slogin*, accessed on 20 April 2015.

[67] Article 5 does not codify all the crimes relating to human rights violations.

[68] Christoph J.M. Safferling 'Can Criminal Prosecution be the answer to massive Human Rights Violations' (2004) 5*GLJ* 1469 at 1488.

mechanism.[69] This issue shall be discussed further in Chapter 6. Also, a full study of voluntary codes of corporations, particularly their engagement for the purpose of corporate social responsibility (CSR), is outside the scope of this study, since the focus of this study is an inquiry into the possibility of putting corporations in Africa under a binding normative framework that will ensure their accountability in the conduct of their business in the continent.

On the second proposition, Surya Deva suggests that 'states, especially the home states of MNCs, should show the required political will in introducing suitable extraterritorial measures to enhance corporate compliance with their human rights responsibilities'.[70] This is in consonance with the 'theory of effective control' that states of origin of MNCs are better placed to control and regulate their own companies.[71] Admittedly, in an attempt to fill the vacuum of regulatory failure in the host states, the home states of MNCs came with a measure of some regulatory regime which enables victims of violation of human rights in Africa and other countries abroad to sue for compensation.[72]

In the US, the ground for claims in federal district courts is the Alien Tort Claims Act (ATCA)[73] and sometimes the Torture Victim Protection Act (TVPA)[74] while in the EU it is Article 2 of European Council Regulation on jurisdiction in Civil and Commercial matters (the Brussels Regulation).[75] In other jurisdictions such as the United Kingdom (UK), Germany, Australia and Canada, victims seek to explore domestic tort laws to make MNCs culpable.[76] The remedies in all these countries are purely for tortious acts to which monetary compensation can be awarded in favour of the victims. The number of litigants cuts across every developing nation, including African countries.

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[69] The extension of human rights in to the WTO is likely to fail. In fact the proposal was rejected by majority members of the WTO. See Daniel CK Chow 'Why China opposes human rights in the World Trade Organization' (2013) 35 *JIL* 61 at 66; Daniel CK Chow & Thomas J Schoenbaum *International Trade Law: Problems, Cases, and Materials* (2012) 369. He notes that every attempt made to inculcate human rights in to the WTO law after the demise of the Havana Charter has ended in failure.

[70] See Deva op cit note 44.

[71] Alexandra Gatto *Multinational Enterprises and Human Rights, Obligations under EU Law and International Law* (2011) 25.

[72] See infra notes 74–75 on the regulatory measures.

[73] The Act which was enacted in 1789 confers original jurisdiction on the Federal district courts over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.

[74] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (Codified at 28 U.S.C. § 1350 (2006)).

[75] The Brussels Regulation 'which is directly applicable' in all states of EU members and provides that; 'any defendant corporation which is domiciled in an EU member state, could be sued in that member state'.

[76] Jedrzej George Frynas 'Social and Environmental Litigation against Transnational Firms in Africa' (2004) 42 *JMAS* 363–388 at 363; Chilenye Nwapi 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) *UJIEL* 24–43 at 25.

Nonetheless, the hurdles to be surmounted by litigants making use of the extraterritorial jurisdiction of the home states of the MNCs are so many that in the end only a few make it.[77] According to Natalie Bridgeman, 'plaintiffs are unlikely to find redress in US courts. Although corporate environmental abuse abroad is common, successful litigation of the abuse is not'.[78] Another scholar notes that 'of the nearly dozen cases brought against [MNCs] for human rights and environmental violations, not one has actually been fully litigated, nor has a judgment been entered against any corporate defendants'.[79] The reason behind the difficulty in the use of extra territorial jurisdiction in the US for corporate accountability is that the plaintiffs, among other things, must prove personal and *subject-matter jurisdiction*, *forum non conveniens* and *a cause of* action within the ambit of the law of nations.[80] The governments of the home states too are not always comfortable with these cases and seek to truncate them.[81] In the US, which forms the most efficient and prominent forum for these cases, the government often opposes the trial to the extent that at one time during the Bush administration, legislation was proposed to put an end to the whole problem.[82] Critics argue that US corporations are negatively affected by the cases and that they could strain relations between the US and other nations.[83]

Indeed, the quest by the US judiciary to tread softly and to avoid interference in the foreign relationship of the US with other nations informed the narrow interpretation of the

[77] John R Wilson 'Coming to America to File Suit: Foreign plaintiffs and the *Forum Non Conveniens* barrier in transnational litigation' (2004) *OSLJ* 659 at 690. Noting that the *forum non conveniens* as it is presently constituted 'frustrates the judicial resolution of disputes that cross national boundaries'; Bahareh Mostajelean 'Foreign alternatives to the Alien Tort Claims Act: The success (or is it failure?) of bringing civil suits against multinational corporations that commit human rights violations' (2008) 40 *GWILR* 497 at 504. Suggesting alternatives to ATCA as a result of stumbling blocks placed before the foreign victims of corporate human rights violations which rendered their cases unsuccessful; Aric Short 'Is the Alien Tort Statute sacrosanct? Retaining Forum Non Conveniens in human rights Litigation' (2001) 33 *NYUJILP* 1001 at 1024 .Stating that the foreign elements of ATCA cases make the principle of forum *non conveniens* inevitable, the application of which my eventually lead to the dismissal of the cases.

[78] Natalie L Bridgeman 'Human Rights Litigation under the ATCA as a proxy for Environmental claims' (2003) 6 *YHRDLJ* 1–44 at 1.

[79] Borchien Lai 'The Alien Tort Claims Act: Stopgap Measure or Permanent Remedy' (2005) 26 *North-western JILB* 139–166 at 140.

[80] For example in *Piper Aircraft Co. v Reyno*, 454 U.S. 235 para 256 (1981), court considered the issues of court congestion, local interest in resolving the controversy, the preference for applying familiar law, ease of access to evidence and the convenience of witnesses , yet the court dismissed the claim and rejected the arguments made by plaintiffs that 'alternative forums are inadequate, whether because of a lack of class action procedures, less developed law, less favourable remedies, fewer available causes of action'.

[81] On interplay between government support and opposition against ATCA suits See Jide Nzelibe 'Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation' (2013) 33 *NJILB* 475 at 511–524.

[82] See Alien Tort Statute Reform Act sponsored by Senator D Feinstein introduced on 17 October 2005, available at *https://www.govtrack.us/congress/bills/109/s1874*, accessed on 20 June 2015.

[83] See Beth Stephens 'Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation' (2004) 17 *HHRJ*.

Alien Tort Statute (ATS) by the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co.*[84] In a judgment delivered by Chief Justice Roberts, the Supreme Court held that the presumption against extraterritoriality applies to the ATS. While affirming the judgment of the Court of Appeal, the court further held that corporations 'are often present in many countries' and their mere presence in the US alone is not enough to trigger cause of action in ATS against their criminal complicity.

Therefore, based on this judgment, it is reasonable to assert that the future of corporate litigations with respect to violations by US corporations abroad is bleak. Thus, the concern of Justice Breyer (who together with Justice Ginsburg, Justice Sotomayor and Justice Kagan concurred with the majority judgment delivered by Chief Justice Roberts but gave different reasons for the court's decision) is likely to manifest the fact that the US will 'become a safe habor for violators of the most fundamental international norms' if ATS is denied of extra-territorial reach.[85]

Although the majority of the judges reached the same conclusion in the judgment, they however disagreed on the issue of the extra-territorial reach of the ATS. The implication of that disagreement is that certainly the controversy with respect to corporate accountability of MNCs in the US is not yet settled. However, the reality now is that the door of extra-territorial application of ATS to ensure corporate accountability for corporations doing business in Africa is almost closed. But even if the Supreme Court had decided in favour of corporate accountability, the preliminary requirements that must be satisfied before the court can hear the cases still remain as obstacles too difficult to surmount.

In the same manner, the UK government has reformed its justice system, particularly, the 'no win no fee conditional fee agreements (CFA)'.[86] This, no doubt will create a serious barrier for victims of human rights violations abroad who want to proceed against MNCs in

[84] Suit No. 06-4800-CV, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010). The Supreme Court judgment was delivered on 17 April 2013.

[85] Ibid. Note that the major point of disagreement between CJ Roberts and Justice Breyer and others was the extraterritorial reach of ATS. To Justice Breyer, under certain conditions, ATS could be used extraterritorially to provide remedy for egregious violations of international norms so that U.S. does not become 'a safe harbor for violators of the most fundamental international norms'. Thus at para 7 he enumerated three requirements which are (1) if the violations occurred in the US, (2) if the defendant is a citizen of America and (2) or (3) if the national interest of the US is greatly and negatively affected by the conducts the defendant's conduct.

[86] See Legal Aid Sentencing and Punishment Offenders Act 2012, available at *http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted*, accessed on 20 June 2014; Ministry of Justice Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations the Government Response' (2011), available at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228974/8041.pdf*, accessed on 20 June 2015.

the UK.[87] If home states retreat in the pursuit of corporate accountability against corporations of home origin doing business abroad, the result might be disastrous for human rights in Africa; at least in the corporate sector. On the other hand, if they do not, it is not a guarantee that all corporate human rights problems in Africa will be resolved through home state efforts. The solution therefore lies in Africa itself and the problem can better be solved by Africa. This is what this thesis addresses. Total reliance on home state jurisdiction for corporate accountability is like chasing a shadow. Thus, this thesis seeks to examine the idea of an African approach to corporate responsibility for human rights violations, through the instrumentality of the AU. That is not to say that the AU alone can solve the problems of corporate human rights violations in Africa. However, since the problems of corporate abuse persist in Africa, Africa must take concerted, pragmatic and complimentary efforts to address the problem. They must learn a lesson from Brutus who said:[88]

> There is a tide in the affairs of men.
> Which, taken at the flood, leads on to fortune;
> Omitted, all the voyage of their life
> Is bound in shallows and in miseries.
> On such a full sea are we now afloat,
> And we must take the current when it serves,
> Or lose our ventures.

[87] One of the reforms is that the losing party will no longer pay success fees to the victorious party. Since success fees are part of money accruable to counsels. Its prohibition means that one important source of remunerating counsels is frustrated. This may discourages some lawyers in the UK from taking up certain cases. See Richard Meeran 'Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States' (2011) 3 *CUHKR* 1 at 18–19. He states that the effect of the reform 'is likely to produce a significant reduction in damages awards for developing country claimants – would effectively rule out recovery of success fees in MNC litigation and consequently reduce the incentive for UK lawyers to take on such cases'; Richard Meeran 'Multinationals will Profit from the Government's Civil Litigation Shake-up' *The Guardian* (24 May 2011), available at *http://www.theguardian.com/commentisfree/libertycentral/2011/may/24/civil-litigation-multinationals*, accessed on 20 June 2015; The Corporate Responsibility Coalition 'Implications of the Jackson Civil Costs Reforms for Human Rights Cases against Multinational Corporations' noting that 'The combined effect of these changes will severely reduce the ability of claimant law firms to take on human rights litigation against MNCs in the future. Claimants' lawyers will face the prospect of investing enormous amounts of time and money not knowing whether, even if the case is successful, they will recover anything more than a fraction of the costs incurred', available at *http://corporate-responsibility.org/wp-content/uploads/2013/11/jackson_analysis5.pdf*, accessed on 8 June 2015.

[88] Williams Shakespeare *Julius Caesar* Act 4 Scene 3, 218–224.

1.2 The current regulatory regime

Attempts made in the past towards the creation of a multilateral regulatory regime for corporations at the international level did not succeed.[89] The UN Global Compact which was endorsed and supported by the UN does not amount to a comprehensive framework for corporate accountability but instead an easy route for corporations to adopt CSR without a regulatory input.[90] The UN Draft Norms[91] aimed at correcting flaws in the Global Compact provided a pure regulatory regime at the international level, but was unfortunately jettisoned by the UN with its prescription. The inadequacy of the Global Compact to address the problem of corporations and human rights adequately and the rejection of the UN Draft Norms, among other things, informed the appointment of the Special Representative of the UN Secretary-General (SRSG) for Business and Human Rights in 2005 to examine the existing state of corporate accountability and 'compile a compendium of best practices of states, MNCs, and other businesses'.[92] The SRSG came up with a tripartite framework for corporate accountability, widely-known as the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights[93] in 2008. Unlike the previous endeavours, the final report of the framework in May 2011, known as the UN Guiding Principles on Business and Human Rights (UNGP)[94] was unanimously endorsed by the UN Human Rights Council. It has been argued correctly that the endorsement fills the gap that has been missing in the quest for global corporate accountability.[95] The main challenge of the SSRG has been said to

[89] See Carolin F Hillemanns 'European & International Law UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 10 *GLJ* 1065–1080 at 1066.
[90] See John Ruggie 'Global Compact is a Safe Point of Entry' (2009), available at *http://globalcompactcritics.blogspot.com/2009/10/john-ruggie-global-compact-is-safe.html*, accessed 20 June 2015. He notes that 'The Global Compact …was intended as learning forum where companies can get used to the idea of CSR … for a lot of governments in the developing world this is a safe point of entry into the global CSR'.
[91] See UN Sub-Commission on the promotion and protection of human rights 'Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (UN Draft Code) (26 August 2003) E/CN.4/Sub.2/2003/12/Rev.2, available at *http://www.refworld.org/docid/403f46ec4.html*, accessed on 27 August 2015; Commentary to the UN Draft Code (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003), available at *http://www1.umn.edu/humanrts/links/commentary-Aug2003.html*, accessed on 27 August 2015.
[92] UN Secretary 'General Secretary-General appoints John Ruggie of United States Special Representative on issue of human rights, transnational corporations, other business enterprises' UN Press Release SG/A/934 (28 July 2005), available at *http://www.un.org/News/Press/docs/2005/sga934.doc.htm*, accessed on 20 June 2015.
[93] HRC 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' UN Doc A/HRC/8/5 (2008).
[94] See Special Rep. of the Secretary-General 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc. A/HRC/17/31 (21 March 2011).
[95] Press Release UN Office of the High Commissioner of Human Rights, New Guiding Principles on Business and Human Rights (UNGP) endorsed by the UN Human Rights Council on 16 June 2011, available at

be how to address the 'governance gap caused by globalization' which rendered many states incapable of addressing the issue of corporate human rights abuse in their territories.[96] With that recognition, it was expected that the UNGP would provide a ready-made solution to the problem of incapacity. Something in form of a binding regulatory regime that can be enforced multilaterally or globally even if those states failed to take a leap. The UNGP however took a different approach, one that can be described as state-model approach in the sense that it insists on the significance and primary role of states in the protection of their citizens from corporate human rights abuse.[97]

That approach preserves the concept of state responsibility. It states in the first leg of its tripartite framework that the state has a duty to use legislative and executive powers at their disposal to protect their citizens and environments 'against human rights abuses by third parties, which includes corporations'.[98] In spite of this duty, states are not responsible for adverse conducts of non-state actors that result in human rights violations, except if they are complicit in those crimes. They can however be liable for breach of their obligation to protect, if they fail to enact appropriate laws and make suitable policies to control, prevent and punish such conduct.[99] The UNGP therefore, require states to fill the governance gap through a periodic review of corporate human rights accountability frameworks for corporations within their territories which they are expected to develop in line with the UNGP.[100]

The second leg addresses the incapacity of those states that might not be able to perform their responsibility to protect by shifting the issue of responsibility to the boardroom of corporations, though not in mandatory form but in persuasive tone. It reiterates the fact that 'business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights' and, therefore, impose a 'responsibility' upon them 'to respect … all such rights'.[101] The imposition of responsibility on corporate actors is not only to ensure a business atmosphere that is friendly with human rights obligations but also to eschew violation of such rights in the course of doing business. Therefore, they must not be the cause or part of the cause adverse to human rights through their operational and delivery

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http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, accessed on 20 May 2015.

[96] See HRC op cit note 93 paras 11–16.

[97] See first leg of the tripartite framework of the UNGP, UNGP op cit note 95 para 1.

[98] Ibid paras 6–7.

[99] Ibid.

[100] Ibid at 8.

[101] Ibid.

service processes, their business affinity or their products per se. They are to respect human rights and make provision for a robust remedial framework for human rights violations by corporations.

The third leg of the framework deals with the right of the people to have access to a remedy should their human rights be violated by corporations. It is obvious that the third leg, like the first, also deals with responsibility of the state. Thus David Bilchitz argues correctly: 'if the state is the primary enforcement agent, then it will be responsible for ensuring that remedies are available when fundamental rights are violated'.[102] Rights and obligations trigger fulfilment if enforced by the states and that, of course, is the pride and the essence of states. If the state however fails to provide meaningful, effective and timely remedies for victims of corporate human rights violations within its territory, then according to John Ruggie, 'the state duty to protect can be rendered weak or meaningless'.[103] The UNGP therefore requires a state to perform its duty to protect by providing victims of corporate human rights violations with adequate remedy.[104]

As expected of a controversial work of this nature, the UNGP have been both criticised[105] and applauded.[106] According to critics, the UNGP do not create a binding international obligation and, therefore, fail to solve the problems of corporate human rights violations. The failure of the SRSG to create enforceable international legal obligations has generated a heated debate on the nature of its corporate human rights obligations.[107] The main challenge is how weak states can meet their obligations under the UN framework to solve the problems of corporate human rights violations in their territories in the absence of such a legal regime. In cases where states fail to discharge their duty, can reliance be placed on the

[102] David Bilchitz 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Violations?' (2010) *SUR-IJHR* 199 at 203–204.
[103] See UNGP op cit note 95 para 22.
[104] Ibid paras 22–27.
[105] See Jean-Marie Kamatali 'The New Guiding Principles on Business and Human Right Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?' (2012) 20 *CJICL* 437–464 at 445–449; Elisa Morgera 'From Corporate Social Responsibility to Accountability Mechanisms: The Role of the Convention on Biological Diversity' (2012) 6 *UE Research Paper Series* 321–354 at 348; David Weissbrodt 'UN Perspectives on "Business and Humanitarian and Human Rights Obligations" Proceedings of the Annual Meeting' (2006) 100 *ASIL* 135 at 138; Bilchitz op cit note 102.
[106] Ethix Press 'UN and OECD guidelines reinforce expectations on companies to respect human rights' (17 June 2011), available at *http://www.ethix.se/sites/default/files/blandade_filer/EthixPress%20June%202011_UN%20OECD%20Guidelines_1.pdf*, accessed on 20 July 2015; Steptoe & Johnson LLP 'UN Guiding Principles for Business & Human Rights: Issuance of Ruggie Principles Portends Increasing Need for Multinational Businesses to Focus on Human Rights Compliance' (20 April 2011), available at *http://www.steptoe.com/publications-newsletter-172.html*, accessed on 20 July 2015.
[107] See Kamatali op cit note 105; Morgera op cit note 105; Weissbrod op cit note 105; Bilchitz op cit note 102.

responsibility of corporations to respect human rights to fill the gap? Penelope Simons argues that 'beyond domestic law, Ruggie's framework conceives of a moral or voluntary responsibility to respect human rights'.[108]

Similarly, Amnesty International contends that 'the draft Guiding Principles effectively make corporate human rights due diligence a voluntary tool for business'.[109] More scholars are of the same view.[110] Others contend that beyond an obligation not to do harm, the SRSG should have imposed an obligation on corporations to contribute to the realisation of human rights.[111] Thus, they argue that responsibility to respect human rights imposed by the SRSG creates negative and not positive obligations. No doubt, the imposition of both positive and negative obligations on corporations to respect human rights could have been more efficacious in realising human rights globally. In addition, if the nature of the obligations imposed is mandatory and not voluntary, the issue of positive and not negative obligations may not be of much impact to be a setback. But in spite of the absence of the two catalysts in the UNGP, the framework is still a valuable tool to implement. On closer examination of the UNGP, it is crucial to appreciate that though it creates direct negative obligations, the positive obligations of corporations can also be inferred from it indirectly.[112]

The major weakness of the framework is its voluntary nature at the international level. However, despite that shortcoming, this study will argue that the UNGP have laid a good foundation for corporate accountability. Even if Ruggie was not in a hurry to create binding and enforceable corporate obligations at the international level, there is no doubt that the comprehensive principles which he proffered form the fulcrum upon which such enforcement mechanisms should be based at any level of governance spectrum, be it at the domestic, regional or at the international levels. In fact, Peter Muchlinski contends that the widespread notion of voluntarism of the UN framework is misconceived and argues rightly that 'due diligence mechanisms' are capable of creating binding legal obligations.[113]

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[108] Penelope C Simons 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 *JHRE* 1 at 5–53.

[109] Amnesty International 'Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Draft Guiding Principles and on post-mandate arrangements' (2010), available at *http://www.amnesty.org/fr/library/info/IOR50/002/2010/en*, accessed on 25 June 2015.

[110] See Kamatali op cit note 105; Morgera op cit note 105; Weissbrodt op cit note 105; Bilchitz op cit note 102.

[111] See for example Bilchitz op cit note 102. He contends that 'corporate obligations should not only involve 'negative obligations to avoid harm but also include a "duty to fulfil": obligations to contribute actively to the realization of fundamental rights'.

[112] Ibid.

[113] Peter Muchlinski 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation' (2012) 22 *BEQ* 145–177.

It must be noted that the UNGPs are not an end but a means to an end. They do not claim to solve all the problems of corporate human rights abuse but are internationally recognised principles of corporate accountability which should be worked upon to solve the problems of corporate human rights violations. According to Ruggie, 'principles are principles. They are not a toolkit. You don't take it off the shelf and plug it in and get an answer'.[114] You have to implement it by doing something extra. So, implementation of the framework is what is important and at the implementation stage, this study is of the view that all the weaknesses of the framework can be addressed. Therefore, this study attempts to recommend that with respect to Africa.

1.3 Aims and objectives of the study

The major purpose of this study deals with how to develop an African approach to the issue of corporate human rights accountability in Africa by implementing the UNGP. This is necessary because the battle of over 50 years to shift responsibility for protection of human rights to multilateral or international institutions or to enact a global regulatory regime that will solve the problems of corporate human rights violations despite the incapacity of some states to meet their obligations.

In that situation, the panacea to the problem some scholars argue correctly may lie at the regional level.[115] However, as argued above, some scholars have expressed their dissatisfaction with the performance of the AU to monitor corporate accountability in Africa. They argue that though Africa is a continent where abuses of corporate human rights violations are numerous, the AU has done nothing significant to solve these problems.[116] Unfortunately, there is paucity of research on this area. While research on corporate governance and accountability is high, specific focus on Africa is rare and inadequate.[117] Most researchers in this area concentrate on the study of home-state jurisdiction without a sufficient nexus to the study of host-state jurisdiction and in particular the regional legal

[114] See *Business Ethics* 'Business and human rights: Interview with John Ruggie' (30 October 2011) *The Magazine of Corporate Responsibility*, available at *http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/*, accessed on 20 April 2015.

[115] See Alice de Jonge *Transnational Corporations and International Law Accountability in the Global Business Environment* (2011) 149–150; The South Africa Institute for Advanced Constitutional Public Human Rights & International Law (SAIFAC) 'The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System' A Report of SAIFAC (17 February 2010); see also Peter T Muchlinski *Multinational Enterprises & The Law* 2 ed (2007) 118.

[116] Ibid, SAIFAC Report; Daniel Aguirre 'Corporate Social Responsibility and Human Rights Law in Africa' (2005) 5 *AHRLJ* 239 at 265; see also Emeka Duruigbo 'Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry' (2001) 7 *ASICL* 101 at 126.

[117] Ibid Aguirre; Ibid SAIFAC Report.

jurisprudence. Thus, this thesis is important as it aims to fill the gap by engaging in that enquiry.

It is also significant because it is actuated by a response to the call of the SRSG for more research in the area of corporate accountability in order to facilitate implementation of the framework in this part of the globe.[118] Ruggie lays the premise by arguing that there is bound to be future debate on the UNGP but 'at least we now know what the foundations are and how to frame the future debate'.[119] This thesis will engage in an inquiry as part of this 'future debate' on how we can use the foundational principles of the UNGP to confront corporate human rights violations in Africa.

Aside from the major objective of the thesis, other aims and objectives have emerged within the central objective that must be addressed. Most of the states in Africa are weak and could not perform their obligations under the UNGP. In such a situation, how can Africa implement the UNGP? This thesis therefore aims also to explore the reasons why the African states are unable to stand up to their responsibilities in this regard and suggests the possible ways of remedying this situation.

Of course, the whole discourse still centres on the major objective. A critical look at the UNGP reveals that they attempt to solve this problem of incapacitation of states by suggesting complimentary efforts from other states in accordance with the principle of international law.[120] Among other things, it prescribes that where states are 'unable to protect human rights adequately'[121] because MNCs are involved, the home states 'have roles to play' in ensuring that 'businesses are not involved with human rights while the neighboring states can provide important additional support'.[122] It also calls for concerted efforts from 'multilateral institutions' and co-operation among states to resolve the issue of corporate human rights responsibility (CHRR) and accountability. In fact, the use of extra-territorial jurisdiction is also supported for the attainment of that purpose.[123] In that regard, the AU as a regional organisation has a vital role to play in this matter, to use its institutional structure and mechanism to evolve a legal regime of CHRR and accountability in the continent. The inquiry of how the AU can fit in to this challenge is the main engagement of this thesis.

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[118] See *Business Ethics* op cit note 114.
[119] Ibid.
[120] Note that the UNGP also call for complimentary efforts from corporations but this thesis deals with how states can implement UNGP through a regulatory approach, hence the Corporate Social Responsibility approach of the corpoations is outside the scope of this study.
[121] See UNGP op cit note 95, commentary to para.7.
[122] Ibid.
[123] Ibid.

Having said that, another objective is to examine how corporations can be liable together with states for their complicity for human rights violations under the African human rights system. In order to do this, it is important to examine the state of the current level of regulatory, normative and corporate accountability framework for corporations doing business in Africa. In doing this, it is important to note that the AU's legal jurisprudence is dictated by the 'Western notions and concepts of International Law',[124] though with little modifications that reflects African perspective. Therefore, even though, most of the AU treaties can be violated by states with complicity of corporations or vice versa, the existing legal structure of the AU does not hold corporations accountable directly for violations of human rights.

This is due to the fact that only states are parties to the African human rights treaty regime. It then means that the African human rights system follows the state centric view of international law that seek to protect human rights through the instrumentality of the states alone, on the premise that only states are the primary bearers of human rights obligations.[125] As a result, the state and not corporations has four cardinal duties to give effect to the provisions of regional and international human rights treaties.

The first is the duty to respect human rights and the purpose is to prevent the government itself from trampling on the rights of the people. The second is the duty to protect human rights, this places obligation on the state to protect her citizens from human rights violations by third parties. The third is the duty to promote human rights, which is a unique duty in the African treaty regime[126] because it places a further obligation on the state to showcase its human rights records. The last, is the duty to fulfil human rights, which is a mandatory injunction to states to implement and realise the purports and intents of human rights.

As a result of these obligations, a state can be held liable for failure to discharge its obligations under the African human rights regime, as it is clear that the state is the

[124] See Rachel Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 50; Nsongurua J Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40 *SJIL* 105 at 121.
[125] See Dixon op cit note 45.
[126] This is African [Banjul] Charter on Human and Peoples' Rights (African Charter) an African treaty adopted in Nairobi, Kenya, by the Organization of African Unity (now African Union) Assembly of Heads of State and Government on 27 June 1981, OAU doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) which entered into force on 21 October 1986 and ratified by all member states of the African Union including Eritrea which acceded to the Charter in January 1999, available at *http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf*, accessed on 20 July 2015. See Article 1 of the African Charter.

mechanism of enforcement of the human rights regime in Africa. Unfortunately, most states are complicit in corporate human rights violations in Africa, as this study has shown earlier.

The deficiency of the AU's legal structure with regard to corporate accountability comes to the fore in the case of *SERAC and CESR v Government of Nigeria*[127] where the African Commission on Human and Peoples' Rights (ACHPR, or the African Commission) rendered a decision holding the Nigerian government liable for complicity in the violation of human rights perpetuated by corporations on the grounds of state responsibility without attributing any blame to the corporations involved. The African Commission found Nigeria to have breached its four-fold obligations guaranteed by the African Charter on Human and Peoples' Rights (Charter) and was therefore found to have violated the right to enjoy Charter-guaranteed rights and freedoms without discrimination,[128] the right to life,[129] the right to property,[130] the right to health[131] (Article 16), the right to housing,[132] the right to food,[133] the right of peoples to freely dispose of their wealth and natural resources,[134] and the right of peoples to a 'general satisfactory environment favorable to their development'.[135] The implication of that case is that if the state fails to perform their four-fold obligations to protect, respect, promote and fulfil human rights there can be no remedy under the present African legal jurisprudence to hold corporations accountable.

According to Joe Oloka-Onyango, the 'main focus of condemnation' by the African Commission was the government of Nigeria, 'little attention was given to the obligations and responsibilities (in human rights terms) of the companies that were intimately involved … in many of the human rights violations that occurred there'.[136] At the end, the decision of the African Commission was one-sided, making the Nigerian government responsible for all the atrocities that occurred.

In truth, the position of the African Commission is understandable. The Commission could not have focused on the corporation involved (Shell Petroleum Development

[127] Communication 155/96; Decision handed down at the 30th Ordinary session of the Commission held in The Gambia. For text see Bernard H Oxman 'International Decisions' (2002) 96 *AJIL* 677–684. The case will be discussed in Chapter 4.
[128] African Charter op cit note 126, Article 2.
[129] Ibid Article 4.
[130] Ibid Article 14.
[131] Ibid Article 16.
[132] Ibid Article 18(1).
[133] Ibid implicit in Articles 4, 16 and 22.
[134] Ibid Article 21.
[135] Ibid Article 24.
[136] Joe Oloka-Onyango 'Who's Watching "Big Brother"? Globalisation and the Protection of Cultural Rights in Present-day Africa' (2005) 5*AHRLJ* 1–26 at 25.

Company, SDPC) when the African human rights system, like all other regional human rights systems, is in fact state-based. The problem lies with the state-based structure and it will be unfair to expect the African Commission to condemn the structure that ensures its legitimacy. As such the responsibility to change the structure lies with the AU and not with the African Commission. However, this study is of the view that the African Commission's decision could be better off, if the African Commission had considered corporate law and human rights theory together with international law. According to Steven Ratner[137] 'human rights theory rejects efforts to limit duty holders to states or to those carrying out state policy'. He further argues correctly that 'corporate law provides guidance to international law on the need to view corporations, and not simply those working for them as duty holders'.[138] Consequently, this study interrogates the question of corporate liability for their complicity for human rights violations under the African human rights system. It rests on the conceptual underpinning that international law is not static; it is shifting and adjusting its self to meet the challenges of human rights protection by moving from the era of strict construction of states as duty bearers to include individuals and now to non-state actors.

The reasons behind the inclusion of non-state actors are the inadequacy of 'state responsibility' and 'individual responsibility' to meet the challenges of corporations. This study therefore proves that corporations are duty bearers that should be saddled with obligations to protect human rights. Thus, CHRR refers to obligations of corporations to respect human rights. On the other hand, accountability helps in questioning the breach of that obligation by the corporation. The whole idea of accountability is to prevent and remedy the arbitrary use of power.[139] In the *Corfu-Channel* case, the conception of accountability as a check in the use of power by questioning conducts of people, states or institutions was adopted.[140] Consequentially, the court observed rightly that 'a state on whose territory an act contrary to international law has occurred may be called upon to give an explanation'.[141] The concept of corporate accountability, as used in this study refers to the entrenchment of

[137] See Ratner op cit note 22 at 461.
[138] Ibid.
[139] *Webster's Third New International Dictionary* (1981).
[140] See Nils Rosemann 'New Perspectives of Accountability: The Merging Concept of Corporate Responsibilities with regard to Human Rights' (2004) paper delivered at the Florence Founding Conference of the ESIL1-14 at 8, available at *http://www.esil-sedi.eu/sites/default/files/Rosemann_0.PDF*, accessed on 20 June 2015.
[141] See *Corfu-Channel* case ICJ Reports (1949) para 8.

corporate-binding obligations, 'imposition of penalties in cases of non-compliance' and 'the right of victims to seek redress'.[142]

Indeed, this enquiry has come at the most appropriate time. A regional institution like the EU has been taking proactive steps to ensure that their home-based corporations do not violate human rights abroad.[143] Certainly, the AU must learn from the EU but it is difficult to compare the two regional institutions because they have different historical backgrounds, focus and level of growth. Nonetheless, the recent move by the AU to extend the jurisdiction of the proposed African Court of Justice and Human Rights (ACJHR) to cover corporate liability[144] indicates its preparedness to take the issue of corporate accountability seriously. Article 46C of the Protocol on the Statute of the African Court of Justice and Human Rights (Protocol) seeks to invest the ACJHR with power to try legal persons for criminal corporate liability.[145] Notwithstanding, the criticism of some scholars, that the motive behind the ACJHR[146] is a ploy to settle a score with the ICC by providing an escape route for the trial of African leaders by the ICC,[147] the establishment of the ACJHR with jurisdiction on corporate liability will go a long way to address the issue of corporate human rights accountability. In fact, Vincent Nmehielle argues that it is easy for 'Any commentator or observer' to view the 'move as indeed reactionary due to a perceived "Africa backlash" on the ICC'.[148]

In addition, the capability of the ACJHR as it is presently constituted by the Draft Protocol to handle a wide array of cases which include genocide, crimes against humanity, war crimes, piracy, terrorism, corruption, illicit exploration of natural resources, criminal

[142] Peter Utting 'The Struggle for Corporate Accountability in Development and Change' (2008) 39 *DAC* 959–997 at 965–966.

[143] Joshua M Chanin 'The Regulatory Grass is Greener: A comparative analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility' (2005) 12I *JGLS* 745 at 778. Note that the EU Framework too is not perfect but it 'is a sound initial step towards a very worthwhile end'.

[144] Franny Rabkin 'African human rights court could cover criminal offences' *Business Day* (29 January 2014), available at *http://www.bdlive.co.za/national/law/2014/01/29/african-human-rights-court-could-cover-criminal-offences*, accessed on 20 July 2015; 'Africa to create criminal court' *Daily Monitor* (15 July 2012).

[145] See 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' adopted by AU Heads of State and Governments on 27 June 2014, available at *http://www.au.int/en/content/protocol-amendments-protocol-statute-african-court-justice-and-human-rights* accessed on 20 July 2015.

[146] Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/ AU/Dec.366 (XVII), adopted at the 17th Ordinary Session of the AU Assembly, 30 June to 1 July 2011 in Malabo, Equatorial Guinea (para 8).

[147] Stephen Arthur Lamony 'African Court not Ready for International Crimes' *African Arguments*, available at *http://africanarguments.org/2012/12/10/african-court-not-ready-for-international-crimes-%E2%80%93-by-steven-lamony/*, accessed on 20 May 2015. But see Chidi Anselm Odinkalu 'Concerning the Criminal Jurisdiction of the African Court –A Response to Stephen Lamony' *African Arguments*, available at *http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/*, accessed on 20 May 2015.

[148] See Vincent Nmehielle 'Taking Credible Ownership of Justice for Atrocity Crimes in Africa' in Nmehielle op cit note 62 at 240.

corporate liability among others is doubtful. With respect to corporate criminal impunity, the idea to extend the jurisdiction is commendable. Today, on the issue of CHRR, the ingredient of reform in any nation or region of the world should be the UNGP. As such this thesis avers that a serious regional institution intending to take complimentary efforts that will adequately address the issue of corporate accountability must start from a critical examination of the UNGP and then begin a research on how to implement it in its region. The issue of access of individuals to the ACJHR is not even guaranteed. Yet, the hope of attaining a society free from corporate abuse in Africa is not lost.

At this juncture, the question for consideration is whether that extension of jurisdiction alone is an adequate compliance with the UNGP and if that can ensure corporate accountability in Africa? The answer may be negative; it does not amount to full compliance to the UNGP, nor is it capable of ensuring corporate accountability in Africa. But it is the beginning of the process of corporate accountability in Africa. Consequently, this thesis seizes this opportunity to fill the missing link. It interrogates how the present potential in the AU can be catapulted to live up to the demands of the widely acclaimed 'internationally recognized principles of corporate accountability' recognised by the UNGP and how the hydra-headed problems of corporate human rights violations can be resolved. This is a crucial issue for two reasons. One, the failure of the states to protect always leads to violation of human rights treaties of AU itself; and two, research on this area is rare, as noted earlier.[149] Thus, this thesis is important as it aims to fill the gap by engaging in that enquiry.

In addition, this study, if completed and published will facilitate effective and efficient regulatory mechanism on corporate accountability in African states; it will also motivate the AU to evolve a complimentary regulatory and normative framework that will help the states to meet their expectation in the UN framework and serve as an instrument of advocacy at the hands of law firms, NGOs and international organisations interested in corporate human rights accountability. Ultimately, the study will also be useful to various stakeholders like students, legal practitioners, policy-makers, states, regional institutions in Africa, international institutions, corporations, academics, researchers and a host of others who have stake or interest in corporate human rights obligations and accountability in Africa.

[149] See Aguirre op cit note 116; SAIFAC op cit note 116.

1.4 Research questions

As noted earlier, the UNGP have provided us with a template to address the issue of CHRR and accountability. According to Ruggie, the framework is not a 'toolkit' because it does not provide a ready-made solution to the problems at hand. It calls for a thorough research before implementation. In fact, the truth is that if a thorough research is done as contemplated by Ruggie, a new framework will emerge. The beauty of that new framework is not that it will be in conflict with the general principles enunciated but will take care of peculiar history, experience, unique environmental differences and idiosyncrasies of each nation, state or continent. To conduct an enquiry on an African approach to corporate accountability for human rights which is the primary task of this research, this study will consider the following questions:

1. What is the justification and quest for CHRR and accountability in Africa and which forum is suitable for its implementation in Africa?
2. What is the nature, extent and history of corporate human rights violations in Africa?
3. What is the current level of regulatory, normative and corporate accountability framework for corporations doing business in Africa?
4. Is the current level satisfactory and what is responsible for the result?
5. What are the main principles of the UN framework, the present level of compliance with the framework by states in Africa and the question of suitability of the framework itself?
6. How can the AU develop a framework for CHRR and accountability?
7. What are the hindrances to the adoption of a framework for CHRR and accountability and how can the hindrances be addressed.

1.5 Research methodology

This study will primarily entail a desk research. It will involve a critical analysis of human rights instruments and literature on corporate accountability as well as on the relevant norms, ethics and codes dealing with CSR at both regional and international level.

In doing this, the study will adopt comparative, theoretical and doctrinal approaches. Consequently, the thesis will rely majorly on primary and secondary sources relevant to the study. The primary sources to be used include international and regional human rights instruments, the domestic law of some host and home states regulating the activities of

MNCs, and the judgments of international, regional and domestic courts. The constitutions of some countries in Africa shall also be examined to see their impact on the proposed legal framework for CHRR and accountability. Furthermore, UN and AU treaties, documents and declarations relevant to the study shall also be examined. The secondary sources to be relied on include journal articles, law textbooks and documents and reports collected by government agencies, human rights bodies/commissions, NGOs, and other electronic sources relevant to the study.

Among other things, the study will explore the theory of social enterprises to justify the basis for corporate accountability in Africa. The study will go further in the scholarship of social enterprises theory by examining the possibility of its compatibility with African jurisprudence and philosophy.

1.6 Scope and limitation of study

The focus of this research is an inquiry into the possibility of putting corporations in Africa under a binding normative framework that will ensure their accountability in the conduct of their business in Africa. A full study of voluntary codes of corporations, particularly their engagement with private partnership for the purpose of CSR, is outside the focus of this research. The research is interested in analysing business-related aspects of human rights that are suitable for transnational business in Africa in order to propose uniform corporate human rights obligations for Africa. Consequently, only relevant literature suitable for a discourse on CHRR and accountability will be considered.

In spite of this limitation, the study will examine the normative standards for corporate governance approved by the AU.[150] The indices[151] for evaluating and assessing the compliance of states to the codes through the African Peer Review Mechanism (APRM) shall also be examined.[152] This study will examine in detail an attempt by the AU to provide a normative framework for corporate governance in Africa and this will include a critical study

[150] See NEPAD Secretariat 'Objectives, Standards, Criteria and indicators for the African Peer Review Mechanism' 6th Summit of the NEPAD Heads of state and Government Implementation Committee (9 March 2003). Those approved by the Heads of State and Government of the AU are Principles of Corporate Governance (OECD and Commonwealth), International standards on accounting reporting, International standards on auditing, Core principles of Effective Banking Supervision, Core principles for Securities and Insurance Supervision and Regulations, African Charter on Human and Peoples' Rights, Labour Codes of the International Labour Organization (ILO) and Codes on industrial and environmental safety and hygiene of the World Health Organization, available at *http://www1.uneca.org/Portals/nepad/Documents/Objectives-Standards-Criteria-Indicators%20for%20APRM.pdf*, accessed on 20 May 2015.

[151] Ibid para 4.3.

[152] APRM is a process by which African governments voluntarily agree to have their policies with respect to human rights, political and economic issues evaluated by panels of prominent Africans.

of the roles of APRM and the New Partnership for African Development (NEPAD) with respect to corporate human rights obligations and accountability.

1.7 Structure

This study is divided into eight chapters. Chapter 1 has two sections; the first is an introduction which provides a general introduction, explaining the link between corporation and global commerce in Africa and the ensuing governance gap resulting in corporate human rights violations; section 2 explains the theoretical background on which the discussion of the remaining chapters is based.

Chapter 2 attempts to indentify the uniqueness of the African experience in relation to corporate human rights violations by discussing these violations in Africa in three dimensions, its history, nature, and extent. The discourse on history reveals frequent complicity of states in corporate human rights violations; the nature of corporate human rights violations itself shows complexity and difficulty in determining criminal liability of the perpetrators, while its extent shows that nearly all human rights treaties have been violated by the states in Africa with the complicity of corporations. The whole discourse also reveals that states in Africa are victims of international legal structure which incapacitate them to regulate corporations effectively.

Chapter 3 focuses on the existing regulatory regimes for CHRR and accountability in African states. The chapter adopts a comparative approach. The thesis notes that all states in Africa rely on the constitutions as the fundamental law of the land to protect human rights even in the corporate sector and it begins its enquiry from that premise. Two types of constitutional approaches to corporate human rights accountability are examined. The first is countries with a special constitutional regulatory framework for corporations; and the second is countries with general regulatory frameworks. The extent to which these constitutional regulatory frameworks can adequately protect human rights in the corporate sector are considered. Thereafter the discourse turns to the examination of the existence of a regulatory framework for corporate criminal liability (CCL) in the states. For that purpose, states in Africa are divided into three and some states are assessed within this classification. This is followed by examination of other regulatory frameworks that are relevant for corporate accountability in some states apart from the constitutional provisions in order to determine the adequacy of a national regulatory framework for corporate accountability in Africa.

Chapter 4 continues the study in Chapter 3 on multiple regulatory sites; it examines the complimentary role of the AU and others in ensuring corporate accountability for human rights in Africa. It is worth noting that the AU is the major focus in this chapter. Therefore, after a background discourse on the AU, the chapter examines the African Charter and its institutional and regulatory mechanism for the protection of human rights in Africa. It also discusses complimentary efforts of sub-regional institutions in the African continent like the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS) and the East African Community (EAC).

Chapter 5 critiques the UNGP. It examines the tripartite framework for corporate accountability, widely-known as the United Nations 'Protect, Respect and Remedy' Framework for Business and Human Rights, the concept of 'due-diligence' and extra territorial jurisdiction within its framework. It discusses the nature and extent of the human rights obligations protected and articulates the usefulness of the UNGP and their implications for the AU.

Chapter 6 examines reasons and justifications for recommending the AU as the forum for dealing with corporate accountability in Africa. In doing so, it addresses three issues. The first is the dilemma of the status of MNCs in the theoretical analysis of international law. The second is the inadequacy of the regulatory, institutional and remedial frameworks put up by the home states of the MNCs in addressing the state of CHRR and accountability in Africa; and third, the effects of global commerce on developing states in Africa. I argue in this chapter that the overall effect of those reasons is that the present situation demands that the AU should play a viable role on corporate accountability in the continent. Furthermore, this chapter supports the choice of the AU by examining the new emerging trends in international law for corporate and individual criminal liability. It also examines how the present embers of corporate accountability in the AU can be triggered or fanned to ensure an effective regional corporate accountability regime for human rights in the continent. Thus, the chapter discusses the emergence of corporations as new duty bearers, the role that law and institutions can play in addressing the issue of CHRR and accountability in Africa and reasons behind the quest for legal and institutional frameworks for CHRR and accountability in Africa. It reviews the African approach to corporate responsibility for human rights violations and accountability and justifies the basis for the quest for a new legal framework that addresses CHRR and accountability from an African and theoretical perspective.

Chapter 7 considers an African approach to corporate human rights responsibility. It develops a framework for the AU that addresses corporate human rights violations and accountability from an African perspective in response to the call of the SRSG[153] for further study on the UNGP. The proposed framework deals with how the widely acclaimed 'internationally recognized principles of corporate accountability' recognised by the UNGP can be used by the AU to help the states in Africa not only to effectively perform their international obligations but also to solve the problems of corporate human rights violations. Therefore, it examines how some legal and policy-making institutions in the AU can be rejuvenated and overhauled in order to perform effective corporate accountability oversight and gives adequate remedies to victims of corporate human rights violations in Africa. For this purpose, NEPAD and its mechanisms for accountability APRM, ACJHR and the Working Group on Extractive Industries, Environment and Human Rights (WGEIEHR) violations in Africa are considered as places for the development of corporate accountability and implementation of such obligations in Africa. The role of regional economic communities (RECs) in the new corporate accountability framework is also examined. Likewise, the role of all states with respect to their original jurisdiction and the role of some of them who are competent and capable to exercise extraterritorial jurisdiction with respect to corporate human rights violations in Africa is also considered. In addition, the issues of contents and principles of the framework as well as other institutional mechanisms to be adopted for its implementation are addressed in this chapter. Again, possible problems that can be encountered in implementing the framework and how such problems can be surmounted are also given analytical consideration. Finally, Chapter 8 deals with conclusion, findings and recommendations.

CHAPTER 2
THE HISTORY, NATURE AND EXTENT OF CORPORATE HUMAN RIGHTS VIOLATIONS IN AFRICA

2.1 A brief history of corporation

The previous chapter introduced the subject of the research and provided a background of the study. This chapter discusses the history, nature and extent of corporate human rights violations in Africa. It begins with a short history of corporation itself and how Africa came in contact with corporations at different stages of its growth.

The origin of the corporation can be traced to Ancient Rome[1] and 'in the middle ages of Western Europe'.[2] These first categories of corporations were not business oriented but an association with a public interest objective.[3] They were established as 'an extension of either' of the state or the church[4] and their corporate status as an artificial person, particularly with regard to the ecclesiastical corporations were to enable them to own property as a separate body.[5]

In the fifteenth century, a separate entity status was also extended to business entities.[6] Most of this early generation of corporations in the form of the present MNCs[7] was granted charters of incorporation by the king to promote the sovereignty and economic interests of the state.[8] For example, a charter authorised the Dutch West India Company to negotiate and conclude 'contracts, engagements and alliances' with chiefs and people of the colonies … to choose and 'discharge Governors', to recruit 'people for war', and appoint

[1] Blackstone explained that Numa Pompilius was the first to introduce the idea of corporate bodies by separating 'Factions of Sabines and Romans' in to different entities to avoid wrangling among them. He was of the opinion that if they see themselves as different entities, rather than as individuals, they were likely to stop killing themselves. See, Douglas Arner 'Development of the American Law of Corporations to 1832' (2002) 55*SLR* 23–52 at 25; see also Eric Enlow 'The Corporate Conception of the State and the Origins of Limited Constitutional Government' (2001) 6*WUJLP* 1–31 at 18–19.
[2] Katsuhito Iwai 'Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance' (1999) 47 *AJCL* 583–632 at 589.
[3] New Internationalist Magazine (NIM) 'A Short History of Corporations' (July 2002), available at *http://newint.org/features/2002/07/05/history/*, accessed on 13 April 2015.
[4] Frank R Lopex 'Corporate Social Responsibility in a Global Economy after September 11: Profits, Freedom, and Human Rights' (2003/2004) 55 *MLR*7 39 at 743.
[5] Lewis D Solomon, Donald E Schwartz, Jeffrey D Bauman & Elliot J Weiss *Corporations Law and Policy: Materials and Problems* (1998) 89–90.
[6] See Phillip Blumberg *The Multinational Challenge to Corporation Law, the Search for a New Corporate Personality* (1993) 3; Marshall Clinard & Peter Yeager *Corporate Crime* (1980) 22.
[7] The Muscovy Company in 1555, the East India Company in 1600, the African Company in 1619, and the South Sea Company in 1711); see NIM op cit note 3.
[8] See Lopex op cit note 4 at 743.

civil officers all for the purpose of safe administration, maintenance of order, security and justice, and for 'the preservation of the places'.[9]

England was the first country in the world to incorporate companies and, with its attendant separate entity status, saw it as a political strategy to extend her colonial empire and commercial prowess in other countries of the world.[10] The fallout of this policy extended to the US, where corporations were responsible for the extension of British colonial regime.[11] This was possible because the earliest generation of corporations became an extension of governmental power. None of them was privately owned.[12]

They were in two categories; the regulated companies and joint stock companies.[13] Regulated companies secured a right of monopoly from the crown to trade abroad by paying a substantial sum of money for the privilege conferred by the 'corporate charter'. On the other hand, unincorporated joint stock companies belonged to those who could not obtain a charter from the crown because of their financial incapacity but sought to invest in stocks of large firms as an alternative.[14] This no doubt closely resembles the modern day public corporations where many people invest through public issue of shares.[15]

With regard to Africa, the word corporation was alien to pre-colonial life where business was merely agrarian and had neither assumed the global status of today nor the corporate entity status. Then, African kings and chiefs merely controlled trades and businesses to ensure that tax and royalties were paid, but between 1880 and 1935 they gradually began to lose their sovereignty and independence to the Europeans until 1914 when apart from Ethiopia and Liberia, 'the whole Africa had been partitioned and occupied by the

[9] Marina Ottaway 'Reluctant Missionaries' (2001) 125 (July/August) *FP* 44–54 at 45.
[10] See Joel Bleifuss 'Know Thine Enemy, A Brief History of Corporations' *Third World Traveller* (February 1998), available at *http://www.thirdworldtraveler.com/Corporations/KnowEnemy_ITT.html*, accessed on 13 April 2015.
[11] The Virginia Company and Massachusetts Bay Company founded the Virginia Colony and Massachusetts Bay Colony in America respectively, see Lopex op cit note 4 at 744.
[12] Ibid Lopex at 744.
[13] Arner op cit note 1 at 25.
[14] Paul Mahoney 'Contract or Concession? An Essay on the History of Corporate Law' (1999/2000) 34 *GLR* 873 at 887; Lopex op cit note 4 at 74.
[15] Arner op cit note 1 at 25; Indeed, Levitt argues that 'the chartered companies of the old mercantilism were the forerunners of the transnational corporations of a new mercantilism' see Kari Levitt *Silent Surrender: The Multinational Corporation in Canada* (2006) 23–24; Kari Levitt 'Mercantilist Origins of Capitalism and its Legacies: From Birth to Decline of Western Hegemony' (2011) 1 *Emerita estudios críticos Del desarrollo, segundo semestre de* 51–87 at 53. He noted that the symbiotic relationship between the colonial empire and the merchants in the 'accumulation of territory and wealth' marked the mercantile era of the first generation of corporations.

imperial powers', thus signifying the establishment and entrenchment of colonial rule in Africa.[16]

Africa had its first contact with the first generation of corporations as the 'Europeans took the initiative and went to other parts of the world' for business.[17] Part of the business was slave trade. Olufemi Amao[18] argues that 'the earliest form of corporate abuse of human rights in the countries of the South (including Africa) can be traced to the slave trade period'. That was the beginning of the relationship between European companies and Africa and the beginning of corporate human rights violations in Africa. Although those corporations who engaged in slave trade did not have the same structure with the modern day corporations, their similarity lies in their style of operation.[19] In addition, most of the big corporations today have been indicted directly or indirectly for their negative role in the slave trade.[20]

The corporation facilitated the contact of Africa with colonial empire and the emergence of imperialism as its harbinger. Since colonialism and business went hand in hand and the search for markets and materials abroad supplant 'other motives for imperial expansion'.[21] The imperial power[22] which was mainly from Europe subscribed to Article 34[23] of the Berlin Act which provided that any of the imperial powers which took or occupied any African coast or named themselves as 'protectorate' of such coast had to show that it had sufficient 'authority' there to protect existing rights, such as, freedom of trade and that of transit 'under the conditions agreed upon'.[24] This was the so-called doctrine of effective occupation that was to make the conquest of Africa such a murderous business. It should be emphasised that this conference did not begin the partition of Africa but merely laid down a few rules to govern a process already in motion.[25] As a result of resistance to the 'European conquest and occupation', particularly from the north-eastern part of the continent thousands of Egyptians, Sudanese, and Somali lost their lives.[26] One of the rulers who opposed the

[16] A Adu Boahen 'Africa and the Colonial Challenge' in A Adu Boahen (ed) *Africa under Colonial Domination 1880–1935* (2003) 1.
[17] Walter Rodney *How Europe Underdeveloped Africa* (1976) 85.
[18] Olufemi Amao *Corporate Social Responsibility, Human Rights and the Law, MNCs in Developing Countries* (2011) 10.
[19] Ibid at 10.
[20] See Gilpin infra note 47.
[21] See Peter Kareithi 'White Man's Burden: How Global Empires Continue to Construct Difference' (2001) 20 *RJR* 6–9 at 6.
[22] They are France, Britain, Germany, Portugal, Belgium, Spain and Italy.
[23] This was signed during the Berlin Conference between 15 November 1884 and 26 November 1885, under the leadership of German Chancellor Otto von Bismarck.
[24] See General Act of the Berlin Conference on West Africa, 26 February 1885, available at *http://africanhistory.about.com/od/eracolonialism/l/bl-BerlinAct1885.htm*, accessed on 15 April 2015.
[25] Ibid at 15.
[26] Ibid at 45.

British consuls and missionaries was Jaja of Opobo. He insisted that the corporations pay duties to him and stopped trade activities on the river until one British corporation 'agreed to pay duties'.[27]

South Africa had a different experience, unlike most other African states under colonial empire, the economy of South Africa was transformed and that accentuated infrastructural and technological development. This was due to the fact that gold and diamonds were discovered during the period. It must however, be noted that the development was of no positive effect to the Africans and the coloureds who bore the brunt of the achievements.[28] Indeed, South Africa, unlike other African states went through the apartheid system of government until 1994.

The issue that baffles one is not with the prospect of the corporation and its potential for increasing growth, nor that of the dwindling fortune of the state, but the abuse that emerged from the exercise of corporate power and the inability and unwillingness of the state to address it. Perhaps because states were complicit in the corporate human rights violations right from the start. It has been argued that the history of chartered corporations shows that 'the relationship between entrepreneurship and violence was ever-present in the European engagement with Africa' and that 'state sanctioned violence' was a better tool used to archive the result.[29] State complicity in corporate human rights violations still continues in Africa, this time, not by the charter of a foreign king but with the support of independent states of Africa. Therefore, the study of corporate human rights violations can be traced to four distinct phases of African development: the era of slavery; the colonial era; the apartheid era; and the post-independent era.

[27] Ibid 67.
[28] Ibid 185.
[29] See 'Chartered companies in the age of mercantilism and the slave trade, CA. 1450–1830', available at *http://what-when-how.com/western-colonialism/chartered-companies-africa-western-colonialism/*, accessed on 16 April 2015.

2.2 Corporate human rights violations during the era of slavery

Trade relationships between Europeans and Africans four centuries before the emergence of colonial rule was nothing but a commercial transaction in slave trade.[30] As noted earlier, with respect to colonial rule, commercial consideration was also the reason behind the business of slave trade. Indeed, the quest for labour to work in plantations to meet the unquenchable demands for sugar in Europe was a major factor in the business of slave trade.[31]

The exact figure of Africans imported to Europe as slaves could not be ascertained because apart from the fact that it would be difficult to get the number of those smuggled through illegal routes and those who died on the coasts, European scholars and historians find it convenient to reduce the figure 'in order to white-wash the European slave trade'.[32] Nevertheless, it has been reported that twelve and a half million 'embarked from Africa to the Americas via the infamous middle passage'.[33]

Jenny Martinez observes that slavery was a major part of the global commerce[34] or 'multinational trade'. In fact, the sale of Africans as properties was said to be more lucrative than the sale of gold.[35] The players in the transatlantic trade were the first generation of corporations. They purchased and facilitated the shipment of Africans as slaves and used them as labour in the plantation firms.

The Royal African Company,[36] which obtained its charter in 1672, was one of the most prominent corporations at the time because it had the monopoly from the Crown to trade in slave within Africa and West Indies. As a result, it made use of individual traders and other small firms and issued licenses to them for that purpose.[37] The sale of Africans, their shipment to Europe and their forced labour in different firms together with deadly torture and hardship they went through was nothing but a gross violation of human rights, perpetuated by corporations with the complicity of the European states and African chiefs and kings. But,

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[30] See Rodney op cit note 17 at 103. He defined slave trade as 'the shipment of captives from Africa to various other parts of the world where they were to live and work as the property of Europeans'.
[31] Joel Quirk *The Anti-Slavery Project From the Slave Trade to Human Trafficking* (2011) 29.
[32] See Rodney op cit note 17 at 104.
[33] See Quirk op cit note 31 at 29; Claude Meillassoux *The Anthropology of Slavery: The Womb of Iron and Gold* chapters 1 & 5.
[34] Jenny Martinez 'Anti-Slavery Courts and the dawn of International Human Rights Law' (2008) 117 *YLJ* 550–641 at 558, 633 noting that slavery was supported by 'industrial capitalism' and that 'the antislavery story told here suggests that one of the most suitable uses for international courts may be in combating illegal action by non-state, transnational actors'; Burt Neuborne 'Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement' (2003) 58 New York University *ASAL* 615 at 619 & 620.
[35] Rodney op cit note 17.
[36] Its former name was Company of Royal Adventurers Trading to Africa.
[37] Ann M Carlos & Jamie Brown Kruse 'The Decline of the Royal African Company: Fringe Firms and the Role of the Charter' (1996) 49 *EHR* 291 at 291.

perhaps, at the beginning, the enormity of the crimes associated with slave trade had not dawned on the European states, particularly, Britain.

Some were of the view that 'Africans were better off working as slaves on the plantations than being left in the hands of their murderous chiefs'[38] who agreed to sell them to slavery. However, the emergence of the Society for the Abolition of Slave Trade changed that perspective as it exposed the horror and injustice that slaves were experiencing.[39] Their efforts yielded a fruitful result when slave trade was abolished in 1807 and Britain enacted a law making it a felony for anyone to indulge in such a barbaric trade.[40] In addition, the slave trade was also prohibited by regional and international instruments.[41] Indeed, it must be noted, that the avalanche of world conventions and extensive human rights treaties that emerged at the global level after the Second World War revealed indirectly the intensity and enormity of human rights violations perpetuated by those who had hands in slavery.

In the first instance, by buying Africans as properties and placing a right of ownership on them, they could have committed a crime against humanity if it were to be in the 20th century.[42] FSimilarly, forcing Africans to work as slaves in the plantation firms against their will could not only have been forced labour but a violation of human rights.[43] As a result of slavery, homes were divided; husbands, wives and children were sold into different places to avoid contact and intimacy between them.[44] Whether in the winter or summer, they slept on the planks 'with their heads raised on an old jacket and their feats toasting before smoldering fire'.[45]

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[38] See Abolitionist Movement 'Abolition of slave trade', available at *http://www.educationscotland.gov.uk/abolition/abolitionistmovement/index.asp*, accessed on 20 May 2015.
[39] Ibid.
[40] British Slave Trade Felony Act of 1811.
[41] See, Additional Protocol II of 1977 to Geneva Conventions of 1949 which prohibits slavery and slave trade even during wars; See Article 7(1)(c) (§ 1777) of The Statutes of the International Criminal Court; Article 5(c) (1793 of the International Criminal Tribunals for the former Yugoslavia and ICTR Statute, Article 3(c) (§ 1794) for that of Rwanda; Article 2 (§ 1756) Slavery Convention of 1926; Article 1 (§ 1767) of Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions similar to Slavery); Article 4 of the Universal Declaration of Human Rights (1948); Article 5 of the African Charter 1981; Article 4 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950).
[42] See International Military Tribunal (IMT) Charter (Nuremberg), Article 6 (§ 1759); IMT Charter (Tokyo), Article 5(c) (§ 1787).
[43] See ILO Conventions (29) concerning forced or compulsory Labor; ILO Conventions (105) concerning abolition of forced labour (1957); Article 5 of the African Charter op cit note 41; Article of European Conventions op cit note 41.
[44] Heather Andrea Williams 'How Slavery Affected African American Families', available at *http://nationalhumanitiescenter.org/tserve/freedom/1609-1865/essays/aafamilies.htm*, accessed on 20 May 2015; Louis Hughes *Thirty Years as a Slave* (1897) 193−195, 204.
[45] Kym S Rice & Martha B Katz-Hyman (eds) *World of a Slave: Encyclopedia of the Material Life of Slaves in the United States* (2011) 55. Since this thesis is not about slavery, it is not possible to chronicle all the gory tales of horrors that were perpetuated by the slave owners and corporations contrary to human rights norms. However for the chronicle of these crimes; see Quirk op cit note 31; Sharp Granville *A Representation of the Injustice and*

Indeed, the benefits of the slave trade to corporations cannot be over emphasised. Olufemi argues that it triggered their rise to enviable global status which has had negative impacts on the 'economic well-being of nation states' because from that period, they 'leveraged their power to bargain with the governments and gradually extricate themselves from state control'.[46] Thus, the slave trade helped in developing a new set of powerful non-state entities (corporations), which became rich through their active participation in the business. Furthermore, evidence has been adduced that many of the modern-day corporations are closely linked to slavery and that they also profited from slave trade.[47]

It has been argued that the earliest form of corporations that traded in transnational business had similar traits with the present-day MNCs.[48] And to prove that, Robert Gilpin reveals that the most prominent MNCs in the US today are the protégés of those early corporations.[49] Textile corporations like WestPoint Stevens, insurance corporations like Aetna, New York Life, AIG, financial and banking corporations like JP Morgan Chase, Manhattan Bank, FleetBoston, Brown Bros, Harriman and Lehman Bros, and rail road corporations like Norfolk Southern, CSX, Union Pacific and Canadian National have been linked with slavery in specific terms.[50]

In spite of that revelation, attempts made so far to make corporations accountable for their roles in human rights violations during the era of slavery ended in fiasco. For this purpose, it is important to consider a case in the US. In *Re African-American Slave Descendants,*[51] the plaintiffs sought to make the defendants/corporations liable for their

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Dangerous Tendency of tolerating Slavery (1769) 79; James Walvin *Black Ivory* (1992) 19–20; Adam Hochschild *Bury the Chains: Prophets and Rebels in the Fight to Free an Empire's Slaves* (2005) 81; for the human rights norms violated as a result of the slave trade, see the Preamble to the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71, adopted by the United Nations General Assembly in 1948: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'; Article 1: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood'; Articles 3 & 13 of Universal Declaration of Human Rights 1948 (UDHR) and Article 12 of International Covenant on Civil and Political Rights 1966 (ICCPR); Article 2 of the ILO Convention, No. 87, available at *http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087*, accessed on 29 May 2015; the 1776 the United States Declaration of Independence, available at *http://www.ushistory.org/Declaration/document/*, accessed on 20 April 2015); Article 2 of European Convention on Human Rights op cit note 41; Article 4 of the African Charter op cit note 41.

[46] Amao op cit note 18 at 11; see also Patricia M Muhammad 'The Trans-Atlantic Slave Trade: A Forgotten Crime against Humanity as Defined by International Law' (2003) 19 *AUILR* 883−947 at 892.

[47] See Robert Gilpin 'The Political Economy of the Multinational Corporations: Three Contrasting Perspectives' (1976) 70 *APR* 184–191 at 189–190.

[48] See Ann M Carlos & Stephen Nicholas 'Giants of Earlier capitalism: The Chartered Trading Companies as Multinational Corporations' (1988) 62 *BHR* 398−419.

[49] Gilpin op cit note 47 at 189.

[50] James Cox 'Corporations challenged by reparations activists' *USA Today* (21 February 2002), available at *http://usatoday30.usatoday.com/money/general/2002/02/21/slave-reparations.htm*, accessed on 20 April 2015.

[51] In *Re African- American Slave Descendants Litigation* 375 F. Supp 2d. 721, 726 (N.D. Ill. 2005).

predecessors' involvement in slavery and its attendant human rights violations. They alleged that the corporations who participated in slavery were the predecessors of the defendants and that the defendants profited from unjust enrichment of their predecessors in the slave trade business. A series of violations committed by the defendants as enumerated in their Second Consolidated and Amended Complaint were tortuous acts, use of property rights of slaves, profiting from slave labour, violation of human and constitutional rights of the slaves among other violations.[52] On corporate complicity, they alleged that their predecessors who were banks made financial credit available to slave traders to boost their trade and received custom duties on ships used to transport slaves.[53] As for the defendants in railroad business, it was alleged that they acquired an interest in railroad lines that was not only partly constructed by the slaves but that was also used to transport slaves.[54] The allegation against predecessors of defendant insurance companies was that they insured ships used for slave trade and issued life policies insurance on slaves in the interest of slave owners as beneficiaries.[55] Even though, some of the defendants had admitted their involvement in the slave trade business and its concomitant human rights violations,[56] courts still dismissed the entire plaintiffs' claims partly for lack of standing and also for being statute barred.[57]

Justice Posner at the Seventh Circuit Court of Appeal opined that there was no nexus between the defendants' wrongful acts and their financial harm and that unless the court ventured into the realm of speculation, it was difficult to assess damages against the plaintiffs.[58] He further held that the representatives of the estates of the slaves amongst the plaintiffs had standing to sue because of direct injury perpetuated against them by the defendants but of delay in instituting their case, time was against them and their claims were statute barred.[59] Despite the dismissal of the suit, the question of MNCs and violation of human rights of Africans which it raised is of great value to the issue of corporate accountability in this era of globalisation. No doubt, the debate for reparation on account of

[52] Second Consolidated and Amended Complaint at 258–366, In *re African-American Slave Descendants* ibid 737.
[53] Ibid at 125–223.
[54] Ibid.
[55] Ibid.
[56] Brown Brothers Harriman was alleged to have accepted that it accepted slaves as security for loans and 'owing up to 346' slaves. See *In re Africa* supra note 51 at 125−223.
[57] Judge Norgle of the Northern District Court dismissed the case on the grounds they had no standing, that they had failed to state a definite claim on which their relief could be granted and that their case was statute barred under the political question doctrine and under the statutes of limitations. See *In re African* slave, supra note 51.
[58] In *re African American Slave Descendants Litigation* ('*Slave Descendants*') 471 F. 3d 754, 763 (7th Cir. 2006) at 759.
[59] Ibid at 762.

corporate abuse, slavery and servitude in the US is recognition of the negative impact of slave trade on Africans.[60]

Since an attempt by Africans to make corporations accountable for their wrongs during the era of slavery failed at the domestic level, the next option to consider had to be at the transnational level. Regrettably, however, at the global level, no effort was made to provide redress for human rights violations that occurred during the era of slavery. Thus, Martinez argues, the focus of the world after the Second World War was on 'war crimes' and 'crimes against peace' perpetuated by governments and not the non-state actors like corporations and other slave traders.[61] Moreover, the view of many scholars was that non-state actors like corporations are not within the scrutiny of the international human rights legal regime.[62] Consequently, any attempt to make them accountable at the international or regional level has always been regarded as strange and unconventional.

But that position is not correct. In fact, 'the idea that nations should use international law-making to protect the rights' of people extra-territorially was first adopted with respect to the abolition of the slave trade[63] and non-state actors like corporations were not excepted from the jurisdiction of the 'Mixed Commission' that was established by Britain and other nations[64] to try those who refused to comply with the law abolishing slave trade. The history of slave trade and the use of extra-territorial law by nations of the world to subdue it have shown that egregious human rights violations by corporations can only be addressed effectively by the concerted efforts of regional institutions and international law.

2.3 Corporate human rights violations during the colonial era

As noted above, slave trade was abolished, but was unfortunately also replaced with colonialism. Both endangered and infringed human rights and corporations played substantial roles and benefited significantly from the two.

As instruments of colonial empire, most corporations assumed the power of states in the colonies, with authority to exploit resources of the colonies as specified in their charters, to print currencies, enter into treaties, to restrict native opposition, generate revenue and to

[60] See Mari J Matusda 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *HCRCLLR* 323 at 397.
[61] Jenny Martinez *The Slave Trade and the origin of International Human Rights Law* (2011) 165–157.
[62] Ibid.
[63] Ibid at 138.
[64] Spain and Portugal were the earliest nations to join the treaty establishing the commission, later many other nations, including US joined.

support their administration with security system.[65] As a result of that administrative power, Joyce Carry[66] distinguished corporations into two; one that this thesis will refer to as colonial corporations and the other as 'the old merchant companies'. According to him, colonial corporations did not only have a charter for 'a trade monopoly', they also had one for the 'administration of those lands' and thus 'they undertook responsibility of a government'.[67]

Notable corporations in this category with regard to Africa were the Royal Niger Company,[68] the British East Africa Company,[69] and the British South Africa Company.[70]

However, like the modern corporations of today, the primary goal of the management of these companies was to satisfy the interests of the stockholders without considering the people and communities where they operate.[71]

As noted earlier, the issue of human rights began to feature for the first time in the colonial era after the Second World War, when the Universal Declaration of Human Rights

[65] See John Braithwaite & Peter Drahos 'Globalization of Corporate Regulation and Corporate Citizenship' in Fiona Macmillan (ed) *International Corporate Law Annual* 2 (2002) 8; Peter Spiro 'New Players on the International Stage' (1997) 2 *HLPS* 19 at 28.

[66] Joyce Carry *The Case for African Freedom* (1962) 171.

[67] Ibid.

[68] Note that the Royal Niger Company was founded in 1886 with Goldie as president. Before1886, the company formerly existed as a mere trading company with no administrative power. During that period, it changed its name twice, formerly, known as United African Company and later as National African Company before the final adoption of the Royal Niger Company. European traders in the colonial territory of Nigeria at that particular time were its stockholders and they saw the company as their main representative. To obtain an administrative charter, the management of the company took some steps that are the same with the strategy of the modern day corporation. First, it called for public subscription of its shares and the capital share of its company was increased from £125,000 to £1,000,000. Second, it sold part of its shares to rivalry French companies in the same territory and finally, it paid money to the owners of the same French companies in an attempt to buy them over an action which could be regarded as company acquisition today. It paid dividends annually and was granted administrative charter in 1866. For this, see Carry op cit note 66 at 171; Amao op cit note 18 at 16.

[69] The British East Africa Company under the leadership of William Mckinnon was granted a charter by the Britain to take up the administration and development of Eastern part of Africa in 1888. The company faced problems in administering Buganda due to intermittent religious wars between the French Catholics and British Protestants unlike in Kenya where there was relative peace. In 1895, British government took over direct administration of Kenya and Uganda and paid compensation in the sum of £250,000 to revoke the charter of East African Company. See, History of Uganda, available at *http://www.historyworld.net/wrldhis/plaintexthistories.asp?historyid=ad22*, accessed 27 April 2015.

[70] On 29 October 1889, the British South Africa Company (BSAC) received a charter to govern south -Central Africa. The company had a right to make ordinances subject to the approval of the Secretary of State and could establish a police force to support its administration. With its police force, BSAC conquered Mashonaland (now Zimbabwe) and ruthlessly dislodged rebellious opposition by Matabele and the Mashona against the whites who had settled there as farmers and with the support of the British army defeated a rebellion by the Ndebele in 1896. The company governed the present Zimbabwe till 1923, when the white settlers took over the government and in the present Zambia in 1924, when the British government directly took over its administration. See Cecil John Rhodes, South Africa History online, available at *http://www.sahistory.org.za/people/cecil-john-rhodes*, accessed on 27 April 2013; see also the charter, available at *http://www.rhodesia.me.uk/Charter.htm*, accessed 29 April 2015.

[71] On how the colonial companies embarked on destruction of African towns, killing and maiming people in order to attain their objectives of conquering lands and attaining monopoly of trade, see Ike Okonta & Oronto Douglas *Where Vultures Feast* (2003) 13.

(UDHR) and European Convention on Human Rights (ECHR) were signed by the imperial powers.[72] Even though, the African nationalists who fought for independence used the UDHR in particular to publicly condemn the colonial regime and made a demand for freedom,[73] their focus was not the strengthening or entrenching of human rights in Africa but a one-way struggle of putting an end to imperial rule.[74] That notwithstanding, it is obvious that the colonial era was marked with human rights violations against African people and corporations were not only the beneficiaries but the facilitators of that infringement.

Although the home states of these colonial companies encouraged them, these companies were the direct and major actors in the human rights violations that occurred during the period. In the process of acquiring more territories, they were virulent in trampling on the natives' rights, killing, imprisoning and maiming the natives. The role of the Royal Niger Company, the British East Africa Company and the British South Africa Company with respect to these human rights violations has been briefly discussed in this thesis. Apart from their direct involvement, it must be noted that since corporations prepared the way for the empire, they should be held accountable for their complicity in human rights violations committed by the colonial governments in order to suppress anti-colonial struggles and consolidate themselves in power. For example, the British East African Company first administered Kenya, after which the British colonial government took over. That change as a pattern of the colonial system did not remove the fact that both corporations and their home states (imperial power) were partners in the violation of human rights associated with colonialism.[75] Indeed, opportunities accruing to corporations did not wane through the lack of administrative power. Even when European companies did not have administrative or governmental responsibility, they were still the means by which economic exploitation by the home states were carried out.[76]

[72] Brian Simpson *Human Rights and the end of Empire: Britain and the Genesis of the European Convention* (2004) 300; Roland Burke *Decolonization and the evolution of International human Rights* (2010) 75–89.
[73] Ibid.
[74] Ibid.
[75] Jeremy Sarkin 'The Coming of Age of Claims for Reparations for Human Rights Abuses Committed In the South' (2004) 1(1) *SUR IJHR* 67 at 71 writing on human rights violations during the colonial era in Africa he notes 'A corporation's awareness of ongoing human rights violations, combined with its acceptance of direct economic benefit arising from the violations, and continued partnership with a host government, could give rise to accomplice liability'.
[76] See Thomas Packenham *The Scramble for Africa, 1870–1912* (1992) 386–387, 491–494; Michael Doyle *Empires* (1986) 176–177, 189–191.

As a result, they received tremendous support from the colonial governments and their home states to the total neglect of the native Africans.[77] That support 'gave them access to the wealth of the colonies on extraordinarily favorable terms' while 'local communities received few economic benefits for their work and had no basis to complain'.[78] That favouritism resulted in 'swaths of African farmland owned by whites'.[79]

Of course the colonial discriminatory policy led to revolutionary movements in parts of Africa that were crushed by the imperial powers in a brutish manner endangering human rights of the people. It is equitable, therefore, that corporations should share in the blame of crimes and gross violations of human rights that occurred between 1952 and 1956 in Kenya. While it has been argued that the name Mau-Mau is shrouded in mystery,[80] it is obvious that it was a movement initiated against European domination particularly that of land acquisition, which later metamorphosed into a struggle for political freedom. The struggle turned into a bloody war in which many Africans were killed, imprisoned, tortured and humiliated by the imperial power.[81] Looking critically at the revolt with the antecedents of the modern-day corporations in violating the rights of the indigenous people, it is not difficult to see similarity between them. The root cause of the revolt was the displacement of the majority of the Kikuyus from their lands and that has been the hallmark of corporate human rights violations in the present day.[82] If Kikuyus had not been displaced from their lands, there would not have been the Mau-Mau uprisings. In addition, the reason to dispossess the Kikuyus of their lands was to exploit the resources of the natives. As noted previously, the European companies were the facilitators of the 'economic exploitation of the colonial territory'.[83] Consequently, they could not be exonerated of the human rights violations that ensued in the imbroglio.

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[77] Steven Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' 111 (2001) *YLJ* 443 at 453.
[78] Ibid.
[79] Ibid.
[80] See Brad Steiger *Real Vampires, Night Stalkers and Creatures from the Dark side* (2010) 48 he noted that the name Mau-Mau its self is shrouded in mystery saying 'no one knows the real meaning of "Mau-Mau" other than a Kikuyu (also Gikuyu) tribesperson'; on the name see Fabian Klose *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (2013) 339.
[81] Roberts Bates stated that more than 12 000 Africans were detained and a figure also higher than 4 000 were killed or maimed. See Roberts Bates 'The Agrarian Origins of Mau Mau: A Structural Account' (1987) 61(1) *AH* 1 at 1. Also available at *http://dash.harvard.edu/bitstream/handle/1/3710306/bates_maumau.pdf?sequence=4*, accessed on 29 April 2015.
[82] Matthias Grunewald 'Mau Mau Uprising'. He noted that 'the economic bifurcation of the Kikuyu set the stage for what was essentially a civil war within the Kikuyu during the Mau Mau Revolt', available at *http://www.newworldencyclopedia.org/entry/Mau_Mau_Uprising*, accessed on 20 May 2015.
[83] See Ratner op cit note 77.

However, it is noteworthy that the British government has been taken to court over this issue. In *Mutua and Others v Foreign and Commonwealth Office*[84] the plaintiffs who were five victims of torture and human rights violations filed an action against the Foreign and Commonwealth Office claiming personal damages for injuries and torture suffered at the hands of the Kenya police under the colonial administration of the British government during the period of emergency declared by the government in reaction to Mau-Mau insurgence. While the defendants admitted that the plaintiffs were tortured as claimed, it brought a preliminary application to strike out the suit on the ground that that their claims were statute barred.[85] The preliminary objection was however dismissed by McCombe J who ruled that considering 'the seriousness of the allegations' and the quality of the 'existing documentation'[86] at the hand of the plaintiffs, the case should be allowed to proceed to trial.[87] While this case has been settled out of court with the British government paying the total sum of £19.9 million to a number of about 5 228 claimants,[88] another new case has been instituted by other law firms on behalf of about 41 005 Kenyans.[89] Considering the volume of human rights violations that occurred during the period and the possibility of linking the beneficiaries of the colonial empire to corporations, it is not unlikely that some corporations will be sued in future over this issue.

At this juncture, it should be noted that apart from the use of the corporation as a tool for the attainment of the objective of imperial power, international law itself was initially conceived by the imperial power to serve their purpose.[90] Thus, John Strawson rebuts that there was nothing in the Peace of Westphalia to justify the creation of the doctrine of state sovereignty but just a monopolised grant 'of legal personality to the European powers'.[91] Of course, the international relations under the colonial era were not between 'European and

[84] Case No HQ09X02666.
[85] The Limitation Act 1980 of British Government provides that claims for personal injury should be brought within three years 'from the date of accrual of the cause of action or knowledge, whichever is later'.
[86] The document incriminated the British government by revealing communication between it and the colonial administration in Kenya over the on the Mau-Mau struggle.
[87] [2012] All ER (D). Before this ruling, the court had formerly ruled in another preliminary application that the case was 'a properly arguable one and fit for trial'; see [2011] EWHC 1913 (QB).
[88] See, Foreign & Commonwealth Office & the Rt Hon William Hague 'Statement to Parliament on settlement of Mau Mau claims' (6 June 2013), available at *https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims*, accessed on 23 May 2015.
[89] Katie Engelhart '40,000 Kenyans accuse UK of abuse in second Mau Mau case' *The Guardian* (29 October 2014), available at *http://www.theguardian.com/world/2014/oct/29/kenya-mau-mau-abuse-case*, accessed on 23 May 2015.
[90] See CG Weeramantry *Universalizing International Law* (2003) 35.
[91] See, John Strawson 'Book Review' (2004) 5 *MULR* 513 at 516. Reviewing Christopher Weeramantry *Universalizing International Law*.

non-European states but between European states who were intent on acquiring title over the non-European territories'[92] and international law supported it.

As a result of that structure, the administration of the colonial states was subjects to the home states of colonial government. A bipartite relationship between weak (host) states and powerful home states emerged from that period in relation to the treatment of corporations until today. In addition, the use of corporations as instruments for achieving the purpose of the home states, which was to exploit natural and mineral resources of the host states, made each of them complicit in human rights violations committed by any of them. The knowledge that their violations occurred in the process of archiving a common purpose made each of them weak in making use of the principle of checks and balance to control one another. As a result, corporations became too powerful for the host state administration to control. That trend continues till today.[93]

2.4 Corporate human rights violations during the apartheid era

In 1902, Britain conquered the Boers and Orange Free State became a British Colony. Similarly, in 1907, the Transvaal and Orange Free State were granted the right to self-government by the British. However in 1909, the Union of South Africa was born by an agreement between the British colonies who were administering Natal and the Cape and the Boers who were administering the colonies of the Transvaal and Orange Free State.[94] The African natives were not part of the agreement to form a Union of South Africa, even though the land of South Africa originally belonged to them. Neither did they participate in the then run European governments. As early as 1913, natives were living in secluded reserves and they had to obtain a pass before they could leave their abode.[95] Prime Minister Malan in 1948 aggressively implemented the system of apartheid in South Africa, which officially ended in 1994.

Cases that were filed in the US[96] after the end of apartheid in South Africa, particularly during the early twenty-first century, showed the complicity of corporations in

[92] Anthony Angie 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *TWQ* 739 at 746.
[93] With respect for the current position, see for example Miguel Juan Taboada Calatayud, Jesús Campo Candelas & Patricia Pérez Fernández 'The Accountability of Multinational Corporations for Human Rights' Violations' (2008) 64 (65) *CCDCFFC* 171–186 at 172. They noted that as a result of the powerful status of MNCs, 'the power of individual nation states to establish and control the rules of the economic system is fading'.
[94] See Walter Wall Bank *Contemporary Africa: Continent in Transition* (1964) 36.
[95] Ibid at 81.
[96] *See Re South African Apartheid Litigation* (generally referred to as the *Khulumani* case) infra note 106.

the violation of human rights by the apartheid regime. Corporations, particularly MNCs benefited from the apartheid policies and did not stop business in spite of those discriminatory and dictatorial policies. There should be nothing harmful in doing business in any country. Indeed, it is easy to assume that business enterprises by corporations are ingenuous and innocuous even in a country where despots rule, but a comprehensive report of the South African Truth and Reconciliation Commission (TRC)[97] put a question mark on such an untested assumption. To the displeasure of many who are of the opinion that business is innocuous and that it cannot violate human rights, the 'premise of business as a homogeneous entity' was questioned by the report.[98] It was discovered that 'business was central to the economy that sustained the South African state during the apartheid years' and that certain corporations, particularly mining companies 'were involved in helping to design and implement apartheid policies'.[99] The report also went further to illustrate how corporations supported the apartheid regime by providing armoured vehicles to the police for the purpose of quelling protests and demonstrations against the regime[100] while at the same time denying trade union rights to black workers.[101]

It has also been suggested that corporations did not only collude with the apartheid government, but also profited from the system that violated the human rights of blacks, particularly that of freedom fighters and workers.[102] Further evidence of complicity emerges as far back as the 1960s with critics of apartheid arguing 'that (multinational) companies producing goods inside South Africa were morally and often practically complicit in apartheid'.[103] Consequentially, Reverend Leon H Sullivan called for the withdrawal of the US MNCs because of their failure to bring apartheid to a halt.[104] This issue was also evident

[97] The TRC was established '[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the apartheid era' under the Promotion of National Unity and Reconciliation Act 34 of 1995. The Final Report was issued in two parts: Volumes 1–5 in 1998, available at *http://www.goshen.edu/library/EMBARGO*; and Volume 6 in 2003, available at *http://www.info.gov.za/otherdocs/2003/trc*, all accessed on 8 June 2015.
[98] Ibid see Volume 4 of the Report, particularly para 2.
[99] Ibid para 23.
[100] Ibid para 26.
[101] Ibid Volume 5 para 156.
[102] See Mia Swart 'Beyond Repair: Accomplice Liability under International Law and the Apartheid Reparations Case' (2006) 21 *SAPR/PL* 229–245 at 229–230; Wolfgang Kaleck & Miriam Saage-Maals 'Corporate Accountability for Human Rights Violations Amounting to International Crimes the Status Quo and its Challenges' (2010) 8 *JICJ* 699–724 at 706.
[103] Gay W Seidman 'Monitoring Multinationals: Lessons from the Anti-Apartheid Era' (2003) 31(3) *PS* 381–406 at 388.
[104] See Mzamo P Mamgaliso 'South Africa Corporate Social Responsibility and the Sullivan Principles' (1997) 28 *JBS* 219–238 at 228.

in the report as the TRC observed rightly that 'certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies'.[105]

However, it should be noted that the issue of corporate complicity in human rights violations during the era of apartheid had been the subject of litigation in the US. In *Re South African Apartheid Litigation* (the *Khulumani* case),[106] the District Courts had considered issues of aiding and abetting of corporations in the commission of human rights violations by states and its enforcement agencies. That case is a consolidation of ten separate suits brought by three groups of plaintiffs against corporations (almost 50 banks and companies) that were doing business in South Africa during the apartheid era. The plaintiffs who were South African citizens claimed that the defendants (corporations) supported and assisted the apartheid government of South Africa to commit human rights violations. The substance of their claim was that by co-operating and supporting the apartheid government to ensure continuity and protection of their business interests, the corporations aided and abetted the commission of crimes like extra-judicial killing, torture, cruel, inhuman or degrading treatment, and denationalisation.

The Southern District Court of New York dismissed the plaintiffs' claim[107] in regard to those corporations who were merely doing business with the apartheid government but allowed the claim with respect to those who were involved in aiding and abetting serious crimes such as torture and extra-judicial killing in violation of international law. While the court reasoned that it was preposterous to make corporations who aided and abetted 'particular acts' to be liable 'for the breadth of harms committed under apartheid' regime, it also provided the basis by which corporations can be held liable by contending that knowledge is sufficient as a *mens rea* requirement for corporate criminal complicity. The case had to be allowed to proceed if it could be proved that the defendants' corporations had knowledge that their business relationship with the apartheid government aided them in the violation of human rights. The court inferred that the acts of manufacturing and 'selling of heavy trucks, armored personnel carriers, and specialized military equipment to the South African Securities Services' by the defendants was sufficient to prove the requirements of *mens rea* and *actus reus* for criminal complicity.

[105] See the Report of TRC op cit note 97 Volume 5 para 156.
[106] 617 F.Supp.2d 228 (S.D.N.Y. 2009).
[107] The case was first decided by Judge Sprizzo who dismissed the plaintiffs' claims in their entirety describing it as an exercise in 'vigilant gate keeping'. On appeal, the majority of the Court of Appeals took a different view from Judge Sprizzo and the Supreme Court found itself 'extraordinarily – unable to muster a quorum', the case reverted back to the District Court in 2009, on a second motion to dismiss by the defendants which was heard this time by Judge Scheindlin.

2.5 Post-independent era: Corporate human rights violations in Africa

It was expected that independence of states in Africa from colonial tutelage would mark the end of dependency on foreign power in Africa, especially with respect to the economy, development, and corporate abuses. But unfortunately this was not so.[108] On the contrary, Kwame Nkrumah, one-time president of Ghana contended that colonialism was only replaced with neocolonialism and that both systems were facilitated and orchestrated by imperialism.[109] He argued against economic domination which according to him was a feature of neocolonialism and declared that a consequence of that new state of affairs was that the economic policies of Africa were subject to the whims and caprices of foreign nations, even though in the end the social-economic problems of Africa remained unsolved.[110]

As early as 1965, he fingered corporations as instruments of exploitation in Africa as he condemned 'direct economic exploitation' of African resources 'through an extension of the operations of giant interlocking corporations'.[111] These 'interlocking corporations' also referred to as 'imperial corporations' are the MNCs of today.[112] This study will briefly examine corporate human rights violations during the post-independent era in the following sections.

2.5.1 Corporate human rights violations in states of conflict

The history of most states in Africa, after independence is littered with civil wars and conflicts emanating from rivalry in the struggle for power and control of resources by groups of insurgent militants, against the constituted authority of states.[113] As with all wars and violent conflicts, it resulted in gross violations of human rights and crimes against humanity. Reports and investigations[114] over the causes and the enduring strength of such conflicts in

[108] See Hsu Nai-chiung 'The Interrelation of Political and Economic Independence' (1966) *PR* 12–14 at 13, available at *https://www.marxists.org/subject/china/peking-review/1966/PR1966-05d.htm*, accessed on 20 May 2015.
[109] Kwame Nkrumah *Neocolonialism: The Last Stage of Imperialism* (1965).
[110] Ibid.
[111] Ibid at 239.
[112] See Richard J Barnet & John Cavanaugh *Global Dreams: Imperial Corporations and the New World Order* (1994) 480.
[113] See Institute for Security Studies 'Africa's international borders as potential sources of conflict and future threats to peace and security' (May 2012), available at *http://www.issafrica.org/uploads/Paper_233.pdf*, accessed on 23 May 2015.
[114] See Centre for Conflict Resolution, University of Cape Town 'The Social life of war, Track Two: Constructive Approaches to Community and Political Conflict' (1999) Volume 8(1) at 16–18. Noting that 'the multinational actors' who were intrigued 'with local political interests' were stirring 'up much of the violence

Africa have shown that corporations play critical roles in promoting them for their own benefits to the extent that they can be held to be complicit in the concomitant crimes and violations of the fratricidal wars.[115] As an example, it is important to take a brief look at five of those conflicts from different African states.

2.5.1.1 The civil war in Sierra Leone between 1991 and 2002

Though the male adults formed the greater number of the victims, 'perpetrators singled out women and children for some of the most brutal violations of human rights recorded in any conflict'.[116] Boys aged 10 to 14 were conscripted as child soldiers; girls of the same age shared the same fate as women; they were gang raped and shared among the militants as sex slaves.[117] About 4 513 were killed. In addition, the African Commission identified a total number of 1 012 as 'victims of sexual violence and forced conscription' while the number of those who were amputated or suffered from other violations of human rights is 11 991.[118] While it is conceded that corporations had nothing to do with the root cause of this conflict,[119] they contributed to perpetuating the state of war through their business relationship with the rebels. If they had not supported the rebels directly or indirectly with financial resources coming from the illicit trade of diamonds, the war would not have been prolonged[120] and consequently the number of victims would have been drastically reduced.

2.5.1.2 Intransigence in Liberia from 1979 to 2003

Similarly, for almost 25 years (1979 to 2003), Liberia went through unrest, 'a bloody coup d'état, years of military rule, and two violent civil wars' which were marked with crimes

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themselves'; Report of the UN Special Rapporteur on Mercenaries, UN Human Rights Commission document E/CN.4/1996/27, Geneva (17 January 1996) para. 26, it notes that 'the aggravating factor is that their participation is linked to the bloodiest aspects of a conflict and to crimes against human rights. Moreover, the financial considerations and desire for illicit gain through looting which are associated with their participation may be decisive in prolonging the conflict. The mercenary's interest lies not in peace and reconciliation but in war, since that is his business and his livelihood'.

[115] Abiodun Alao *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (2007) 198.

[116] See TRC 'Witness to Truth report of the Truth & Reconciliation Commission, Sierra Leone' Volume 2 (2004) chapter 2, para 22, available at *http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf*, accessed on 3 May 2015.

[117] Ibid Chapter 2 paras 23 & 24.

[118] Ibid Chapter 5 para 1 and Chapter 2 para 83.

[119] Ibid Chapter 2 paras 13 &18 'The Commission finds that the central cause of the war was endemic greed, corruption and nepotism [and] holds the political elite of successive regimes in the post-independence period responsible for creating the conditions for conflict'.

[120] Ibid, see, Chapter 2 para 36 'different fighting factions did target diamondiferous areas for the purposes of gathering mineral wealth to support their war efforts'.

against humanity and gross human rights violations.[121] During this period, corporations were actively involved in the resultant negative implications of war. The Truth and Reconciliation Commission devoted volume 3 of its report to direct and indirect criminal activities of corporations bordering on human rights violations and 'the extent to which corporations contributed to the perpetuation of violent conflict in Liberia'.[122]

Corporations both of African and European origin made huge profits from the relaxed regulatory regime for environment, forests and mineral exploration in Liberia.[123] Charles Taylor's symbiotic business relationship with them was secured by the grant of exclusive concessionary rights of exploration in return for their military assistance.[124] Thus they became the fulcrum upon which the perpetuation of the war rested as they supplied arms and ammunition to Taylor contrary to a UN resolution.[125] Taylor was not the only rebel that corporations supported; some corporations shifted ground and supported opposition rebels against Taylor.[126] It was alleged that an American corporation sponsored Julu who was a security chief in one of the corporations to the tune of $2 million to execute a coup in Monrovia against NPFL.[127]

Through their support to the war belligerents, these corporations can be held to be complicit in the human rights violations committed during the period of the intransigence.[128]

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[121] The seed of discord was shown during Doe's administration due to his poor record of human rights and economic malfeasance. His cronies engaged in ethnic cleansing, murder and infringement of human rights. Due to agonies suffered under his administration, people initially taught that the insurgence of rebellious and warring factions, particularly that of Charles Taylor and his National Patriotic Front of Liberia (NPFL) could usher in the desired peace and relief nor did they knew that they were moving from frying pan to fire on a fast lane that marked the beginning of intermittent wars that will destroy the fabric of the nation and sanctity of human dignity. The devastating effects of the wars on the then three million people of Liberia was enormous, 250 000 were reported killed, 464 000 were forcefully displaced; while about 350 000 became refugees in other countries of the world. For the root cause of wars in Liberia, See TRC 'Giving the Diaspora a Voice' Volume 3 Title VIII. It noted that 'Although Charles Taylor was initially welcomed by many Liberians as a liberator who would bring an end to the tyrannical rule of Samuel Doe, it soon became clearer that the Taylor era would be oppressive, if not worse, than anything experienced under Doe' at 8–9.

[122] Ibid para 6.

[123] See Infra op cit notes 125 & 128.

[124] See TRC op cit note 121 para 4c.

[125] Seventeen of them were named in the Commission's report while the UN also named some of them. See TRC report, ibid paras 73, 74 & 80; United Nations Security Council 'Report of the Panel of Experts pursuant to paragraph 25 of Security Council resolution 1478 (2003) concerning Liberia' UNSC S/2003/779, Fig 2 para 80 of the UN report.

[126] See William Reno *Warlord Politics and African States* (1998) 79. He notes that the 'pursuit of commerce was the critical variable in conflicts'.

[127] See, TRC op cit note 121 paras 106 & 109; Daniel 'Report Arming Liberia's Fractional Gangs' *African Policy* 5 (15 August 1996).

[128] Three NGOs filed a complaint against Larsen and Horneman Group DHL, a French corporation alleging that by importing Liberian timbre in to European countries, with the knowledge that the logs originated from a war torn country, they are guilty of 'recel' the criminal act of 'selling and/or handling illegally obtained goods'. For the complaint, see Global Witness 'Bankrolling Brutality: Why European Timbre Company DLH should be held to account from Liberian Conflict Timbre', available at

The real truth is that most of them were directly involved in the violation of human rights and crimes against humanity. They forcefully conscripted children into their security units.[129] Those who were supposed to be in school suddenly became combatants carrying guns. The security units attacked the neighbouring communities[130] and their employees[131] in order to quench the uprisings against their exploitative activities. Consequently, farms and homes were destroyed in the course of constructing a 108-mile road without any compensation to the victims[132] while many people lost their lives in the process.[133]

2.5.1.3 Struggle for power and its attendant conflicts in Angola

With regard to Angola, the fierce struggle for political power between different factions which fought against colonial rule[134] led the nation to civil war as soon as it got her independence from Portugal; 1.5 million people lost their lives during the interregnum, more than four million were internally displaced, and over five hundred thousand became refugees in other countries.[135] Although the war could be described as a skirmish actuated by an inordinate ambition to capture power, it has been unearthed that corporations were party to gross human rights violations and crimes that occurred in Angola during the war. Global Witness, a NGO from Britain brought the role of the global diamond industry in funding the

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http://www.globalwitness.org/sites/default/files/import/bankrolling_brutality_hi.pdf, accessed on 8 May 2015; on 29 May 2012, another case was filed against three corporations which are Elenito Investment Limited ('Elenilto'), Western Cluster Limited and Sasa Goa, a subsidiary of Vedanta Group, claiming special damages of United Stares six Billion Dollars (US$6 billion) and general damages of United States four Billion Dollars (US$4 billion), on behalf of Orbital, INC. ('Orbital'), a wholly owned Liberian corporation, at the Civil Law Court, Sixth Judicial Circuit, Montserrado County, Monrovia, Liberia before his Honor, Yusif D. Kaba, Resident Circuit Judge, available at *http://heritageliberia.net/index.php?option=com_content&view=article&id=1664:elenilto-2-other-companies-sued-for-action-of-damages&catid=54:legal-matters*, accessed on 9 May 2015.

[129] TRC op cit note 121 paras 53 & 110.

[130] Ibid para 51.

[131] Ibid para 111. It notes that 'The owner of American Mining Associates (AMA) acknowledged to members of the Kimberley Process review team that the company had hired some of Charles Taylor's former bodyguards to intimidate local miners'.

[132] Ibid para 56.

[133] Ibid, in fact, 200 people were reported killed in Youghbor. About hundreds of people were reportedly killed at Gio near Yekepa and 300 children were found dead inside a well 'near Sanoquellie, in Nimba County'. See TRC op cit note 121 paras 57 & 107.

[134] The Movement of Popular Liberation of Angola (MPLA) formed in 1957 was led by Agostinho Neto, the National Front for the Liberation of Angola (FNLA) formed in 1963 was led by Holden Roberto and the third faction is the National Union for the Total Independence of Angola (UNITA), led by Jonas Savimbi.

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civil war in Angola into the limelight.[136] According to the Global Witness, 'the De Beers Company and its Central Selling Organization (CSO) … dominated the international diamond industry for the last 60 years' and they facilitated the sale of rough diamonds purchased in Angola to other corporations of the world who had the knowledge of its illegal origin.[137] The strategy adopted by De Beers was to buy the preponderant portion of rough diamonds, 'at a time when a large section of the country's diamond mines were under UNITA's control'.[138] The reason for this strategy was to keep the thriving international market of the business glowing[139] in order not to disappoint the global corporations' insatiable quest for supply. The belligerents, particularly, UNITA and the government used mineral resources and corporations as tools of war.[140] On the part of the government, foreign corporations were licensed to explore mineral resources on the basis of their readiness or ability to provide security assistance.[141]

A good example was America Fields Inc, who entered into a joint venture agreement with a Caribbean-based security firm, International Defence and Security (IDAS), 'to develop a mining concession'.[142] Thus, the sale of diamonds became a central feature of the war to the extent that even when the UN Security Council prohibited 'the direct or indirect export of unofficial Angolan diamonds', the sale still continued unabated in Antwerp until the end of the war.[143]

2.5.1.4 Civil conflicts in Sudan and the role of corporation

Sudan gained independence from Britain in 1956 and from then until 9 July 2011 when South Sudan was carved out of the entire country with her own right to self-determination, it was in an era of civil war conflicts and skirmishes. A state of chaos and anarchy became the order of the day when the Sudanese People's Liberation Army (SPLA) took up the gauntlet to fight against unfair and discriminatory treatment of the Southern Provinces of the Sudan by the state government controlled by Khartoum. The response to the rebellious attack by the

[136] See Global Witness 'A Rough Trade: The Role of Companies and Governments in the Angolan Conflict', available at *http://www.globalwitness.org/sites/default/files/pdfs/A_Rough_Trade.pdf*, accessed on 20 May 2015.
[137] Ibid.
[138] Ibid.
[139] Ibid
[140] Jedrzej George Frynas & Geoffrey Wood 'Oil and War in Angola' (2001) 28(90) *RAPE* 587–606 at 598.
[141] Ibid at 599.
[142] See Johan Peleman 'Mining for Serious Trouble', in Abdel-Fatau Musah & J Kayode Fayemi *Mercenaries: An African Security Dilemma* (2000) 162.
[143] For further reading on corporate complicity in Angola, see Global Witness *All the President's Men: The Devastating Story of Oil and Banking in Angola's Privatized War* (2002) 37–40, 50.

government was not that of a change of policy or a truce-mending fence but a vicious and sporadic attack to return fire with fire. This conflict led to the death of more than two million people and about three million were also internally displaced.[144] Reports of gross human rights violations perpetuated by both the government and the rebels have been given adequate publicity.[145] However, the issue of corporate complicity arising even in wars caused by internal governmental policy is not only disheartening and worrisome; it shows the hubristic nature of the corporation. At a time that the whole world was condemning the government of Sudan for gross violation of human rights,[146] the Talisman Energy Inc became the business partner of the government through an acquisition of the concession of Arakis[147] to explore oil in the war zone of the South Sudan. This joint venture with government was opposed by the rebels who feared that the government might be made stronger militarily to attack them as a result of the income that the oil exploration would yield.[148] In spite of the international public outcry, International Petroleum Corporation belonging to Lundin Petroleum AB, a Swedish corporation, brushed aside the ethical consideration of embarking on the exploration of oil in Block 5A concession in the Sudanese war zone.[149] The criticism that continuation of its business in the same war zone 'would encourage more attacks on the civilians living in its concession area' fell on deaf ears until it acquired an acreage which later sold at a US$86.1 million profit in 2003.[150]

Exploration of oil by these corporations in the war zones occasioned wanton destruction of properties, displacement of people, gross violations of human rights and

[144] Girma Kebbede 'South Sudan: A War Torn and Divided Region' in Girma Kebbede (ed) *Sudan's Predicament: Civil War, Displacement and Ecological Degradation* (1999) 44 at 49.
[145] See International Crisis Group (ICG) 'God, Oil and Country: Changing the Logic of War in Sudan' (2002) 91–114, available at *http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/sudan/God%20Oil%20and%20Country%20Changing%20the%20Logic%20of%20War%20in%20Sudan*, accessed on 16 June 2015; Human Rights Watch Report 'Famine in Sudan 1998: The Human Rights Causes', available at *http://www.hrw.org/reports/1999/sudan/*, accessed on 10 July 2015; the Report of the International Eminent Persons Group (IEPG) 'Slavery, Abduction and Forced Servitude in Sudan' released by the US State Department Bureau of African Affairs on 22 May 2002, available at *http://www.state.gov/p/af/rls/rpt/10445htm*, accessed on 20 May 2015); International Crisis Group Africa Report 54 'Ending Starvation as a Weapon of War in Sudan', available at *http://www.crisisweb.org/projects/africa/sudan/reports/A400820_14112002pdf*, accessed on 20 May 2015.
[146] See UN Special Reports on Human Rights Situation in Sudan (1999), prepared by Leonardo Franco, Special Rapporteur (A/54/467), available at *http://www.hri.ca/fortherecord1999/documentation/genassembly/ a-54-467.htm*, accessed on 20 May 2015.
[147] Both Arakis and Talisman Inc are Canadian companies.
[148] Penelope Simons &Audrey Macklin *The Governance Gap: Extractive Industries, Human Rights, and the Home State advantage (*2014) 33; 'Fighting in Sudan Threatens Oil Project' *Globe & Mail* (14 February 1998) A13.
[149] See Jemera Rone *Sudan, Oil, and Human Rights* (2003) 601.
[150] See Bloodhound 'Justifying Blood Money Lundin's communications to shareholders and the market during the development of oil concession Block 5A in Sudan 1997 – 2003' (May 2013) 8, available at *http://bloodhound.dk/files/justifyingbloodmoney@lowresolution.pdf*, accessed on 16 June 2015.

ignited combustible violence that led to the death of many. Consequently, Lundin Petroleum AB was accused of corporate complicity in Sudanese human rights violations. It was alleged that it provided the government with materials that were used to wage the war. It also worked with security forces who committed gross human rights violations in order to suppress the opposition.[151] Specifically with respect to corporate complicity of Talisman, it has been argued that its emergence in Sudan's territory contributed in greater measure to human rights violations.[152] It bolstered government's strength to attack civilians and increased the number of people displaced.[153] It 'profits and benefits from human rights violations committed by the government as systematic displacement enhances security for Talisman's oil operations'.[154]

2.5.1.5 From conflict to genocide in Rwanda

The genocide in Rwanda which claimed the lives of eight hundred thousand people in four months and which occasioned the most horrendous form of sexual violence against women was caused by ethnic rivalry, particularly the desire of the few Hutu elites to ensure their perpetuation in power.[155] While the international community, particularly developed states like the US and the UN were accused of failure to nip the conflict in the bud before it got out of hand,[156] the corporations had their own share of blame not only as beneficiaries of the war but as supporters who aided the commission of gross human rights violations during the war. For example, Mil-Tec Corporation a British company was deeply involved in the supply of arms to[157] the Hutu during and after the genocide despite the UN resolution to the contrary.[158]

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[151] See Corporate Accountability Working Group 'Joint NGO Submission Consultation on Human Rights and the Extractive Industry' (9 December 2005) 14, available at *https://www.earthrights.org/sites/default/files/documents/escr-joint-ngo-submission.pdf*, accessed on 16 June 2015.

[152] Ibid.

[153] The company was eventually sued, see *The Presbyterian Church of Sudan, et al. v Talisman Energy, Inc. and Republic of the Sudan* (2001) Suit number Docket: 07-0016.

[154] See Georgette Gragnon, Audrey Macklin & Penelope Simons 'Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones Implications for Human Rights and Canadian Public Policy' (January 2003) 3, available at *http://www.law.utoronto.ca/documents/Mackin/DeconstructingEngagement.pdf*, accessed on 16 June 2015.

[155] Although there is divergence of opinion with regard to the root cause but more scholars are of the opinion that the reason is ethnic rivalry for power, see Takele Soboka Bulto 'The Promises of New Constitutional Engineering in Post-Genocide Rwanda' (2008) 1 *AHRLJ* 187–206 at 187; David J Francis *Uniting Africa: Building Regional Peace and Security Systems* (2006) 76; Martin Shaw *What is Genocide?* (2007) 138.

[156] Rory Carroll 'US chose to ignore Rwandan genocide' *The Guardian* (31 March 2004); Samantha Power 'Bystanders to Genocide: Why the United States let the Rwandan Tragedy Happen' (2001) 288(2) *TAM* 84–108; A Walter Dorn & Jonathan Matloff 'Preventing the Bloodbath: Could the UN have Predicted and Prevented the Rwandan Genocide?' (2000) 20 *TJCS*, available at *https://journals.lib.unb.ca/index.php/jcs/article/view/4333/4968*, accessed on 16 June 2015.

[157] See Romeo Dallaire & Kashan Manocha 'The Major Powers and the Genocide in Rwanda' in Paul Behrens & Ralph Henham (eds) *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (2007) 61–75 at 70.

Receiving the sum of US$4.8 million for arms and ammunition purchased in Albania, it made delivery in Rwanda by 'using an Israeli shipping agent located in Tel Aviv, together with other cargo carriers'.[159] Belgian banks were also implicated in the transactions as the embassies of Rwanda abroad facilitated payments to Mil-Tec Corporation.[160] Without the availability of these arms and ammunition, the war would not have degenerated into a situation in which over ten thousand people were killed daily. No doubt the companies which assisted others to kill by making weapons of destruction available to the belligerents are themselves guilty of crimes of complicity.

2.5.2 Corporate human rights violations and complicity of states

The difficulty behind corporate human rights violations in developing countries, particularly in African states is that it often carries with it the complicity of states. The violation of human rights by corporations works in a way that makes states partners in the crime.[161] Ironically, as noted before in this study, states have a responsibility under international law to protect their citizens from violation of human rights by non-state actors such as corporations.[162] The same state which is saddled with the responsibility of safeguarding people in its territory from infringement of human rights has become the means by which those rights are violated. The violation of human rights by states takes different shapes, sometimes, human rights are violated unilaterally by the states in direct form and at other times, they are violated with concerted efforts of corporations.

The International Law Commission (ILC) has made a great contribution to international law in this respect. It has dichotomised the principle of state responsibility into two. The primary rules which deal with duties and obligations of states and the secondary rules which set parameters to determine when states breach those duties.[163] The secondary

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[158] See James Coflin 'Small Arms Brokering: Impact, Options for Controls and Regulation' International Security Research and Outreach Programme International Security Bureau (May 2000) 1–34 at 9, available at *http://www.international.gc.ca/arms-armes/assets/pdfs/coflin2000.pdf*, accessed on 16 June 2015.
[159] Ibid; Dallaire & Manocha op cit note 157.
[160] Linda Melvern *Conspiracy to Murder: The Rwandan Genocide* (2004) 58. Note that even though payment was made through the Embassy, all documents relating to the payments have been destroyed.
[161] On complicity, see Special Rep. of the Secretary-General 'Guiding Principles on Business and Human Rights (UNGP): Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc. A/HRC/17/31 (21 March 2011). Commentary to principle 17, it provides that 'the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime'
[162] See the discussion of this in Chapter 1 of this thesis under section 1.2.
[163] See *Report of the International Law Commission* [1991] 2 Y.B. Int'l L. Comm'n, pt. 2 at 1, U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (1991 Draft Articles); *Report of the International Law Commission*, [1980] 2 Y.B. Int'l L. Comm'n, pt. 2, at 30-34, U.N. Doc. A/CN.4/SER.A/1980/ Add.1 (1980 Draft Articles). On definition of secondary rules, see HLA Hart *The Concept of Law* (1961) 89–96.

rules developed by the ICC are anchored by the doctrine of attribution which attempts to make states liable for failure to perform their duty and to make them accountable for the unlawful conduct of their agents.[164] Once the conducts of the private parties that are tantamount to a breach of international law can be attributed to a state, then the state is deemed to have breached its obligation under international law.[165]

In this regard, with respect to Africa, the case of *SERAC and CESR v Government of Nigeria*[166] is the most cited example of state complicity in corporate human rights violations. The argument of this thesis is that the complicity of states in corporate human rights violations in Africa and the failure of regional and international legal jurisprudence to address it decisively will lead to a state of perpetual breach of international obligations, gross violations of human rights without remedies contrary to the universally acceptable maxim of law; ubi *jus ibi remedium*.

A similar case with respect to the Ogoni people decided by ECOWAS in 2012 will justify this argument. In *SERAP v The Federal Government of Nigeria*[167] the plaintiff alleged that the federal democratic government of Nigeria was liable for the violation of the rights to health, adequate standard of living and rights to economic and social development of the people of the Niger Delta by a consortium of corporations[168] because of its failure to enforce laws and regulations to protect the environment and prevent pollution.[169] The court held that the government of Nigeria violated Articles 1 and 24 of the African Charter on Human and People's Rights and was therefore liable for human rights violations by the corporations in the Niger Delta. So, a careful perusal of this case along with the history of Ogoni's travails at the hands of corporations in Nigeria will show either the inability or unwillingness of the government of Nigeria to address corporate human rights violations within its territory and the failure of regional judicial frameworks with respect to the issue of corporate human rights responsibility and accountability in Africa.

It should be noted that Nigeria is not alone when it comes to complicity in corporate human rights violations. All the states in Africa are guilty of this crime which is due to poor

[164] Ratner op cit note 77 at 443.
[165] Under ICC, it is difficult to prove that conducts of private parties are that of the states unless it can be proved that they are acting under the instruction and control of states. See Article 11(1), 5 and 8 of the ICC.
[166] See Communication 155/96 decision was given at the 30th ordinary session of the Commission held in The Gambia.
[167] ECW/CCJ/JUD/18/12.
[168] Ibid. The corporations are Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil. They were sued together with the federal government of Nigeria but in a preliminary objection by the corporations, their names were struck out as the court held that it has no jurisdiction over them.
[169] Ibid.

human rights record in the continent,[170] though their involvement differs and even where it is of the same kind, it is not of the same degree. Some just stand by and fail to protect their citizens against corporate human rights violations; some are actively violating human rights of their people together or with the satisfaction of corporations, while some go beyond their territories to become involved in human rights violations in other countries of Africa.

The first two instances can be categorised as internal state complicity in corporate human rights violations, while the third can be designated as external complicity. A few examples will illustrate each point. On internal state complicity in human rights violation, the first example is that of the DRC, where over three million people have died since the commencement of the civil war in 1998.[171] That war has been prolonged unnecessarily due to exploration of resources by corporations and their fraternity with the rebels and the state government. The attacks on Kilwa, a small town in the province of Katanga by Soldiers of the 62nd Infantry Brigade of the Congolese Armed Forces (*Forces armées dela République démocratique du Congo*, FARDC) in order to crush a minor security breach by some rebels[172] gives a good illustration of how states and corporations can combine efforts to commit crimes against humanity and gross violations of human rights. Civilians bore the brunt of the attacks, they were arbitrarily clamped into detention, tortured, their properties pillaged, women and children were raped and about 94 people were killed by the state military unit.[173] Anvil Mining Limited, an MNC, facilitated the operation by providing logistical support to the government soldiers. A vigorous attempt made in Australia,[174] Canada[175] and even in DRC[176] to prosecute Anvil Mining Limited or its employees for criminal conducts in violation of

[170] See Amnesty International, *Amnesty International Report 2008 – The State of the World's Human Rights* (2008) 3, noting 'human rights promised in the Universal Declaration [of Human Rights] are far from being a reality for all the people of Africa'.

[171] See 'Rights & Accountability in Development, Unanswered Questions: Companies, Conflicts and The Democratic Republic of Congo' (2004) 1, available at *http://www.unites.uqam.ca/grama/pdf/RAIDDRC_Ex-Summary.pdf*, accessed on 17 May 2015.

[172] See African Association for the Defence of Human Rights, Katanga (Asadho/Katanga) 'Report on Human Rights Violations Committed In Kilwa in the Month of October 2004' (2005) 8, available at *http://www.abc.net.au/4comers/content/2005/asadho-report-oct2OO4.pdf*, accessed on 18 May 2015.

[173] Ibid at 13–15.

[174] The Australian Federal Police explored the possibility of a criminal action against the company which has its head office in Australia but probably discouraged by the judgment of acquittals passed by the Congolese Military Court in favour of the employees, halted the process. See Adam McBeth 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 *YHRDLJ* 127 at 152.

[175] The Supreme Court of Canada dismissed the application for leave to appeal the judgment of the Quebec Court of Appeal, that the Canadian court has no jurisdiction to hear the claim of criminal conducts against the company on the basis of forum *non conveniens*. See case No 34733 Association *Canadienne contre l'impunité v Anvil Mining Limited*, available at *http://www.canlii.ca/en/ca/scc-l/doc/2012/2012canlii66221/2012canlii66221.pdf* , accessed on 18 May 2015.

[176] See Global Witness 'Kilwa Trial: A Denial of Justice - Chronology October 2004 - July 2007' 17, available at *http://www.globalwitness.org/sites/default/files/pdfs/kilwa_chron_en_170707.pdf*, accessed on 18 May 2015.

international law and suits for remedies for the victims failed, revealing the inadequacy of the domestic legal framework of the DRC and the reluctance of home states governments to police their corporations for human rights accountability abroad.

The second example, with regard to Sudan, is the atrocities perpetuated by the Sudanese government with support of corporations against South Sudan before its independence in 2011 were not hidden to the international community. Colin L Powell, the US Secretary of State noted that the government in Khartoum was responsible for the Darfur genocide.[177] The decision of the African Commission in *Sudan Human Rights Organisation and Another v Sudan*[178] corroborates this view as the African Commission noted that the government 'did not act diligently to protect the civilian population in Darfur against the violations perpetrated' by Janjaweed and government forces' and therefore held that the state violated Articles 1, 4, 5, 6, 7(1), 12(1) and (2), 14, 16, 18(1) and 22 of the African Charter.[179]

With regard to the second category, the Liberian government of Charles Taylor is the first good example. The Liberian government under Taylor supported the Revolutionary United Front (RUF) to commit gross human rights violations in Sierra Leone and reaped financial benefits from the exploration of diamonds under RUF control.[180] Consequentially, Taylor was found guilty of aiding and abetting the commission of terrorism, murder, acts of violence, rape, sexual slavery, outrages against personal dignity, cruel treatment, inhuman acts, enlistment of children into armed forces, enslavement and pillage, all human rights violations that occurred in Sierra Leone.[181]

The second example is the complicity of the republics of Burundi, Rwanda and Uganda in human rights violations in the DRC.[182] Corporations in these countries and their state governments supported rebels in the DRC and used the civil war as a ploy to exploit the mineral resources belonging to the country.[183] In a case brought by the DRC against the three countries, the African Commission held that the states violated Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter on Human and

[177] See Glenn Kessler & Colum Lynch 'U.S. calls killings in Sudan genocide' *Washington Post* (10 September 2004) Al.
[178] (2009) AHRLR 153 (ACHPR 2009) para 168.
[179] Ibid para 228.
[180] See, the Appeal Chamber judgment in *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-A (10766-11114) paras 678 & 684; Case No. SCSL-03-1-T, *Prosecutor v Charles Ghankay Taylor* at the Trial Chamber.
[181] Ibid. See para. 708 of the Appeal judgment, the court confirmed the sentence of Taylor by the Trial Chamber.
[182] See reference S/2001/357, the report of the Panel of Experts, submitted to the Security Council of the United Nations in April 2001.
[183] See UN Security Council 'Letter dated 10 November 2001 from the Secretary-General to the President of the Security Council' (13 November 2001) (S/2001/1072) paras 106–119 & 150.

Peoples' Rights and that 'adequate reparations be made on behalf of the victims of human rights violations committed by the armed forces of the respondent states whilst in effective occupation of DRC territory'.[184]

Another example is from South Africa. It was alleged that the officers of British Company Lonmin supported the South African police with strategic feedback information mechanisms and resources that led to the killing of the 34 Marikana mineworkers. The government of South Africa was said to be aware of the plan by the police and the company officers to end the strike by all means on 16 August 2012 but did nothing to prevent it. In fact, it was insinuated that 'the relationship between Lonmin and the [ANC] determined every action that happened in the buildup to the massacre' and that there was an 'unhealthy relationship between the mining companies and the state'.[185]

2.5.3 Corporate human rights violations and African communities

Corporations through foreign investment have entered into joint ventures with governments in Africa. The purpose of the joint ventures is to explore mineral resources in African territories in order to boost the economy of Africa. Unfortunately, this has metamorphosed into the displacement of local communities with its concomitant features of destruction of homes, loss of land and means of livelihood culminating in gross violation of human rights. With respect to Africa, it has been argued that 'mining-induced displacement … was … one of the most under-reported causes of displacement in Africa, and one that was likely to increase, as mineral extraction remained a key economic driver'.[186] There is plethora of examples from Africa which corroborates that assertion. In Botswana, the San, or Bushmen, were forced to leave their ancestral homes in the Central Kalahari Game Reserve, 'allegedly to open the park to diamond mining'.[187] In Ethiopia, the government embarked on a 'vigilization' policy aimed to forcefully displace the people of Gambella from their ancestral home to pave the way for corporate and industrial farming, a move that has resulted in gross violations of human rights.[188] In fact, the issue of displacement of people from their

[184] *D. R. Congo v Burundi, Rwanda and Uganda*, No. 227/99 (2003).
[185] See Global Research 'South Africa: Killing of 34 Marikana Mine Strikers – The Role of British Company Lonmin', available at *http://www.globalresearch.ca/south-africa-killing-of-34-marikana-mine-strikers-the-role-of-british-company-lonmin/5359728*, accessed on 17 May 2015.
[186] See Official Report of the Regional Seminar on Internal Displacement in the Southern African Development Community (SADC) Region, available at *http://www.brookings.edu/fp/projects/idp/SADC_rpt.pdf*, accessed on 20 May 2015) P5.
[187] Ibid at 5.
[188] See Human Rights Watch, Ethiopia 'Army commits torture, rape' (28 August 2012), available at *http://www.hrw.org/news/2012/08/28/ethiopia-army-commits-torture-rape*, accessed on 20 May 2015.

traditional homes to create room for corporations is a common feature in Ghana,[189] South Africa,[190] The Gambia,[191] Uganda[192] and all other states in Africa.

The devastating news concerning this issue is that states in Africa are unable or unwilling to prevent gross violation of human rights committed by corporations against the local communities in the process of exploring mineral resources in the continent. For example, the Africa Commission condemned 'the active support by the government for the policy of the oil companies in Ogoni Land' which polluted their land, destroyed their houses, food crops and other means of livelihood and eventually displaced them from their habitation. The African Commission notes that the government gave 'the green light to private actors and the oil companies in particular, to devastatingly affect the well-being of Ogonis'[193] and therefore called upon the government to take steps to rectify the problems created by them. Unfortunately in 2012, after about 11 years, the ECOWAS court echoed the same statement to the government of Nigeria when it noted that:

> 'In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta, but rather a failure to use the State authority, in compliance with international obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region'.[194]

Similarly, the African Commission delivered a landmark decision when it held that the forceful displacement of Endorous from their ancestral land to pave way for a tourist business industry by the state without an adequate compensation violated Articles 1, 8, 14, 17, 21 and 22 of the African Charter.[195] In sum, it is obvious that African states place a

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[189] Commission for Human Rights and Administrative Justice (CHRAJ) (2008) 'The state of human rights in mining communities in Ghana' (2008), available at *www.nodirtygold.org/HumanRightsInGhanaMiningCommunities.pdf*, accessed on 19 May 2015.

[190] South African Human Rights Commission (SAHC) 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo. Johannesburg' (2008), available at *http://www.sahrc.org.za/home/21/files/Reports/Anglo%20Report%20Final%202008_Chp%201%20to%203.pdf*, accessed on 19 May 2015.

[191] Clayton Masekesa 'Zimbabwe: Displaced Marange villagers in quandary' *The Standard* (28 April 2013); Oxfam's report 'The New Forests Company and its Uganda Plantations' (September 2009), available at *http://www.oxfam.org/sites/www.oxfam.org/files/cs-new-forest-company-uganda-plantations-220911-en.pdf*, accessed on 27 May 2015.

[192] See *Baleke & 4 Others v AG of Ugandan & 2 Others*, Suit No. 179 of 2002, on forced eviction in the Mubende Districts of Uganda.

[193] See *SERAC* case supra note 167 para 58.

[194] Ibid para 33.

[195] Communication 276/2003 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* para 298 Recommendation 1.

greater premium on the exploration of mineral resources than the observance of human rights.

2.5.4 Corporate human rights violations and the workplace

The human rights situation in the workplace in Africa is alarming. Gross violations of human rights persist in the industrial sector of any corporation, be it state-owned, multinational or indigenous. As for the MNCs, their initial preference for Africa is motivated by the benefits of cheap labour resulting in the 'race to the bottom'[196] which violates the human rights of employees by taking advantage of them. The International Labour Organization (ILO) has provided the regulatory framework which if implemented could curb such human rights violations in the workplace. They are freedom of association and its counterpart, the right to collective bargaining, prohibition of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.[197] Even states that have not ratified the convention, as members of the ILO are expected to provide regulatory mechanisms for the enforcement of those rights in their territory. Corporations are not exempted, 'the core ILO conventions provide basic reference points' to see how their business operations can negatively affect human rights and how they can avoid its adverse impacts by integrating the culture of human rights into their business management.[198] Thus, corporate due diligence mechanisms to avoid negative human rights impacts is important with respect to Africa because the present situation of human rights in the workplace is worrying.

In Zambia, Human Rights Watch exposed the violation of labour rights by corporations against their employees. Workers in Chinese corporations were subjected to inhuman cruelties while working, they were 'being slapped, hit, and kicked by their Chinese bosses, or having rocks, hard hats, or other equipment thrown at them'[199] and if they protested, shots were fired to intimidate them.[200] Workers could not join a trade union of their own choice, and the right to collective bargaining was lost.[201] The government of Zambia

[196] See A Nicolaides & CM van der Bank 'Globalisation, NEPAD, Fundamental Human Rights, South African and Continental Development' (2013) 1(2) *IJDES* 54−72 at 58.
[197] See ILO's Declaration of Fundamental Principles and Rights at Work (ILO Conventions 87 & 98) 1998.
[198] See, United Nations Human Rights Office of the High Commissioner 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide' at 11.
[199] Human Rights Watch '"You'll be fired if you refuse": Labor abuses in Zambia's Chinese state-owned copper mines' (4 November 2011) 74, available at *http://www.hrw.org/reports/2011/11/04/you-ll-be-fired-if-you-refuse*, accessed on 21 May 2015.
[200] Ibid at 22.
[201] Ibid at 87

lacks the personnel, financial and political wherewithal to enforce 'domestic and international labor law in the Chinese-owned copper mines in Zambia'.[202]

The issue of conscription of young children for armed conflict is a common phenomenon in Africa during a state of conflict; however, even in times of peace, the use of child labour by MNCs is rampart in Africa. In this regard, Malawi is the most affected country in the southern region of Africa.[203] The major tobacco MNCs receive nearly 'US$10 million a year in economic benefit through the use of unpaid child labour in Malawi'.[204] Similarly in Zimbabwe, the emergence of foreign companies in the mining industry due to bankruptcy of indigenous companies in the sector opened a new floodgate for the exploitation of children in the business.[205] An infant worker echoes the voices of millions of Zimbabwean children who dropped out of school to work in the mining field with a MNC when he said, 'I get US$10 for every ton I fetch and it takes me about three days to do so. We work from sunrise to sunset together with the adults and are treated the same, but the job is so hard'.[206] Though, the domestic law of Zimbabwe outlaws the employment of children under the age of 18 to perform hazardous work, the main problem is that 'these laws were poorly enforced by inspectors who had no special training or resources to address the issue'.[207] Similarly, boys and girls from the age of seven are actively engaged in working in the mining and industrial sector in Ghana, Niger, Peru and the United Republic of Tanzania.[208] Perhaps there is no worse example of human rights violations in Africa than that of Eritrea where adult men and women were conscripted to work under inhuman conditions in the state-owned corporations indefinitely without hope of liberty from commercial bondage.[209]

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[202] Ibid at 68.
[203] See, Paul Mkupa Gondwe 'Child labour magnitude, nature and trends in Malawi' A Paper for the National Conference in Eliminating Child Labour in Agriculture, available at *http://www.eclt.org/wp-content/uploads/2013/07/Child_Labour_Magnitude_Nature_and_Trends_in_Malawi.pdf*, accessed on 22 May 2015.
[204] See Wilma Stassen 'Report reveals "horror" of tobacco farming', available at *http://allafrica.com/stories/201208080261.html*, accessed on 22 May 2015.
[205] See IRIN Africa 'Zimbabwe: Mining Industry attracts child labour as Economy picks up' (2010), available at *http://www.irinnews.org/Report/90770/ZIMBABWE-Mining-industry-attracts-child-labour-as-economy-picks-up*, accessed on 22 May 2015.
[206] Ibid.
[207] See IRIN, Africa 'Zimbabwe: Child Labour on the rise,' (2012), available at *http://www.irinnews.org/Report/94939/ZIMBABWE-Child-labour-on-the-rise*, accessed on 22 May 2013.
[208] See ILO, Bureau for Gender Equality 'Girls in Mining: Research Findings from Ghana, Niger, Peru, and United Republic of Tanzania', available at *http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1028&context=intl&sei-redir=1*, accessed on 22 May 2015.
[209] See Human Rights Watch 'Hear no evil: Forced labor and Corporate Responsibility in Eritrea Mining Sector' (2013), available at *http://www.hrw.org/reports/2013/01/15/hear-no-evil-0*, accessed on 21 May 2015.

2.5.5 Corporate human rights violations and toxic waste dumping in Africa

Other common abuses by MNCs in Africa are that of environmental pollution, the use of Africa as a dumping ground for toxic waste. In 1986, a Norwegian MNC in Guinea-Bissau dumped a 'highly toxic incinerator ash' on an 'open-air site'.[210] Likewise, in 1988, the deposit of hazardous toxic and radioactive wastes at Koko in the-then Bendel State of Nigeria caused the residents of the village to suffer 'chemical burns, paralysis, premature births, and fatalities'.[211]

In 1992, some MNCs in Italy and Switzerland took advantage of the civil wars in Somalia to secure an '$80 million twenty-year contract for dumping toxic waste',[212] while in 2006, Cote d'lvoire (Ivory Coast) experienced this type of trade in hazardous waste when a vessel, the *Probo Koala,* chartered by the Dutch company Trafigura, dumped toxic waste in Abidjan districts.[213] The list is endless. In fact, various instances of such gross violations of human rights by the MNCs are widespread and intensely publicised by NGOs 'using the immediacy of global communications'.[214]

2.6 Conclusion

From the era of slavery in Africa to the post-colonial era, this study has so far revealed that states do not only have the potential to violate human rights, they actually do either singlehandedly or in concerted efforts with corporations. As a result of this complicity, most, if not all human rights protected by the African Charter have been breached. Such human rights include the right to economic, social and cultural development,[215] the right to a clean and healthy environment,[216] the right to redress and justice,[217] the right to human dignity,[218]

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[210] Gary Cox 'The Trafigura Case and the System of Prior Informed Consent under the Basel Convention – A Broken System?' (2010) 6 *LEAD* 265–283 at 266.
[211] See Andrew Webster-Main 'Keeping Africa out of the Global Backyard: A Comparative Study of the Base Land Bamako Conventions' (2002) 26 *ELPJ* 65–94 at 65; Hao-Nhien Q Vu 'Comment: The Law of Treaties and the Export of Hazardous Waste' (1993/1994) 12 *JELP* 389 at 390.
[212] Ibid. Noting that 'The contract was signed by the Somali Minister of Health, yet at the time, none of the warring factions truly held power in the war torn, famine-stricken nation'.
[213] See Okechukwu Ibeanu 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the Right to Development'. Report of the Special Rapporteur for United Nations General Assembly on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human right, available at *www2.ohchr.org/english/bodies/hrcouncil/.../A-HRC-12-26-Add2.pd*, accessed on 24 April 2015.
[214] See, David Kinley & JunkoTadaki 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *VJIL* 931–1023 at 934.
[215] African Charter op cit note 41 Article 22.
[216] Ibid Articles 16 & 24.
[217] Ibid Article 7.
[218] Ibid Article 5.

the right to free association and lawful assembly,[219] the right to life,[220] the right to work,[221] the right of expression, the right to information,[222] and the right to education.[223] The violation affects not only the individuals but the communities and the environment that are the objects of protection by the African Charter. In view of the unreliability of states to guarantee human rights, due to their frequent complicity in human rights violations, the question that calls for interrogation is how do we protect human rights in such states? As noted before, under international and regional human rights systems, the same states who are involved in human rights violations have been entrusted with the protection and fulfilment of human rights of those in their territory. How then are they able to meet satisfactorily their obligations and duties to respect human rights? How are human rights protected? Ordinarily, once states have ratified regional and international human rights treaties, they must enact adequate domestic regulations and adopt sufficient institutional and administrative frameworks to carry out their obligations and duties under those treaties. Thus, the state legal apparatus is the major mechanism for the protection of human rights. If however, that apparatus is weak or unable to protect human rights in any state, institutional regulatory frameworks 'for individual and group complaints' should be made available 'at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level'.[224] In such a scenario, to find a long lasting solution to the problem of corporate human rights violations in Africa, it is imperative to assess the state of regulatory and institutional frameworks for corporate accountability in Africa at the state level and also at the regional and international level. The next chapter deals with this issue with respect to the states.

[219] Ibid Articles 9 & 10.
[220] Ibid Article 4.
[221] Ibid Article 15.
[222] Ibid Article 10.
[223] Ibid Article 17.
[224] See UN 'The Foundation of International Human Rights Law', available at *http://www.un.org/en/documents/udhr/hr_law.shtml*, accessed 24 May 2015.

CHAPTER 3
NATIONAL REGULATORY REGIMES FOR CORPORATIONS IN AFRICA

3.1 Introduction

Having examined in the previous chapter, the nature and extent of corporate human rights violations in Africa, this part of the thesis seeks to consider the institutional and regulatory regimes for corporations doing businesses in the states of Africa. The purpose is to find out the current state of corporate accountability framework in Africa through an examination of states' regulatory regime for human rights protection in the corporate sector. It is important to examine the adequacy of the domestic law of the states because of the primary responsibility the UNGP accords to them with regard to the protection of their citizens from corporate human rights violations in their territories.[1] It is admitted that companies by their own volition engage in voluntary approaches to ensure they comply with human rights obligations, but voluntary approaches through Codes have not been successful[2] and the quest for a regulatory framework for corporate accountability continues till date, even at the UN.[3]

As noted earlier,[4] the focus of this study is an inquiry into the possibility of putting corporations in Africa under a binding normative framework that will ensure strict human rights compliance in their business operation in the continent. This thesis is of the view that such regulatory framework for corporations is still possible through the implementation of the UNGP. With such objective and focus, the reason behind the examination of the national regulatory framework of states in Africa and not self-regulatory mechanisms of the corporations will be justified in this section.

3.2 Human rights protection under the national constitutions

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[1] See SRSG 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' U.N. Doc. A/HRC/17/31 (UNGP) (21 March 2011) Pillars 1 and 3 of the tripartite framework revolve on the states; Surya Deva & David Bilchitz 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Surya Deva & David Bilchitz (eds) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (2013) 13. Noting that under the UNGP states are 'the predominant institutions for the regulation of MNCs … [and] undoubtedly have a critical role in ensuring that companies do not violate human rights'.

[2] On the reason why the voluntary regulation cannot be relied upon, see Steven R Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *YLJ* 443 at 532 noting that most companies adopt weaker Codes; Engobo Emeseh, Rhuks Ako, Patrick Okonmah, Obokoh& Lawrence Oge 'Corporations, CSR and Self Regulation: What Lessons From the Global Financial Crisis?' (2010) 11 *GLJ* 230 at 259, noting if corporations failed to regulate themselves in the area that concern them most, they cannot be trusted to regulate themselves on the issue of CSR.

[3] See UNHRC 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights' (A/HRC/26/L.22/Rev.1) (25 June 2014), available at *http://www.ishr.ch/sites/default/files/article/files/ecuador_south_africa_resolution_as_adopted_and_orally_revised.pdf*, accessed on 4 July 2015.

[4] See the discussion in Chapter 1 section 1.7.

In regulating the relationship between the governments and its citizens, the traditional task of a constitution is to protect the rights of the citizens from the possibility of being violated by the governments.[5] As Charles Fombad argues, 'the main purpose of a constitution is to limit the use of governmental powers in a manner that will prevent the twin dangers of anarchy and authoritarianism'.[6] Consequently, clauses protecting human rights of the citizens are enshrined in most constitutions to attain this objective. This is categorised in this chapter as general protection of human rights by the constitutions. Its effects in protecting the citizens from corporate human rights violations in Africa will also be discussed. To begin, the following section examines some states in Africa that have specifically used constitutional provisions to impose human rights responsibilities on companies. The effect of such special constitutional regulation of corporations in Africa is discussed.

3.2.1 Special constitutional regulatory framework for corporations in Africa

In African countries, the constitution is the supreme law of the land.[7] If any law is made contrary to the constitution, such law will be declared unconstitutional and of no effect by virtue of its inconsistency.[8] This higher status accorded to the constitution in the hierarchy of rules has transposed it to be the most suitable and appropriate regulatory framework to protect human rights violations in any country. As Chief Justice Robert French states 'the role of constitutions and constitutional law can be of great significance in the protection of fundamental human rights and freedoms'.[9] Consequently, some states in Africa like South Africa, Kenya, Ghana, Malawi and The Gambia reformed their 'constitutions to impose human rights norms on corporations'[10] in order to realise the efficient protection that are

[5] Hugh Collins 'On the (In) Compatibility of Human Rights Discourse and Private Law' *LSE Law, Society and Economy Working Papers* 7/2012, 1-44 at 2, available at *http://www.lse.ac.uk/collections/law/wps/WPS2012-07_Collins.pdf*, accessed on 5 May 2015.

[6] See Charles Manga Fombad 'Strengthening Constitutional Order and Upholding the Rule of Law in Central Africa: Reversing the Descent towards Symbolic Constitutionalism' (2014) 14 *AHRLJ* 412–448 at 414.

[7] On supremacy of the constitution, see Article 2(1) of the Constitution of Kenya 2010; Article 1 of the 1992 Constitution of the Republic of Ghana; Article 1(1) of the 1999 Constitution of Nigeria; Article 2(1) of 1995 Constitution of the Republic of Uganda (as last amended in 2006); Article 2 of Constitution of the Republic of South Africa 1996; Article 2 of the Constitution of Zimbabwe 2013; Article 2(3) of Constitution of Eritrea 1999; Article 4 of the 1997 Constitution of The Gambia.

[8] Ibid, see Article 2(4) Kenya; Article 1(2) Ghana; Article 1(3) Nigeria; Article 2(2) Uganda; Article 2 South Africa; Article 2(2) Zimbabwe; Article 2(3) Eritrea; Article 4 The Gambia.

[9] Chief Justice Robert French 'The Constitution and the Protection of Human Rights' Edith Cowan University Vice-Chancellor's Oration (20 November 2009), available at *http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf*, accessed on 4 May 2015.

[10] Kiarie Mwaura 'Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil' (2012) 11 *JIBL* 85−110 at 86.

likely to be offered by the constitutional framework.[11] The implication of these provisions is that it provides for direct horizontal application of human rights to corporations.[12] Consequently, corporations can be held liable for breach of human rights violations since human rights provisions can be applied in private litigations.[13] An example can be found in South African case of *Khumalo v Holomisa*,[14] where the court considered the impact of direct horizontal application of the right to freedom of expression in line with section 8(2) of the Constitution of the Republic of South African, 1996 in resolving the dispute between the two private parties.[15] The advantages of this mechanism if well utilised cannot be over-emphasised.[16] As Nolan argues, Article 8(2) would prima facie suggest the import that it could be used to impose positive obligations on the corporations instead of mere negative obligations.[17] This is not impossible if the courts do not take the path of judicial avoidance.[18]

[11] For example, Article 8(2) of the Constitution of South Africa provides that 'a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'; Article 20(1) of the Constitution of Kenya provides that 'The Bill of Rights applies to all law and binds all State organs and all persons' and Article 260 defines "person" to include ' a company, association or other body of persons whether incorporated or unincorporated'; Article 12(1) of the Constitution of Ghana provides that 'the fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution'; Article 17(1) of the Constitution of The Gambia provides that 'the fundamental human rights and freedoms enshrined in Rights and this Chapter shall be respected and upheld by all organs of Freedoms the Executive and its agencies, the Legislature and, where applicable to them, by all natural and legal persons in The Gambia, and shall be enforceable by the Courts in accordance with this Constitution' and Article 15(1) of the Constitution of Malawi provides that 'the human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter'.

[12] For discussion on direct horizontal application of human rights corporations due to the constitutional clauses, see Jernej Letnar Černič 'Corporate Obligations under the Human Right to Water' (2011) 39 *DJILP* 303−345 at 332−334; Aoife Nolan 'Holding Non-state Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12 *IJCL* 61–93 at 66-86; Danwood Mzikenge Chirwa 'In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights' (2008) 8 *AHRLJ* 294−311 at 304-310; Anna R Welch 'Obligations of State and Non-state Actors Regarding the Human Right to Water under the South African Constitution' (2005) *SDLP* 58−64 at 62−63; Marius Pieterse 'Indirect Horizontal Application of the Right to have Access to Health Care Services' (2007) 23 *SAJHR* 157−179 at 161−169; David Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' 125 *SALJ* 754−789 at 774−779.

[13] See Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762−794 at 773.

[14] *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) (*Khumalo*).

[15] Ibid paras 33–45.

[16] On advantages of direct horizontal application of human rights to corporations, see Alistair Price 'The Influence of Human Rights on Private Common Law' (2012) 129 *SALJ* 330–374 at 357; Chirwa op cit note 12 at 309; Nick Friedman 'The South African Common Law and The Constitution: Revisiting Horizontality' (2014) 30 *SAJHR* 63–88 at 84–85.

[17] Nolan op cit note 12 at 79.

[18] Johann van der Westhuizen 'A Few Reflections on the role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy' (2008) 8 *AHRLJ* 251 at 261. A judge of the Constitutional Court in South Africa admitted that Constitutional courts of South Africa are sometimes minimalist in their judgments.

In essence, there is no reason for them to take that path since the Constitution has required them to develop the common law in order to enforce the rights of the litigants.[19]

3.2.2 General protection of human rights by the constitutions under the national law

It is important to consider other countries in Africa that do not impose human rights obligations directly on companies through their constitutional provisions. Those countries also protect their citizens from human rights violations. They do this through the enactment of general provisions in their constitutions for human rights protections, for example in Nigeria,[20] Uganda,[21] Egypt[22] and DRC[23] through civil and political rights (CPR) and social, economic and cultural (SEC) rights. Unlike CPR, SEC rights are not justiciable and this arguably affects the level of its protection in most countries in Africa.[24] Thus, in *Archbishop*

[19] For example see Article 8(3) of the Constitution of South Africa; Article 20(3) of the Constitution of Kenya.
[20] Chapter II of the 1999 Constitution headed 'Fundamental Objectives and directive Principles of State Policy' contains ESR rights, while Chapter IV from sections 33 to 45 contains protections of rights like Right to life (33) Right to dignity of human persons (34) Right to personal liberty (35) Right to fair hearing (36) Right to private and family life (37) Right to freedom of thought, conscience and religion (38) Right to freedom of expression and the press (39) Right to peaceful assembly and association (40) Right to freedom of movement (41) Right to freedom from discrimination (42) Right to acquire and own immovable property (43).
[21] Chapter four of the 1996 Constitution headed Fundamental and Other Human Rights and Freedoms contains rights such as equality and freedom from discrimination (Article 21) Right to life (Article 22) Right to personal liberty (Article 23) Protection from inhuman treatment (Article 24 and 25) Protection of property (Article 26) Right to privacy (Article 27) Right to a fair hearing (Article 28) Right to freedom of assembly and association (Article 29) Freedom of speech and expression (Article 29(1)(a) Freedom of conscience and religion (Article 29(1)(b) Freedom of movement (Article 29(2)) Right to Education (Article 30) Rights of the family (Article 31) Special provisions for disadvantaged groups (Article 32) Rights of women (Article 33) Rights of children. (Article 34) Rights of minorities (Article 36) Right to culture and similar rights (Article 37) Civic rights and activities (Article 38) Right to a clean and healthy environment (Article 39) Economic rights (Article 40(1)) Workers' Rights (Article 40(2) and (3)) Right of access to information (Article 41).
[22] See 2014 Constitution containing different type of rights as following Article 12: Right to work, forced labour, Article 13: Worker Rights, Article 14 right to public post, Article 15: Right to strike, Article 18: Health care, Article 19: Right to Education, Article 35: The right to inherit property, Article 46: Right to a healthy, sound and balanced Environment, Article 48: Right to culture, Article 51: right to Human dignity, Article 53: Equality in public rights and duties, Article 54: Personal freedom, Article 57: Right to Private life, Article 59: Right to safety, Article 62: Freedom of movement, Article 63: Forced migration, Article 64: Freedom of belief, Article 65: Freedom of thought, Article 68: Access to information and official documents, Article 73: Freedom of House, Article 74: Freedom to form political parties, Article 75: Right to establish associations, Article 78: Right to decent, safe and healthy housing, Article 79: The right to healthy, sufficient amounts of food and clean water, Article 80: Rights of the child, Article 81: Rights of the disabled.
[23] Articles 11 to 33 of Chapter 1 of 2005 Constitution with Amendments through 2011 contain civil and political rights while Chapter 2, Articles 34 to 49 contains economics social and cultural rights.
[24] The problem is because SEC rights are regarded as mere aspirational. On review of countries like South Africa, Uganda, Namibia and Ghana see John Cantius Mubangizi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) *2 AJLS* 1−19 at 18. He noted 'Many African constitutions tend to recognise civil and political rights while generally disregarding socio-economic rights. Among all the countries surveyed in this study, only South Africa has made the most advanced constitutional provision for socio-economic rights. Ghana comes in as a poor second. The constitutions of the other countries discussed (Namibia and Uganda) mainly include socio-economic rights in "Directive Principles of States Policy". As such, the justiciability of those rights tends to be uncertain'; On review of Constitutions of Nigeria, Lesotho and Sierra Leone, Frans Viljoen *International Human Rights Law in Africa* 2 ed (2012) at 551−553. Note, however that a vibrant judiciary can enforce SEC rights through a pragmatic interpretation of

Anthony Okogie and Others v The Attorney-General of Lagos State[25] the Court of Appeal in Nigeria held that social economic rights enshrined in the Nigerian Constitution as Fundamental Objectives and directive Principles of State Policy are not justiciable and that courts are not competent to question the executive on the adequacy of their compliance to such objectives and directive principles.

Likewise, in *Centre for Health Human Rights and Development (CEHURD) and Others v Attorney General* (in Uganda)[26] the petitioners alleged that the failure of the government to allocate 'enough resources to the health sector and in particular the maternal health care services' led to the deaths of many women. While seeking compensation for the victims of the health policies, they urged the court to declare the policy of the governments and the conducts of its agents as a 'violation of the National Objectives and Directive Principles of State policy.[27] Similarly, in the Nigerian judgment, the court held that it is the duty of the executive to formulate and implement policies and the court is not competent to question how the executive does this by virtue of separation of powers and the political question doctrine. As noted earlier, the Egyptian and DRC constitutions contain a wide array of social economic rights. The Egyptian Constitution goes further to include numerous entitlements[28] but unfortunately both constitutions are devoid of enforcement mechanisms and judicial oversight functions.[29]

However, in spite of the minimal protection accorded to the SEC rights in Africa, most constitutions if well interpreted by the courts can enforce human rights obligations

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the Constitution. For example in Nigeria, despite the judicial precedent that the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the 1999 Constitution are not enforceable, the court held in *Bamidele Aturu v. Minister of Petroleum Resources and Others* (Suit no FHC/ABJ/CS/591/2009) that the plan of the federal government to deregulate'the downstream sector of the petroleum industry' by refusing to fix 'the prices at which petroleum products may be sold in Nigeria' is contrary to the Fundamental Objectives and Directive Principles of State Policy as contained in section16(1)(b) of the 1999 Constitution. The section provides 'that the Government shall control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity'.

[25] (1981) 2 NCLR 350.

[26] Judgment of Constitutional Court of Uganda dated 5 June 2012.

[27] See Numbers 1(i), XIV(b), XXVIII(b), 33(2) and (3), 20(1) and (2), 22(1) and (2), 24, 34(1), 44(a), 8(a) and 45 of the Constitution of Uganda.

[28] See Articles 7, 8, 11, 12, 16, 17, 19, 20–23, 25, 29–30, 46, 48, 54, 56, 59, 68, 78–79, 80–84, 91, 96, 98 and 99.

[29] The Carter Centre Report 'Carter Centre Urges Dialogue and Constitutional Change to Strengthen Democratic Governance in Egypt' (12 March 2014). At 18 noting that 'the Constitution also does not state whether any of the provisions that provide citizens with socioeconomic rights or other entitlements are subject to trial in court'. In fact, 'there is no judicial mechanism for enforcement if the state fails to live up to its spending obligations', available at *http://www.cartercenter.org/resources/pdfs/news/pr/egypt-constitution-031214.pdf*, accessed on 11 May 2015; UN Economic and Social Council 'Concluding Observations of the Committee on Economic, Social and Cultural Rights Democratic Republic of the Congo' (E/C.12/COD/CO/4 20 November 2009) para 8.

against private parties including corporations, even if indirectly.[30] Admittedly there is an absence of an express statement that it applies to non-state actors (NSA).[31] Nevertheless, the corporations can be bound.[32] This is due to the declaration clause that all persons are bound to comply with the constitutional provisions.[33] Even in common law countries where there is no such statutory interpretation clause that could aid the emergence of that favourable interpretation (of the word 'person' to mean both artificial and natural persons), common law can still be resorted to in order to reach that conclusion. In *Greenwatch (U) Ltd v Attorney General and Another*[34] the issue for determination is whether the applicant as a company was entitled to access a document which was in custody of the agency of the government in line with Article 41 of the Ugandan Constitution. Counsel to the respondent contended that only citizens of Uganda and not corporations were entitled to enjoy the benefit of right to access information in the hand of the state. The court rejected his submission and held that 'indeed corporate bodies can enforce rights under the bill of rights for they are taken as persons in law, though not natural persons'.[35]

Once that hurdle is resolved, the judiciary in those countries, if independent should not find it difficult to apply the relevant human rights to private litigations. This has been the trend of judgments in some cases decided in Nigeria where the courts have held that human rights applied to private litigations.[36] It has been argued that a similar trend is possible in DRC.[37] Thus, it is obvious, that other countries are likely to follow suit. If that interpretation is adopted, people are likely to be protected against corporate human rights violations as actions can be brought against corporations for infringement of human rights.[38]

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[30] See Chirwa op cit note 12 at 310 noting that the horizontal application of human rights is indirect if human rights are considered in private litigations; Nolan op cit note 12 at 67 distinguishing between weaker and stronger version of indirect horizontal application.

[31] The Egyptian Constitution of 2014 has been criticised for this omission. See Carter op cit note 29 at 11.

[32] Cases in most countries in Africa have shown that.

[33] See for example Article 60 of DRC 2005 Constitution, Article 1(1) of Nigeria, and Article 2(1) of Uganda.

[34] See the judgment of Mr. Justice FMS Egonda-Ntende (HCT-00-CV-MC-0139 of 2001) [2002] UGHC 28. Although the court did not grant the prayer because according to the court it was not proved that the applicant is a registered company but the court opines that 'a corporate body could qualify as a citizen under Article 41 of the Constitution'.

[35] Ibid.

[36] See cases of *Muojekwu v Ejikeme*, (2000) 5 NWLR 402, 436 (C.A.)*; Chief Omu Uzo Ukwu v Igwe Chukwudebelu Ezike Ezeonu II* (1991) 6 NWLR 708; *Onwo v Oko*(1996) 6 NWLR 584 to mention a few; but see *Madu v Onuaguluchi* (1985) 6 NCLR 356, where the court held that human rights were not applicable against private individuals.

[37] See International Commission of Jurists (ICJ) *Access to Justice: Human Rights Abuses involving Corporations Democratic Republic of Congo* (2012) at 6 noting that Article 60 can be interpreted to make corporations to comply with human rights in the constitution although no judicial decision on it yet.

[38] Note, however that the shortcomings of tort liability approach to corporate accountability are 'the attribution of responsibility and the so-called 'corporate veil', the causality of tortuous action and damages, and the subjective standard of intent or negligence'. On this, see Wolfgang Kaleck & Miriam Saage-MaaB 'Corporate

However, the major obstacle is the unwillingness of African governments to let the rule of law and constitutionalism prevail.[39] Human rights are protected by the constitution but the institutional structures for their implementation are compromised.[40]

The reality is that even in countries where statutory regulations of corporations are directly protected by the constitution; there is no guarantee that SEC rights are strictly enforced against the governments,[41] not to talk of enforcing it against private entities. In fact, presently, some African countries like Burundi and others are finding it difficult to enforce CPR and are using their constitutions to fraudulently fulfil their inordinate ambition to stay in power.[42] Consequently, if the constitutions are truncated and unable to enforce the responsibility of the government to protect human rights of citizens, to use the same to elicit positive obligations of corporations might be difficult, if not impossible.[43] Only South Africa is an exception on this issue due to the role of its judiciary in consistently evolving a progressive realisation of social economic rights.[44] But even at that, some judgments

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Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010)8(3) *JICJ* 699 at 717.

[39] See Charles Manga Fombad 'Strengthening Constitutional Order and Upholding the Rule of Law in Central Africa: Reversing the Descent towards Symbolic Constitutionalism' (2014) 14 *AHRLJ* 412 at 446; Morris Kiwinda Mbondenyi & Tom Ojienda 'Introduction to and Overview of Constitutionalism and Democratic Governance in Africa' in *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (2013) at 5; Nsongurua J Udombana 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights' (2002) 17 *AUILR*, 1177 at 1236–1238; Serges Djoyou Kamga 'An Assessment of the Possibilities for impact Litigation in Francophone African Countries' (2014) 14 *AHRLJ* 449 at 473.

[40] Ibid.

[41] See Danwood M Chirwa *Human Rights under the Malawi Constitution* (2011) 255–279; NW Orago 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of socio-Economic Rights Disputes' (2013) 16 *PER / PELJ* 170 at 180–189; Atudiwe P Atupare 'Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria' (2014) 27 *HHRLJ* 71 at 105; John Cantius Mubangizi 'The Protection and Enforcement of Socioeconomic Rights in Africa: Lessons from the South African Experience' (2007) 15 *AYBIL* 87 at 105.

[42] See Irene Lamunu 'Exiled Judge says Constitutional Court Endorsed Pierre Nkurunziza's bid for a Third term under Duress' (8 May 2015) *Leadership*, available at *http://leadershipmagazine.org/leader/?p=6978*, accessed on 12 May 2015; 'Other African nations where laws have been changed to the benefit of their sitting leaders include Algeria, Angola, Chad, Djibouti and Uganda'. See *IOL News* 'Don't Cling to Power, UN boss tells AU Leaders' (30 January 2015), available at *http://www.iol.co.za/news/africa/don-t-cling-to-power-un-boss-tells-au-leaders-1.1811302#.VVDCBqEaKM8*, accessed on 13 May 2015.

[43] Note that the courts will not 'impose on a private party the duties of the state in protecting the Bills of Rights … [but] rather to require private parties not to interfere with or diminish the enjoyment of a right'. See *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) para 58.

[44] See Mubangizi op cit note 40 at 105; *Bamidele Aturu v Minister of Petroleum Resources* (Suit No: FHC/ABJ/CS/591/09) where the High Court in Nigeria held that the Federal Government's deregulation of the downstream sector of the petroleum industry was unconstitutional. This case signifies a departure from the judicial perception of social economic right but it is not certain if the appellate courts will confirm it. For a discussion on this see Akinola E Akintayo 'A Good thing from Nazareth? Stemming the Tide of Neo-liberalism against Socio-Economic Rights Lessons from the Nigerian case of Bamidele Aturu v Minister of Petroleum Resources and Others' (2014) 15 *ESR Review* 5–9.

delivered by the courts[45] are watering down the issue of corporate human rights obligations that it becomes uncertain to predict in any given case that the outcome of the application of section 8(2) of the South African Constitution will result in enforcing human rights obligations of corporations.[46] Furthermore, the recent disobedience to the order of the High Court (Gauteng Division) by the South African government confirms the point that South Africa is not an exception to other African countries in respect of government unwillingness to enforce court's orders and allow the rule of law to prevail.[47] The court in that case opined that the refusal of the South African government to detain and arrest the president of the Republic of Sudan, Omar Hassan Ahmad Al Bashir, until the ICC made a request to the South African government 'for his surrender' was 'inconsistent with the Constitution of the Republic of South Africa and invalid'.[48]

According to Howard Varney 'although court orders have been quietly ignored before; this would be the clearest example of open defiance of the courts by the executive'.[49] Rhetorically he asks the question 'should lawyers continue to bring cases before the courts when there is no guarantee that the State will comply with court's orders?'[50] That is the dilemma in which Africa finds itself. If the South African government is unwilling to enforce a court's order against the president of Sudan, what is the assurance that it will enforce judgments against the MNCs? It is not certain.

[45] See the cases of *Juma Musjid* supra note 42; *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC*); Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827(CC); *NM v Smith* 2007 (5) SA250 (CC), 2007 (7) BCLR 751 (CC) ('NM'); *City of Cape Town v Khaya Projects (Pty) Ltd and Others* 2015 (1) SA 421 (WCC); *BDS South Africa and Another v Continental Outdoor Media (Pty) Ltd and Others* 2015 (1) SA 462 (GJ).

[46] In fact Woolman notes that the rights in the Bill of rights are vanishing because the courts are not comfortable with direct application of 'substantivize provisions of the Bill of Rights' see Woolman above note 13 at 783; for contrary view see Nick Friedman 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 *SAJHR* 63 at 78–88.

[47] See the ruling of the court in *Southern Africa Litigation Centre v. the Minister of Justice and Constitutional Development & 11 Others* Case Number: 27740/2015.

[48] Ibid.

[49] Howard Varney 'South Africa's 'moral force' is a Crying Shame' (19 June 2015), available at *https://www.ictj.org/news/south-africas-moral-voice,* accessed on 4 July 2015.

[50] Ibid.

3.3 CCL in the national law

The reception of corporate criminal liability in to the national law jurisprudence is very slow.[51] This is due to a well-entrenched principle, particularly from the Romans that a corporate entity is incapable of committing crimes (*societas delinquere non potest*).[52] The US, which pioneered the idea of CCL,[53] was also influenced by this fictional theory that corporations cannot commit crimes because they are mere fictional entities until 'the nineteenth century when corporations in American society first began to blossom and their potential to do harm first became significant'.[54] As a result of that awareness which became much more pronounced during the industrial revolution,[55] the prosecutors could not but apply the existing legal framework to prosecute corporations for crimes.[56] Since then, some other countries have adopted the concept of CCL in to their criminal justice systems.[57] However, the problem with CCL is that it fails to receive unanimous reception from all countries. To date, some countries still refuse to adopt it into their national laws.[58] While those that adopt it are not unanimous in the way it was adopted and applied.[59] Yet, it remains an essential mechanism of the world legal system to hold corporations liable for wrongdoings.[60]

[51] See for example, Kendra Magraw 'Universally Liable? Corporate-Complicity Liability under the Principle of Universal Jurisdiction' (2009) 18 *MJIL* 458–497 at 458–459, noting that countries have made used of universal jurisdiction to make individuals criminally liable but they have not made any corporation criminally liable.
[52] Edward B Diskant 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure' (2008) 118 *TYLJ* 126–176 at 129; WB Fisse 'The Social Policy of Corporate Criminal Responsibility' (1978) 6 *ALR* 361–412 at 364. He noted that the linking of theory of corporate personality to corporate criminal liability is unhelpful.
[53] See M Catargiu 'The Origins of Criminal Liability of Legal Persons – A Comparative Perspective' (2013) 3 *AIJS* 26–30 at 28.
[54] Diskant op cit note 52 at 135.
[55] Sara Sun Beale 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability' 1–32 at 2 a paper presented at the German Conference on Comparative Law, Marburg Germany in September 2013, available at *http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5910&context=faculty_scholarship*, accessed on 5 July 2015); Diskant op cit note 52 at 135.
[56] Diskant op cit note 52 at 136.
[57] For example, countries like Canada, UK, Netherlands, Denmark, Finland, and Switzerland have done so. See Sara Sun Beale & Adam G Safwat 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *BCLR* 89–163 at 106; Catargiu; op cit note 53 at 29.
[58] For example Germany and Italy, see Catargiu op cit note 53 at 27.
[59] See Cristina De Maglie 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 *WUGSLR* 547–566 at 548 noting 'we may expect the laws regulating corporations to converge. But a surprisingly wide gap persists among developed nations in the mechanisms available to combat corporate criminality'; Beale & Safwat op cit note 57 at 106.
[60] See Gregory M Gilchrist 'The Expressive Cost of Corporate Immunity' (2012) 64 *HLJ* 1–57 at 56.

3.3.1 CCL in the major and specific legislation

Generally states can be grouped into two when it comes to assessment of CCL in domestic law: states that recognise it; and states that do not.[61] Some states in Africa do not impose criminal liability on corporations but on the individuals who commit the corporate crimes while acting in the course of their employment with corporate bodies.[62] This sub-section only deals with the first category of states.

The first category can further be sub-divided into three groups.[63] The first comprises states that treat artificial and natural persons as the same when it comes to criminal liability. Such states attempt to make corporations criminally liable for every offense in their penal code to which a natural person is subjected. The exception to this are those that are difficult to criminalise, for example 'incest or Bigamy'.[64] In Africa, only South Africa has been included by scholars in this category.[65] A second sub-group includes states that 'recognise corporate criminal responsibility but then create a list of exceptions'.[66] Even though no African state has been included in this category, there is no reason why Ethiopia should not be included for the reasons to be discussed later in this sub-section. The third group is states that extend criminal liability to corporations 'only where explicitly provided for in the relevant sections of the penal code or specific statute'.[67] The majority of African countries are to be found within this category. However, it is important to know that there is no strict categorisation. The yardstick may change and states may move from one category to another depending on the approach adopted for the specific offence in question.[68] This sub-section examines the domestic regulations for corporate criminal liability in some African countries

[61] Jennifer Zerk 'Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies A report prepared for the Office of the UN High Commissioner for Human Rights', available at *http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf*, accessed on 14 May 2015.

[62] Almost all countries in Middle East and Northern Africa have this type of legal system, see MENA-OECD Investment Programme 'Business ethics and anti- bribery policies in selected Middle-East and North African countries' paras 123–125, available at *http://www.oecd.org/mena/investment/36086689.pdf*, accessed on 20 April 2015; Lex Mundi *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008) 91–97; Timur Kuran 'Why the Middle East Is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation' (2004) 18 *TJEP* 71–90 at 73 noting that Islamic law recognises the rights of 'only flesh-and-blood individuals' and not that of corporate entity.

[63] Zerk op cit note 61 at 32.

[64] Ibid.

[65] Other countries of the world that have also been included are Canada, Australia, Netherlands, UK, US, Norway, see Zerk op cit note 61 at 32; Allens Arthur Robinson '"Corporate Culture" as a Basis for the Criminal Liability of Corporations'. A report prepared for the UN SSRG on Human Rights and Business (February 2008), available at *http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf*, accessed on 16 May 2015.

[66] France belongs to this category, see Zerk op cit note 61 at 32.

[67] Ibid.

[68] Ibid.

by considering some African countries in the first, second and third categories. More specifically, South Africa will be considered in the first, Ethiopia in the second, Nigeria, Kenya, Malawi and DRC in the third.

3.3.2 South Africa: CCL in the Criminal Code

As far back as 1917, South Africa has recognised the concept of CCL through its criminal law.[69] In 1977, section 384 of the Criminal Procedure and Evidence Act of 1917 was replaced and currently the issue of CCL is being governed by section 332 of the Criminal Procedure Act 51 of 1977.[70] Although, section 332(1) is tersely worded and couched in general form, it covers as many crimes as possible.[71] What section 332(1) does is remove 'the obstacle to imposing criminal liability upon an artificial person that would not be found guilty of a crime requiring fault since it has no mind'.[72] It provides that in order to impose criminal liability on a corporate body for any offence under statutory or common law the fault of the director or servant of such corporation would be attributed to the corporation.[73]

This model of fault attribution for corporate crime is known as the derivative theory.[74] What this means is that the *mens rea* of a human being is attributed to that of a corporate entity. Consequently, a company is found guilty for crimes committed by natural persons.[75] Therefore, '*mens rea* or blameworthiness is an initial element that must be proved, before the accused can be blamed.[76] The advantage of this model over criminal liability of corporations

[69] See section 384 of the Criminal Procedure and Evidence Act 1917 31 of 1917.
[70] CR Snyman *Criminal Law* (2014) 246.
[71] Section 20(1) is wide in the sense that it provides that companies shall be liable for every offence codified by the criminal code to the extent possible. As for s 332(1), *in Ex parte Minister van Justisie: In Re S v Suid Afrikaanse Uitsaaikorporasie* 1992 4 SA 804 (A) 804; 1992 2 SACR 617 (A), it has been interpreted to be broad and held to include negligent acts or omissions.
[72] Jonathan Burchell *Principles of Criminal Law* (2014) 454.
[73] See section 332(1) of Criminal Procedure Act 51 of 1977.
[74] Louise Jordaan 'New Perspectives on the Criminal Liability of Corporate Bodies' *Acta Juridica: Criminal Justice in a New Society: Essays in Honour of Solly Leeman* (2003) 48–71; Burchell op cit note 71 at 451. For study on other theories see Aurora Voiculescu 'Changing Paradigms of Corporate Criminal Responsibility: Lessons for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu & Tom Campbell (eds) *The New Corporate Accountability Corporate Social Responsibility and the law* (2007) 399 at 403–409; Vicky-Louise Borg-Jorgensen & Kathleen Van Der Linde 'Corporate Criminal Liability in South Africa: Time for Change? (Part 2)' (2011) 3 *TSAR* 452–465 at 692–694.
[75] Dorothy Farisani 'Corporate Homicide: What Can South Africa Learn From Recent Developments in English Law?' (2009) 42 *CILSA* 211–226 at 215; on the issue of constitutionality of section 332(1), see M Kidd 'Corporate Liability for Environmental Offences' (2003) 18(1) *SAPL* 1–16 at 4 noting that 'Clearly if it related to individuals it would not be, since it imputes liability to the corporation without giving the latter any opportunity of raising a defence. This would probably be an infringement of the right to freedom in the Constitution if applied to an individual'.
[76] CR Snyman *Criminal Law* (2008) 149. He noted that 'the question of culpability arises only once it has been established that there was an unlawful conduct'.

under the vicarious liability doctrine of common law is that 'a corporate body may incur criminal liability even where an employee was not acting in the course of his employment'.[77]

3.3.3 Ethiopia: A modest approach to CCL

Ethiopia adopts a modest approach to CCL. Article 34 provides for criminal liability of a corporate body only 'where it is expressly provided by law'.[78] The impression is obvious that it is not the intention of the drafters of the Code to make corporations criminally liable for all offences that are predominantly made for human beings. Thus from the onset, a distinction is made between offences that an artificial and natural person can be charged with.

In addition, the phrase as 'provided by law' has two connotations. It shows that the criminal liability of corporate bodies will be determined by specific offences that the Criminal Code deems just to apply to them.[79] Furthermore, it could also be used to justify the extension of criminal liability to corporations through subsequent law in future without amending the Criminal Code.[80] The overall advantage of all this is that corporations 'cannot be held criminally liable for something that is not expressly stated by law' and consequently frivolous litigations against corporations are nipped in the bud.[81]

Like South Africa, the Criminal Code adopts a derivative theory of attribution of fault to the corporation.[82] It provides that a corporation is liable for crimes once any 'of its officials or employees' has committed a crime.[83] Indeed, it is noteworthy that the company can be responsible for wrongs caused by any officer of the company. This is possible because the Code dispenses with hierarchy or status of the accused 'when it comes to criminal culpability

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[77] Justin Kalima 'Corporate Criminal Liability in Environmental Protection: Options for Malawi' (2009) *SAMLJ* 344 at 360.

[78] Article 34(1) of the Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No.414/2004 It provides 'A juridical person other than the administrative bodies of the State is punishable as a principal criminal, an instigator or an accomplice where it is expressly provided by taw. A juridical person shall be deemed to have committed a crime and punished as such where one of its officials or employees commits a crime as a principal criminal, an instigator or an accomplice in connection with the activity of the juridical person with the intent of promoting its interest by an unlawful means or by violating its legal duty or by unduly using the juridical person as a means'.

[79] For example the Code in Articles 525–529, 530, 599, 608, 645, 716, 777 & 90 provide that some offences are applicable to them.

[80] This will justify such law like Customs Proclamation 622/2009 in Ethiopia where Article 92 extends corporate criminal liability to corporations, available at *http://www.wipo.int/edocs/lexdocs/laws/en/et/et016en.pdf*, accessed on 18 May 2015.

[81] Abebe Asamere 'Corporate Criminal Liability: An emerging Concern for Businesses in Ethiopia' *EBR*, available at *http://www.ethiopianbusinessreview.net/index.php/commentary/item/90-corporate-criminal-liability-an-emerging-concern-for-businesses-in-ethiopia*, accessed on 18 May 2015.

[82] On the meaning of derivative theory of CCL, see Gabriel Hallevy *The Matrix of Derivative Criminal Liability* (2012) 63–64.

[83] Article 34(1).

or responsibility'.[84] However, for the company to be liable, the liability of the officers or employees of companies must be proved first.[85]

In such a scenario, it is right to categorise this kind of model as vicarious liability. While that categorisation may not be disputed, it is important to note that the liability of corporations under the Code transcends the liability of companies under the common law of vicarious liability because corporations can be liable, even if the accused does not act in the course of his employer's work. Thus the liability of the company arises under the Code in three circumstances that are broader than the common law of vicarious liability: one, if the accused intends to promote the interest of the company through illegal acts;[86] two, if he breaches the company's legal obligations;[87] And third, if he uses the company as a cloak to commit crimes.[88]

In all those circumstances, the company will be liable. Finally, it is also worth noting that the Code provides for severe sanctions for breach of environmental crimes and other applicable crimes against the corporations in the Code.[89]

3.3.4 Other African states: CCL through specific legislation

Another means by which African countries adopt the concept of CCL is through some specific legislation and the common law of vicarious liability. Nigeria, Malawi, Kenya and DRC are good examples of this. In Malawi and Nigeria, the governments enacted some laws on the environment[90] and other sectors of the economy[91] which render corporations criminally liable for breach of those statutory laws. However, in spite of these statutory

[84] Ibid; Rose Mwebaza, Philip Njuguna Mwanika & Wondowossen Sintayehu Wonndemagegnehu 'Situation Report Environmental crimes in Ethiopia' (July 2009) at 8, available at *http://www.issafrica.org/uploads/EnvironCrimesEthioJul08.pdf*, accessed on 18 May 2015.
[85] It is the same with South African approach to CCL.
[86] Article 34(1).
[87] Ibid.
[88] Ibid.
[89] For environmental crimes see articles 514–524 of the Code; Mwebaza et al op cit note 83 at 8; Mekete Bekele Tekle 'The Scope of Citizens' Environmental Rights Protection Under Ethiopian Law' in Michael Faure & Willemien du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011) 113 at 129.
[90] For the environmental sector of business in Nigeria, section 7 of the Harmful Waste (Special Criminal Provisions) Act Cap H1 LFN 2004; section 6 of Oil in Navigable Waters Act Cap 06 LFN 2004; section 3(1) and 4 of the Associated Gas Re-injection Act Cap 08 LFN 2004; section 27(2) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007; section 62 of Environmental Impact Assessment Act Cap E 12 LFN 2004; in Malawi see sections 75 of the Environment Management Act (EMA) 23 of 1996.
[91] For other sectors in Nigeria, see for examples trafficking in human persons, section 28(2) of Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003, sections 65–67 of Companies and Allied Matters Act of 2004, Laws of the Federation of Nigeria; in Malawi, see for example section 35 of the Money Laundering Proceeds of Serious Crime and Terrorist Finance Act of 2006, and section 141 of the Customs and Excise Act, Cap 42:01 of the Laws of Malawi.

enactments, it has been argued that the status of CCL is still the common law of vicarious criminal liability of the company in line with the English jurisprudence.[92] On the other hand, the courts may lift the veil in order to make the individuals behind the corporate crimes liable.[93] Consequently, it is obvious that the concept of the CCL under the common law still prevails.

Admittedly, oscillation exists between the two determinant factors, which are personal liability of officers of the company and that of the vicarious liability. Yet, it is obvious that most often the balance of the scale tilts towards the personal liability model of corporate officers in most countries in Africa. In *Adeyemo Abiodun and Others v F.R.N*[94] the Court of Appeal in Nigeria affirmed the jail sentence of two employees for seven years by the trial court, but set aside part of the judgment that the company be wound up and its assets forfeited to the federal government. Similarly, in *Federal Republic of Nigeria v Dr. Nwochie Odogwu and Capital Merchant Bank No. 1*,[95] the bank and its managing director were charged with floating a sham company and defrauded many of the bank's depositors. The Failed Bank Tribunal convicted the managing director, while the bank was discharged and acquitted.

The same principle applies in Malawi. In Nyasaland *Transport Company Limited v R*[96] the transport company, which was an appellant in the case, was charged with using a motor vehicle that was likely to cause a road accident and harm to other persons, in breach of Regulation 65(1) of the Motor Traffic Regulations. The court held that the company was not

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[92] With respect to Malawi see Kalima op cit note 77 at 352; for Nigeria see David Folorunsho Tom 'Corporate Crimes and Liability under Nigerian Laws' noting that the 'The trend in Nigerian law which is a reflection of the development in England is towards holding an employer (company) criminally liable for the acts of its employees', available at *http://www.nigerianlawguru.com/articles/company%20law/CORPORATE%20CRIMES%20AND%20LIABILITY%20UNDER%20NIGERIAN%20LAWS.pdf*, accessed on 19 May 2015.

[93] Most of the time, the shareholders have used the corporate personality status of the company to commit frauds. Parent companies have also used their subsidiaries (who are also companies) to violate human rights of many. Consequently, the doctrine of piercing the veil was developed by the courts and later supported in many jurisdictions by statutory law to check the abuse of corporate entity status by shareholders by lifting the veil to identify who is behind the crimes, wrongs or frauds committed by the company and sanction such shareholders accordingly. For study on the concept of lifting the veil, see Thomas K Cheng 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines' (2011) 34 *BCICLR* 329–412 at 357–361; Chao Xi 'Piercing the Corporate Veil in China: How Did We Get There?'(2011) 5 *JBL* 413–430 at 413–414.

[94] Suit No: CA/L/550A/13; Ade Adesomoju 'Appeal court affirms conviction of My Pikin producers' *The Punch* (I January 2014). The company and its officers were charged to court for manufacturing and selling poisonous and adulterated drugs leading to the deaths of 80 children contrary to section 1(18)(a)(ii) of the Miscellaneous Offences Act M17 Laws of the Federation of Nigeria, 2004 and punishable under sections 1(8)(a)(ii); 1(18)(b)(ii) and 3 of the same Act.

[95] (1997) 1 F.B.T.L.R. 179; note that on appeal, the sentence was varied see *F.R.N. v. Dr. Odogwu No. 2* (1997) 1 F.B.T.L.R. 236.

[96] 1961-63 ALR Mal 328 decided on 08 November 1962 by Cram J (High Court of Malawi).

liable because it was not a crime 'to fail to cure a defect in a motor omnibus'.[97] However, in another Malawi case of *Republic v Martins and Noronha Limited*[98] this time with regard to a strict liability offence, the court held that the company was vicariously liable for the failure of its quarry foreman to obey Quarry Regulations which led to the 'fall of earth and rock at the company's stone quarry, killing seven workers'.

The position is the same in Kenya, where the court's jurisprudence is solidified by the Penal Code's strong position in favour of personal liability of officers.[99] While section 23 of the Penal Code recognises that it is possible for a company to 'commit an offence in its own right', it does not envisage a criminal action against the company *suo motu*.[100] According to George Otieno, the statute requires a joint prosecution of the company and the accused who committed the crime.[101] In this way, it will further the modest principle of CCL in the Penal Code that the liability of the company for crimes is the liability of the individual. The same principle holds sway in the DRC where individual liability of officers or directors for crimes is the rule, rather than exception.[102]

As the ICJ observes, the Criminal Code in the DRC 'does not establish criminal liability for legal persons'.[103] In contrast however, like the example of Kenya, it is possible to hold the company and the directors jointly and severally liable for financial offences like fraud or embezzlement.[104] The question is why is there preference for individual liability for crimes rather than CCL in Africa? Three reasons can be traced: one, the slow pace of the development of CCL in spite of the statutory provisions in its support; two, the difficulty of fault attribution to corporations especially in strict liability offences; and third, the existence of statutory provisions in support of the personal liability model.

[97] This case was described as the leading case in Malawi on CCL, for a discussion of the case see Kalima op cit note 76 at 350–352.
[98] 1971-72 ALR Mal 79 per Weston J.
[99] See section 23 of the Laws of Kenya the Penal Code Chapter 63.
[100] George O Otieno 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008-2010) 11 KLR 1 at 27.
[101] Ibid.
[102] ICJ op cit note 37 at 9.
[103] Ibid.
[104] Ibid.

3.4 Protection of human rights under the domestic law of Africa

This section attempts to examine the adequacy of domestic law of labour, property, corporate and environmental law in protecting human rights in Africa. It is going to be strictly narrowed down to the relevant issue of corporate human rights responsibility within the domestic law and not engage in a general study of the whole gamut of domestic law in its entirety. Thus the section attempts to interrogate the question whether domestic law of Africa protects human rights obligations of its citizens from being violated by corporations through labour, property, corporate and environmental law.

As noted earlier in this study, it is not possible to examine the domestic law of all countries. Therefore, domestic law of some countries where violation of human rights by corporations have occurred in the areas of labour, property, corporate and environmental disputes shall be examined. This would capture the domestic law of South Africa, Nigeria, Kenya and Eritrea.

It is important to justify the choice of these four countries. On 16 August 2012, a strike embarked upon by mineworkers in South Africa led in to the police killing 34 workers.[105] Therefore South Africa is included for that reason. In Nigeria, an incessant oil spillage by Shell, a MNC, makes the country an important case study.[106] With regard to Kenya, the eviction of Endorois for business purposes (the creation of a 'nature reserve') even though it occurred in the 1970s makes the country indispensable in any serious study on human rights violations of property in Africa.[107] Finally, Eritrea[108] is an example of how states can violate human rights with the complicity of corporations by forcing their citizens to undertake forced labour.

[105] See David Smith & Terry Macalister 'South African police shoot dead striking miners' *The Guardian* (17 August 2012).
[106] On the story of the incessant spills, see Audrey Gaughran 'Nigeria: Hundreds of oil spills continue to blight Niger Delta' *Amnesty International News* (19 March 2015).
[107] On the Endorois story of Kenya see Korir Sing'Oei 'Engaging the Leviathan: National Development, Corporate Globalisation and the Endorois' Quest to Recover their Herding Grounds' (2011) 18 *IJMGR* 515–540.
[108] See Michael Kourabas 'Canadian Mining Companies and Corporate Accountability' (5 January 2015), available at *http://www.triplepundit.com/2015/01/canadian-mining-companies-corporate-accountability*, accessed on 20 May 2015; Human Rights Watch 'Hear no Evil Forced Labor and Corporate Responsibility in Eritrea's Mining Sector' (January 2013), available at *http://www.hrw.org/sites/default/files/reports/eritrea01134Upload.pdf*, accessed on 20 May 2015.

3.4.1 South Africa

It must be stated at the outset that the South African Constitution protects the rights of citizens to live in a harmless and healthy environment.[109] It also protects their right of ownership to property without any deprivation[110] and provides labour rights generally.[111] In addition, some other laws have been enacted to solidify the protection of these rights in the mining[112] and property sectors[113] and in the workplace[114] generally, to mention but a few. It is crucial, therefore for corporations to comply with the constitutional provisions. However, loopholes exist for corporate human rights violations within the constitutional provisions itself. Section 36 provides general limitations for all the rights protected by the Bill of Rights. In addition, for the right to development, sub-section 2 provides for circumstances in which property may be lawfully expropriated.[115]

It has been argued that sub-section 2 has been the tool of complicity in the hands of 'the state and the mining companies' to violate the right to property of commercial farmers and rural communities'.[116] However, the courts attempt to protect this wherever they can.[117]

In spite of this approach which protects the right to property, the issue of dispossession of land for investment in favour of companies has been rampant with meagre or no compensation at all to the victims.

Admittedly, the South African Constitution expects all natural and artificial persons to comply with the human rights protected by the Bills of Rights,[118] yet it is important to do this because the UNGP makes it mandatory for states to 'set out clearly … that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout

[109] See sections 24 & 27.
[110] Section 25.
[111] Section 23.
[112] They are National Environmental Management Act 107 of 1998; National Water Act 36 of 1998; Promotion of Access to Information Act 2 of 2000; Mineral and Petroleum Resources Development Act 28 of 2002.
[113] See Restitution of Land Rights Act 22 of 1994 (effective from 2 December 1994).
[114] They are the Employment Equity Act 55 of 1998; Occupational Health and Safety Act 85 of 1993; Mine Health and Safety Act 29 1996 amended in 2008; Compensation for Occupational Injuries and Diseases 130 of 1993 as amended by 61 of 1997; Occupational Diseases in Mines and Works Act 78 of 1973 as amended till 83 of 1979; Maritime Occupational Safety Regulations of 1994; Labour Relations Act 66 of 1995.
[115] The 1996 South African Constitution.
[116] See SD Kamga & OO Ajoku 'Reflections on how to Address the Violations of Human Rights by Extractive Industries in Africa: A Comparative Analysis of Nigeria and South Africa' (2014) 17 *PER / PELJ* 453 at 477–478.
[117] For example, in *Alexkor Ltd and the South African Government v the Richtersveld Community* 2004 5 SA 460 (CC), the court held that the purpose of the Restitution Act 'is to provide redress to those individuals and communities who were dispossessed of their land rights by the Government'. Consequently, it ordered restoration of the land in dispute with its mineral resources back to the Richtersveld community.
[118] See sections 8(2) & (4) of the Constitution op cit note 115.

their operations'.[119] According to Ruggie corporate law is the most suitable law to address this issue because it 'directly shapes what companies do and how they do it'.[120]

This leads to the question of how South African company law addresses this issue. It is important to consider the provisions of the Companies Act of South Africa. Sections 15(1) and 7(a)[121] are important for this analysis. Section 15(1)[122] states that the Memorandum of Incorporation of any company must be consistent with the Companies Act of 2008 and any rule that is inconsistent to it is void to the extent of its inconsistency. Section 7(a) of the Act[123] is complementary to section 15(1)[124] and provides that one of the purposes of the Companies Act is to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'.

Reading the two provisions, it is arguable to suggest that companies are obliged to consider corporate human rights violations in their day-to-day management of the affairs of the company. Many scholars have taken this approach.[125] If the said approach is correct, another assumption is likely to follow and that is; in fulfilling their fiduciary duties in section 76(3)[126] directors must consider human rights responsibilities as one of the 'best interests' of the company. While, this possibility is not impossible, lack of clarity in the statutory law calls for caution against its wholesome adoption. As one of the supporters of the approach warns, 'The Companies Act has not yet been tested in practice, nor have its specific details yet come under the gaze of judicial interpretation in a concerted fashion'.[127]

Another reason for caution against a sweeping assumption that corporations should be assumed to have human rights responsibilities comes from the emerging facts from the practice of the existing law in the mining business. Responding to the allegations of human rights violations that occurred while resettling the displaced communities from its Mogalakwena mine, Anglo American Platinum's company in South Africa noted that it had

[119] UNGP op cit note 1 para 2.
[120] John Ruggie 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework'. Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises (22 April 2009) Human Rights Council para 24, available at *http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf*, accessed on 20 May 2015.
[121] See the Companies Act 71 of 2008 which was enacted in April 2009 and came into force on 1April 2011.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Judith Katzew 'Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of The Companies Act 71 of 2008' (2011) 128 *SALJ* 686 at 694; Minal Ramnath & Vincent O Nmehielle 'Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration' (2013) 2 *SJ* 98 at 111–113;
[126] The Companies Act, supra note 121.
[127] Katzew op cit note 125 at 694.

complied with all the laws relating to mining in South Africa.[128] Indeed, the South African Human Rights Commission (SHRC) in its report admits the inadequacy of the existing law and noted that companies must 'move beyond compliance based approaches'[129] if corporate human rights violations are to be a thing of the past in resettlement cases.

Admittedly, the Mineral and Petroleum Resources Development Act[130] (MPRDA) treats the issue of prior consent of the affected people and communities perfunctorily since it is possible for the company to get the mining rights without consultation.[131] However, it is submitted that in spite of the defects in the existing regulatory framework, the loopholes in the legal system could have been blocked if the Companies Act codified the human rights obligations of every company to its stakeholders. The proposal to this effect was made during the consultation process for the reform of the Companies Act of 1973 but was not adopted.[132] This results in perfunctory protection to all other stakeholders in the company apart from the shareholders.

As Linda Muswaka argues, although the 2008 Companies Act purports to ensure the protection of all other stakeholders, instead of only shareholders as was the case in the 1973 Act, it fails to effectively protect such rights.[133] It shifts its protection 'almost entirely to forces outside of company law'.[134] The requirement for some companies to establish a social and ethics committee[135] is not capable to make significant impacts on human rights of

[128] Darren Parker 'Platinum-miner defends its position on human rights abuse allegations' *Mining Weekly* (5 December 2008), available at http://www.miningweekly.com/article/platinumminer-defends-its-position-on-human-rights-abuse-allegations-2008-12-05, accessed on 23 May 2015.
[129] SHRC 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo', available at *http://www.sahrc.org.za/home/21/files/Reports/Anglo%20Report%20Final%202008_Chp%201%20to%203.pdf*, accessed on 22 May 2015.
[130] See Mineral and Petroleum Resources Development Act 28 of 2002 as amended by 49 of 2008.
[131] MPRDA is the principal law dealing with displacement by the corporations in the extractive industry. Sections 5, 10 & 22 of the Act deals with consultation. Note however that in *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) court held that the need to secure environmental authorisations is not compromised with the issuance of a mining right.
[132] See the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) in its parliamentary submission 'Making Corporations Accountable for Human Rights: The implications of the constitution for corporate law reform' (7 August 2008). It proposes that company law should require that human rights obligations of the companies should be placed in the memorandum of association of companies and companies must work to realise them and also that part of the fiduciary duties of the company directors is to ensure protection of human right.
[133] Linda Muswaka 'A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 1)' (2014) 5 *MJSS* 61 at 63. Noting that section 76(3)(b) still 'creates the impression that shareholder primacy is still preferred' and that the Act does not explicitly impose on directors an 'obligation to consider the interests of other stakeholders'.
[134] Ibid.
[135] See section 72(4) of the Companies Act op cit note 120; section 43 (1) of the Companies Regulations, 2011; the Regulation 26(2) of the Companies Regulations GN R351 in GG 34239 of 26 April 2011; for a discussion of the function of the committee, see HJ Kloppers 'Driving Corporate Social Responsibility (CSR) through the Companies Act: An Overview of the Role of the Social and Ethics Committee' (2013)16 *PER / PELJ* 166–199.

stakeholders because the framework adopted for the attainment of its objectives is corporate social responsibility.[136] In addition, the King reports attempt to fill this gap by enumerating duties of corporations to include all stakeholders but suffer the same setback due to their voluntary nature and lack of enforcement mechanisms.[137] Indeed, South Africa must reform its corporate law if the objectives of the constitution are to be fully realised.[138]

3.4.2 Nigeria

Apart from the Nigerian Constitution,[139] there are other specific regulations in Nigeria that purport to protect human rights in the corporate sector, particularly in the most volatile areas of environment,[140] workplace[141] and property.[142] However, apart from some weaknesses in some of the regulations,[143] the ability of the federal executive to enforce the good parts of the existing laws[144] have been questioned by scholars[145] and judiciaries within[146] and outside the country.[147]

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[136] For criticism of the social and ethics committee, see M Gwanyanya 'The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities' (2015) 18 *PER / PELJ* 3102 at 3114.

[137] On how King reports include 'triple bottom-line' and its criticism, see David Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 125 *SALJ* 754 at 772–773; GJ (Deon) Rossouw 'The Philosophical Premises of the Second King Report on Corporate Governance' (2005) 70 *Koers* 745–748 with criticism at 743–744.

[138] This has been the view of many scholars, for example see Bilchitz ibid at 789; Muswaka op cit note 132 at 400.

[139] See 1999 Constitution op cit note 20 on the rights protected by the Constitution.

[140] For some of these regulations see supra note 90.

[141] See for examples, Labour Act, CAP L1, LFN 2004; the National Minimum Wage Act, CAP. N61 LFN 2004 as amended in 2011; Pension Reform Act 2014; Employees Compensation Act 2010; Trade Union Act Cap. T14 LFN 2004 as amended in 2005; the Trade Disputes Act, CAP T8, LFN 2004; the Factories Act, CAP F1, LFN 2004.

[142] See for examples, Employees Housing Scheme (Special Provisions) Act, CAP E8, LFN 2004; National Housing Fund Act, CAP. N45, LFN, 2004; the Land Use Act, CAP L5 LFN 2004.

[143] For weaknesses on Environmental Laws, see Martin-Joe Ezeudu 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court' (2011) 11 *AHRLJ* 23 at 36–39; Environmental Rights Action/Friends of the Earth Nigeria & Oilwatch Nigeria 'Making Policies Work: Between Environmental Policies and Environmental Protection' at 10 (November 2012), available at *http://www.eraction.org/publications/makingpolicieswork.pdf*, accessed on 25 May 2015; Hakeem Ijaiya & OT Joseph 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 *BLR* 306–321; for weaknesses on property laws, see Rhuks Temitope Ako & Olubayo Oluduro 'Identifying Beneficiaries of the UN Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region' (2014) 22 *AJICL* 369 at 393–396; A Carl Levan & Josiah Olubowale '"I am here until Development Comes": Displacement, Demolitions, and Property Rights in Urbanizing Nigeria' (2014) 113 *AA* 387 at 397–402; on the work place see Kenneth Amaeshi, Ifedapo Adeleye & Olufemi Amao 'Corporate Social Responsibility and Employee relations in Africa: Evidence from the Nigerian Banking Sector' in Sonny Nwankwo & Kevin Ibeh *The Routledge Companion to Business in Africa* (2015) 473 at 480; Funmi Adewumi & Adebimpe Adenugba *The State of Workers Rights in Nigeria: An Examination of the Banking, Oil and Gas and Telecommunication sectors* (2010) 62–66.

[144] See section 5 and exclusive legislative list, Part I of the Second Schedule to the 1999 Constitution; BO Nwabueze *A Constitutional History of Nigeria* (2008) 142.

[145] Ezeudu op cit note 142 at 38; Ajuzie C Osondu *Our Common Environment: Understanding the Environment, Law and Policy* (2012) 309; Adamu Kyuka *Usman Environmental Protection Law and Practice* (2012) 170–172; Brown E Umukoro 'Gas Flaring, Environmental Corporate Responsibility and the Right to a Healthy

The question whether corporations have human rights obligations and could be brought to court for violations of such rights under the Fundamental Rights (Enforcement Procedure) Rules[148] was initially rebutted in Nigeria. Karibi-Whyte JCA (as he then was) in the case of *Federal Minister of Internal Affairs v Alhaji Shugaba Darman*,[149] held that the entire human rights provision in Chapter 4 'was designed to protect the individual against the oppressive exercise of government authority and majority power. Hence the rights conferred can be enforced and avail essentially, if not entirely against governments acting through their agents'. This judgment was followed in *Ategie v Mck Nigeria Limited*[150] where the High Court held that it would not allow an application to be brought under the Fundamental Rights (Enforcement Procedure) Rules against a company, irrespective of evidence of infringement of human rights alleged in the action.

However, in view of the Convention on the Elimination of Racial Discrimination, which was approved by the UN General Assembly in 1965,[151] the Nigerian judiciary could not but follow the global trend. In *Uzoukwu v Ezeonu II*,[152] the court held that a person's right to dignity as exemplified in the prohibition of torture and inhuman and degrading treatment is a right that could be enforced against the government and its agents, as well as private persons. Similarly, in *Peterside v IMB*,[153] the court debunked the view that only government and its agents and not corporations could be brought to account for human rights violations. Recently, the Supreme Court in *Denton-West, Walson Jack and 2 Others*,[154] held that every person, be it artificial or natural, is subject to be questioned for its violation of human rights provisions protected by the constitution. So many cases have followed the new trend.

Consequently, all the fundamental human rights enunciated in the fourth chapter of the constitution are to be respected by natural or artificial persons and a breach of any of such

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Environment: The Case of the Niger Delta' in Festus Emiri & Gowon Deinduomo (eds) *Law and Petroleum Industry in Nigeria Current Challenges* (2009) 49 at 62–63.

[146] For example in Nigeria see *Gbemre and Others v Shell Petroleum Development Company Ltd and Others* at Federal High Court of Nigeria, Benin City, 14 November 2005, Suit No: FHC/B/CS//53/05.The case is to be discussed later in this chapter.

[147] *SERAC v Nigeria* 2001 AHRLR 60 (ACHPR), for discussion of this case, see Dejo Olowu *An Integrative Rights-based Approach to Human Development in Africa* (2009) 152–156; *SERAP v Federal Republic of Nigeria* Judgment N° ECW/CCJ/JUD/18/12.

[148] Fundamental Rights (Enforcement Procedure) Rules are the means by which rights protected by the Constitution can be enforced. See Fundamental Rights (Enforcement Procedure) Rules 2009 Nigeria.

[149] (1982) 3 NCLR 915.

[150] Suit No. M/454/92.

[151] Louis B Sohn 'The New International Law: Protection of the Rights of Individuals rather than States' (1982) 32 *AULR* 32 (1982) 1–64 at 25.

[152] (1991) 6 NWLR (Pt 200) 708.

[153] (1993) 2 NWLR (Pt 278) 712 infra 377.

[154] (2013) 10 SCM 73.

rights by corporate bodies, institutions or any person should be dealt with according to the law. Thus it is possible to say that fundamental human rights in Nigeria 'have both vertical and horizontal application and hence bind the state, individuals and corporations'.[155]

Another argument that can be explored in favour of corporate human rights obligations is that if corporations enjoy certain rights in the constitution, then they should also bear the responsibilities to respect the rights of others. In Nigeria, a company can enjoy some of the rights, if not all, that are protected by the constitution. Even, under the military regime, the courts had protected the right of a corporation to freedom of expression. In the case of the *People Star Press Limited v Brigadier R.A. Adebayo and Another,*[156] the High Court held that the edict made by the military government of the then Western Region, against the plaintiff company, prohibiting publication, distribution and sale of its two-weekly newspapers was a violation of its fundamental human rights to 'freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference'.[157] Also in *Concord Press Nigeria Limited v Attorney General of the Federation and Others,*[158] the federal High Court held that the action of the federal military government in closing business premises of a company violated its fundamental right to freedom of expression. A similar decision was reached in *Punch Nigeria Limited and Another v Attorney General of the Federation and Others*[159] with similar facts. In both cases, the court ordered that their companies' premises be re-opened and damages were also awarded in their favour against the government. In fact, freedom of expression has been extended by the court beyond a right that can only be enjoyed by human beings, to include the right enjoyed by corporate entities like schools, institutions and television stations, among others.[160]

The case of Nigeria demonstrates that the constitution has a spiral effect on corporations to respect human rights. However, the extent of the impact of the constitutional regime on the day-to-day management of the companies in the boardrooms would be minimal if the company law did not impose human rights obligations on them. It is important, as Ruggie argues,[161] to codify corporate human rights obligations in the company law for effective protection of human rights. The company law of Nigeria does not mention human

[155] ICJ *Access to Justice: Human Rights Abuses Involving Corporations – Federal Republic of Nigeria* (2012) 5.
[156] (1971) U.1.L.R. 269.
[157] Section 25 of the Constitution of the Federation, 1963.
[158] (Unreported) Suit No: F1IC/L/CS/608/94, delivered on 18 August 1994.
[159] Suit No: FIIC/LICS/601l94, delivered on 29 July 1994.
[160] See *Okogie* case supra note 25, court held that the abolition of private schools by Lagos state government in Lagos state, constituted a violation of the right to freedom of expression.
[161] See Ruggie op cit note 120.

rights.[162] It only codifies common law duties of directors,[163] which is essentially a catalogue of duties to protect the interests of shareholders.

On the other hand, the Code of Governance goes beyond that narrow approach of the company law to include a general duty to all the stakeholders.[164] Consequently, a company has a wide range of duties and obligations to its shareholders and other stakeholders.[165] Article 2(2) of the Code of Corporate Governance reiterates this fact stating that[166] the main objective of the Board of Directors is to look after and enhance the interests of shareholders and to discharge the company's duties and obligations to the stakeholders. Therefore, the board must observe all duties and obligations to the stakeholders in all laws and ethical standards relating to environmental sustainability[167] and report annually on the effects of their operations on people, planet and profit[168]

Furthermore, directors are required to act in honesty, 'in good faith and in the best interests of the whole company'.[169] The Code also notes that the fiduciary duty of directors is to the 'whole company'. This implies that the duty is not circumscribed to cover shareholders alone. To empower the directors with means of attaining that directive, directors are therefore requested to 'use due care and diligence' in discharging their duties. Muchlinski[170] has argued that due diligence has 'certain important legal implications' and concomitantly may become 'a legally binding duty'.

With regard to Nigeria, this is not a problem, even though, the terms 'due care' and 'diligence' are extended to all stakeholders in a Code that is meant to be voluntary, a deep look at various specific legislations and to treaties ratified and domesticated in Nigeria will

[162] Jake Okechukwu Effoduh 'The Corporate Responsibility to respect Human Rights' in Epiphany (ed) *Corporate Governance and Responsibility* (2014) 100 at 146 noting that all the codes in Nigeria and the law regulating companies in Nigeria does not mention company law.
[163] See sections 244, and 279(3)(4) of the Companies and Allied Matters Act of 2004 Laws of the Federation of Nigeria. Although section 279 provides that the interests of the employees must also be considered and in *Okeowo v Migliore* [1979] 11 SC 133 at 138 the court held that the directors' fiduciary duty goes beyond the interest of the shareholders to include that of the benefits of the company as a whole.
[164] See the Securities and Exchange Commission, the Code of Corporate Governance for public companies in Nigeria 2011.
[165] See Article 37 (interpretation) stakeholders include directors, employees, creditors, host communities, regulatory authorities, customers, distributors and depositors.
[166] See Article 28 of the Securities and Exchange Commission, the Code of Corporate Governance for public companies in Nigeria 2011.
[167] Ibid Article 2.3.
[168] This is known as triple bottom line type of reporting see Andrew Savitz *The Triple Bottom Line* (2014). See also Articles 28(3) & 34 of the Code.
[169] Article 36(2a) of the Code, in order to understand, the contextual meaning of the term 'in the best interest' of the company, the meaning of the company its self must be first understood. In that regard, the Code defines companies in an environmental friendly manner as all corporations irrespective of their types and manner of incorporation whose business operations 'impact significantly on wide-ranging stakeholders'.
[170] Peter Muchlinski 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *BEQ* 145 at 157.

show that directors owe human rights duties to all the stakeholders. For example, the liability of directors for negligence and breach of duty in section 282(2) of CAMA, if well utilised, may provide general remedies to all the stakeholders who are adversely affected by the failure of directors to observe due diligence in the course of discharging their managerial responsibility.

It must however be noted that Codes of governance are merely ethical[171] and have been proved to be ineffective in regulating corporations.[172] Thus codification of human rights obligations of corporations is essential for full protection of human rights in the business environments in Nigeria.

3.4.3 Kenya

In Kenya, as stated earlier, there is direct horizontal application of human rights to corporations.[173] Consequently, corporations have human rights obligations to protect and respect human rights of the people as spelt out in Kenyan Constitution[174] and other legislation dealing with the workplace[175] and the environment.[176] However, the requirement to codify human rights obligations of companies in corporate law has not been adhered to.[177] This has led to enduring corporate human rights violations without efficient mechanisms to curtail them.[178] In one of its recommendations to curtail human rights violations by corporations, the Kenya Human Rights Commission (KHRC) urged the state government 'to enact and implement legislation in respect of human rights by developing a policy and law to address violations of human rights by business entities' in line with its obligation under Article 21(4) of the constitution.[179] In another report, KHRC argued that the privatisation of public services

[171] See Article 36(3-4) of the Code.
[172] On inefficacy of Codes, see Natasha Rossell Jaffe & Jordan D Weiss 'The Self-Regulating Corporation: How Corporate Codes can Save Our Children' (2006) 11 *FJCFL* 892 at 915–917.
[173] See sub-section 3.2.1 of this study.
[174] Ibid.
[175] See for example, Employment Act 11 of 2007 Cap. 226; National Social Security Fund Act 45 of 2013; Food, Drugs and Chemical Substances Act, Cap. 254.
[176] See for example, the National Environmental and Management and Co-ordination Act, Cap. 387 (2012) Revision; Physical Planning Act, Cap. 286 of Kenya.
[177] Only voluntary approach is adopted, not a regulatory regime.
[178] Recently the Kenya Television Network (KTN) through its programme called 'Profits for Plague' exposed gross human rights violations by a corporation named Metal Refineries (EPZ) Limited and its conglomerates on the people living in Uhuru Owino in Mombasa. See Kenya Human Rights Commission (KHRC) 'Statement on Human Rights Violations by Metal Refineries (EPZ) Limited and Affiliate Entities on Communities Living in Uhuru Owino' (30 April 2015), available at *http://www.khrc.or.ke/media-centre/press-releases.html*, accessed on 27 May 2015.
[179] Ibid.

'that impact upon the enjoyment of human rights' in Kenya to corporations[180] makes the enactment of such law important.

However, in spite of the overall importance of this enactment, a regulatory mechanism has not been adopted. Presently, the policy and regulatory framework adopted to enforce and implement these constitutional human rights obligations in the business sector is the voluntary model of corporate social responsibility anchored by Capital Markets Authority (CMA), which was established in 2002.[181] The duties of the directors in running the companies are 'to the shareholders and to the company'.[182] Thus, the shareholders primacy model is adopted.[183] Furthermore, directors are not statutorily required to consider the impacts of their operations on other stakeholders.[184] In fact the words human rights are not mentioned at all in the CMA Code of Corporate Governance.[185] On its own, the CMA requires the board of listed companies to identify its stakeholders[186] and give consideration to their interests in its day-to-day management of the company.[187] It notes that the interest of stakeholders must not be discarded even if they cannot be realised.[188] Consequently, the board must manage its interest by adopting a strategy to implement a balance between them 'in order to achieve the long-term objectives of the Company'.[189]

According to the CMA, one of the ways that can be done is by providing a dispute resolution mechanism and to ensure that disputes (between them and the stakeholders) are resolved expeditiously.[190] Another way is for the board to develop and monitor the observance of an ethical code to guide its employees and to ensure that the Codes are

[180] KHRC 'Making the Bill of Rights Operational: Policy, Legal and administrative priorities and considerations' Occasional Report (October 2011), available at *http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf*, accessed on 28 May 2015.
[181] CMA was established as an agency under the Ministry of Finance by legislative Act of Parliament, Cap 485 which was enacted in to law in 1989 and the institution was inaugurated in March1990. See CMA 'About Us', available at *http://www.cma.or.ke/index.php?option=com_content&view=article&id=33&Itemid=114*, accessed on 28 May 2015.
[182] UN 'Mandate of the SRSG on the Issue of Human Rights and Transnational Corporations and other Business Enterprises Kenya' (October 2010) at 17, available at *http://business-humanrights.org/sites/default/files/media/documents/ruggie/corp-law-kenya-oraro-co-for-ruggie-oct-2010.pdf*, accessed on 28 May 2015.
[183] See Jacob K Gakeri 'Enhancing Kenya's Securities Markets through Corporate Governance: Challenges and Opportunities' (2013) 3*I JHSS*94 at 104, noting that apart from adopting such a model, the act does not protects the rights of the minorities.
[184] Ibid.
[185] See Code of Corporate Governance Practices for Public Listed Companies in Kenya issued by the CMA in 2014.
[186] Ibid Article 3.1.
[187] Ibid Article 3.1.4.
[188] Ibid Article 3.1.2.
[189] Ibid Article 3.1.4.
[190] Ibid Article 3.3.

incorporated into the management of the Company.[191] Furthermore, companies must strive to be responsible citizens in the eye of the people.[192] Therefore, consideration must not only be given to the 'financial bottom line' which is its sole profit driven alone, but also to 'the triple bottom line' which concerns the direct and indirect impact of its 'operations on society and the environment'.[193]

There is no doubt that the CMA Codes must have attained its primary objective of advocating 'for the adoption of standards that go beyond the minimum prescribed by legislation'.[194] Yet, there may not be appreciable impacts on human rights and corporate accountability.[195] This is due to two major defects in the Codes. One is on the reception of the Code itself. The Code has been criticised for its wholesome transplantation from the UK without an effort to align it with the local environment.[196] The second deals with the general nature of the Code. They are mere exhortatory. In this sense, Jacob Gakeri argues that 'non-compliance with the Guidelines is largely inconsequential'.[197] What the state needs is a regulatory framework that will gear the corporate sector to respect human rights and promote accountability within the business operations. This cannot be done in developing countries with a voluntary approach to corporate governance but with strong regulatory inputs. As Troy Paredes argues, 'the self-enforcing model is an important step toward more law, but it does not go far enough' to be of help to developing countries 'where law really matters'.[198]

3.4.4 Eritrea

In discussions concerning a national regulatory framework for corporate accountability in Africa, Eritrea is too important to ignore. The reason for this is ironic. It is not because it has any regulatory framework for corporate accountability worth emulating, rather it is because its only regulatory framework for human rights protection is the Eritrean Constitution[199]

[191] Ibid Articles 4.1, 4.2.2 & 4.2.3.
[192] Ibid Article 4.3.
[193] Ibid Article 4.3.2.
[194] Ibid, see introduction to the Code.
[195] It has even been alleged that the establishment of CMA has not brought any significant impacts on corporate governance in Kenya, see Gakeri op cit note 183 at 97.
[196] See Gakeri op cit note 183 at 97; on negative implication of such transplantation, see Troy A Paredes 'A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law isn't the Answer' (2004) 45 *WMLR* 1055 at 1122–1128.
[197] Gakeri op cit note 183 at 97.
[198] Paredes op cit note 196 at 1126–1127.
[199] Constitution is the only visible and fundamental law of the land; however in certain circumstances the constitution is supported with codes, proclamations and legal notices, see UN HRC 'Report of the working group on the universal periodic review Eritrea' at para 8 (A.HRC/26/13) (7 April 2014); International Labour Organization & African Commission on Human & Peoples' Rights Eritrea : constitutional, legislative and

which sadly has not been implemented till date.[200] However, Eritrea is still a force to reckon with because it is a good example of how a state law can unilaterally support human rights violations in the corporate sector. In 1995, Eritrea passed a law compelling every citizen to perform at least 18 months of national service.[201] The objective of the law was to instil patriotism and national fervour into the psyche of its citizens.[202] Ironically, the law has become an instrument of forced labour and gross human rights violations that are being committed daily in the business sector.[203] The conscripts of national service now work indefinitely, even for life.[204] Contrary to the original idea, they work in any business operation, particularly joint ventures where the state has an interest and not purely military service.[205] They are poorly paid and work in servitude against their wishes.[206] In Eritrea, forced labour has become legal in spite of the constitutional safeguards and international conventions against such a crime.[207]

In spite of the concerns of Human Rights Watch in 2013, that the MNCs were likely to be implicated in ensuing human rights violations,[208] a case has been instituted against Nevsun Resources Ltd in Canada for complicity in the human rights violations committed by one of the company's local sub-contractors, Segen Construction at the Bisha mine in Eritrea.[209] This is due to non-availability of credible mechanisms for judicial or administrative redress in Eritrea.[210]

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administrative provisions concerning indigenous peoples' (2009) at 2, available at *http://www.refworld.org/pdfid/4d4aa7942.pdf*, accessed on 30 May 2015.

[200] Simon M Weldehaimanot 'African Law of Coups and the Situation in Eritrea: A Test for the African Union's Commitment to Democracy' (2010) 54 *JAL* 232 at 241–244; Kjetil Tronvoll & Daniel R Mekonnen *The African Garrison State: Human Rights and Political Development in Eritrea* (2014) 39.

[201] See Proclamation on National Service 82/1995 of 1995 (23 October 1995), available at *http://www.refworld.org/docid/3dd8d3af4.html*, accessed on 30 May 2015.

[202] See Gaim Kibreab 'Forced Labour in Eritrea' (2009) 47 *JMAS* 41 at 45.

[203] For the report of gross human rights violation in the business sector see, Human Rights Watch (HRW) 'Eritrea Service for Life State Repression and Indefinite Conscription in Eritrea' (April 2009) at 54–56, available at *http://www.hrw.org/sites/default/files/reports/eritrea0409webwcover_0.pdf*, accessed on 30 May 2015; HRW 'Hear no Evil: Forced Labour and Corporate Responsibility in Eritrea's Mining Sector' (15 January 2013) at 50–68, available at *http://www.hrw.org/reports/2013/01/15/hear-no-evil-0*, accessed on 30 May 2015.

[204] See Kibreab op cit note 202 at 44.

[205] HRW 'Hear no Evil' op cit note 203 at 12–13; UN HRC 'Report of the special rapporteur on the situation of human rights in Eritrea Sheila B. Keetharuth' para 34 (A/HRC/26/45) (13 May 2014).

[206] Ibid UN HRC paras 47–48; See HRW 'World Report 2013' 108–109.

[207] See Article 16 of 1997 Constitution; Proclamation 118/2001; Articles 8, 9 & 18 of the International Covenant on Civil and Political Rights; Article 2 of the ILO Convention 29.

[208] HRW 'Hear no Evil' op cit note 203 at 12.

[209] See Canadian Centre for International Justice (CCIJ) 'Eritreans file lawsuit against Canadian mining company for slave labour and crimes against humanity' (20 November 2014), available at *http://www.ccij.ca/media/news-releases/index.php?DOC_INST=6*, accessed on 30 May 2015.

[210] See Weldehaimanot op cit note 200 at 242 noting that the 'judiciary has been emasculated and finally rendered impotent'.

Finally, it is important to note as earlier reiterated in this research that CSR is not a panacea to the issue of corporate human rights violations in Africa. This assertion is corroborated by the fact that Nevsun claimed to have embarked on CSR to curtail the risks of human rights violations in Eritrea but there was nothing significant to show for it.[211]

3.5 Problems of access to justice

The UNGP is very explicit with regard to the issue of access to justice and the role of the states. It provides that states are expected to 'take appropriate steps to ensure the effectiveness of domestic judicial mechanisms'.[212] For the attainment of that purpose, it adopts a precautionary approach.[213] The approach demands that states should consider 'ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.[214] If that must be done, the first thing is to identify the barriers and then discuss how to address them. Consequently, this section attempts to identify the existing barriers in the national legal systems of African states that could hinder the issue of access to justice in the corporate sector.

[211] HRW 'Hear no Evil' op cit note 203 at19-24; Sharmini Peries 'Is this Voluntary Corporate Social Responsibility Looks Like?', available at *http://hrc-eritrea.org/is-this-what-voluntary-corporate-social-responsibility-looks-like/*, accessed on 30 May 2015.
[212] UNGP op cit note 1, Principle 25 with its commentary.
[213] For the understanding of the Precautionary Principle, see Mary Stevens 'The Precautionary Principle in the International Arena' (2012) *SDLP* 13–15.
[214] See UNGP op cit note 1, Principle 26.

3.5.1 The barriers in brief

Many scholars have noted the difficulty associated with obtaining justice by the victims of corporate human rights violations at national courts, including Africa.[215] In addition, some reports, particularly from the ICJ have examined the regulatory frameworks of some states for corporate accountability and identify the barriers that the victims of corporate human rights violations face in those states.[216]

The first barrier is from the states. A look at the situation in Africa shows that this can come in three ways. The first issue relates to the issue of joint ventures. States in Africa are in joint ventures with MNCs for the purpose of mining in the extractive industries.[217] This has affected the capacity of governments to provide victims of corporate human rights violations in those ventures with access to justice.[218] Indeed, a suit against the corporation is seen by the governments as a suit against the state, hence the reluctance of the states to discourage such suits in order to attract foreign investment and increase their economy.[219] The second issue is that of Bilateral Investment Treaty (BIT) agreements (BIT). In the past, most African states in signing BIT have done so without considering the policy space they should have in regulating the MNCs.[220] The implication of that careless attitude is that it has affected their capacity to regulate most of these companies. To avoid this mistake, the UNGP has warned against signing such agreements in future without regard to policy consideration to protect human rights in their territories.[221]

Unfortunately, the examination of recent BIT agreements signed by some states in Africa has shown that most African states have not yet learnt their lessons in this regard. If

[215] See for example, Erin Foley Smith 'Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses' (2010) 44 *CJLSP* 145 at 191; Tebello Thabane 'Weak extraterritorial remedies: The Achilles heel of Ruggie's "Protect, Respect and Remedy" Framework and Guiding Principles' (2014) 14 *AHRLJ* 43 at 60.

[216] See for example, ICJ op cit notes 37 & 155; ICJ *Access to Justice: Human Rights Abuses Involving Corporations South Africa* (2010) ; Jennifer op cit note 60.

[217] See for example Emeka Duruigbo 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) 26 *UPJIEL* I at 23, 38–39; Evaristus Oshionebo *Regulating Transnational Corporations in Domestic and International Regimes: An African case Study* (2009) 21; Rose Ngomba-Roth *Multinational Companies and Conflicts in Africa: The Case of the Niger Delta* (2007) 140; Uche Ofodile 'Trade, Aid and Human Rights: China's Africa Policy in Perspective' 4 *JICLT* 86–99 at 88.

[218] For example Nigerian government is said to have 55% equity interests in Shell and so in some cases where Shell is sued by the victims, Nigerian Government is either joined or applied to be joined as a party, see *Chief (Dr.) Pere Ajuwa and 1 Other v The Shell Petroleum Development Company of Nigeria Ltd (SPDCN*) (SC.290/2007) ruling delivered by the Supreme Court of Nigeria on Friday, 16 December 2011.

[219] For example the government of South Africa under Thabo Mbeki was opposed to case against MNC, see Kristen Hutchens 'International Law in the American Courts – *Khulumani* . *Barclay National Bank Ltd*.: The Decision Heard 'Round the Corporate World' (2008) 9 *GLJ* 639 at 651; Jedrzej George Frynas 'Social and Environmental Litigation against Transnational Firms in Africa' (2004) 42 *JMAS* 363 at 380 noting that public institutions are often oppose litigations against MNCs.

[220] On how BITs can affect capacity of states, see UNGP op cit note 1, commentary to Principle 9.

[221] Ibid Principle 9.

this attitude continues, it will affect the issue of access to justice in Africa. The third issue is that some political leaders in governments have stakes in some MNCs as well as in some indigenous companies.[222] In order to protect their interests in these companies, they treat them with awe, respect and dignity, even when the companies violate the rights of the people.

The second barrier comes from unwillingness or inability of the public institutions to regulate companies in specific areas. In most African states the public institutions charged to regulate corporations are not transparent and are not willing to protect the victims of corporate human rights violations against corporations in the states.[223] Often, they close their eyes to the agony of the victims leaving them stranded and without administrative remedies.[224]

The third barrier comes from the existing regulatory framework in African states. There are problems with regulatory frameworks for corporate accountability in Africa. First, some states rely on the constitutions for enforcement of human rights with no distinct separate legislation to deal with different aspects of business operations where human rights and business intersect.[225] Second, even in states where separate legislation exits, most of the laws are antiquated and need to be reformed to meet the modern trends.[226] The penalties (both monetary and general sanctions) imposed for corporate human rights violations in most states in the environmental sector are too weak to discourage violations.[227] In states where they are not weak, monitoring institutions are too weak to implement them.[228]

The fourth barrier relates to the issue of CCL. Most states are yet to come to terms with the issue of CCL.[229] They rely on the common law which is not adequate for this purpose.[230] In addition, civil law remedies are not adequate[231] and the process of obtaining justice is cumbersome in most states to the extent that when victims are successful at the courts, the judgments are not worth the trouble of litigation.[232]

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[222] For example some companies are linked with 'elite networks' of powerful individual in the DRC see ICJ op cit note 37 at 27–28.
[223] For example KHRC condemned the National Environment Management Authority (NEMA) and the Ministry of Health and the Department of Health of the Mombasa County Government for failing to enforce the existing laws against the company violating human rights of people and communities living in Owino Uhuru, see KHRC op cit note 178.
[224] Ibid.
[225] Eritrea is an example of such states.
[226] Nigeria is an example of such states.
[227] For example, with respect to Nigeria, see Ezeudu op cit note 143 at 37.
[228] See example, Kenya, KHRC op cit note 178.
[229] On this see the discussion in section 3.3.
[230] Ibid.
[231] Frynas op cit note 219 at 381 'The available legal remedies address some wrongs but not others'.
[232] Ibid at 380 'the nature of the legal process may therefore dissuade potential claimants and limit the potential benefits of litigation'.

The fifth barrier deals with the issue of voluntary approach to corporate governance in Africa. The voluntary approach model, which has been adopted as the corporate governance regulatory mechanism in most African states,[233] contributes to denying access to the victims of corporate human rights violations in Africa.[234] The implication is that in taking decisions at board-level, the interests of other stakeholders, apart from that of the shareholders, are not accorded due consideration.[235]

The sixth barrier is the lack of independence of the judiciary in most states.[236] Independence of the judiciary is essential to the issue of access to justice.[237] The constitutions of most states in Africa aver that judiciaries are independent but in reality, they are not.[238] This has affected the issue of access to justice tremendously and will continue until judiciaries are really independent.[239]

The seventh barrier, aside from the issue of independence of the judiciary, administration of justice is corrupt in most African states.[240] Securing justice in a corrupt environment is a herculean task to victims of corporate human rights violations who are usually the poor and vulnerable in society.[241] In addition, poverty and illiteracy in Africa are also impediments to the issue of access to justice.[242]

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[233] In all African states, even those states with constitutional provisions for corporate human rights obligations, the approach adopted to regulate it is voluntary.

[234] Anna Grear & Burns H Weston 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15 *HLR* 21 at 27. They examined all voluntary corporate governance models and said they are not specifically made to address the problems of the victims of human rights abuse.

[235] See the discussion in section 3.4.

[236] The result of consultation shows that there is independence of judiciary in Botswana, Egypt, Malawi, Mauritius, CapeVerde, Ghana, Tunisia and South Africa. However in the rest countries of Africa, 'the judiciary is somewhat independent, hardly or fully independent or largely independent'. See Economic Commission of Africa (ECA) *African Governance Report II* (2009) 130; Fombad op cit note 6 at 1061.

[237] Julian Mukwesu Nganunu 'Judicial Independence and Economic Development in the Commonwealth' (2014) 40 *CLB* 431 at 438, He noted that in relation to 'economic development, judicial independence … is a sine qua non for impartial judgments'.

[238] See ECA op cit note 236 at 130 noting that 'There has been considerable executive dominance over the judiciary in the appointment and promotion of judges, creating the phenomenon of the executive-minded judiciary – judges who anticipate the wishes of the incumbent governments or protect their leaders and supporters'.

[239] On close relationship between independence of judiciary, see Nganunu op cit note 237 at 438; Fombad op cit note 6 at 1066–1067.

[240] See ICJ op cit note 37 at 39; Abdullahi Olesin 'Corruption: Justice Salami slams Nigerian judges, lawyers' *Daily Independent* (20 April 2014). He quoted the former president of the Court of Appeal, Justice Isa Ayo Salami saying 'The problem of corruption in the judiciary is real and has eaten deep into the system', available at *http://leadership.ng/news/366879/corruption-justice-salami-slams-nigerian-judges-lawyers*, accessed on 2 June 2015; Moses Njagih 'Judiciary sets up anti-corruption unit' (21 May 2014), available at *http://www.standardmedia.co.ke/article/2000121835/judiciary-sets-up-anti-corruption-unit?articleID=2000121835&story_title=judiciary-sets-up-anti-corruption-unit&pageNo=2*, accessed on 2 June 2015.

[241] Magdalena Sepúlveda Carmona & Kate Donald 'Access to justice for persons living in poverty: a human rights approach' at 13, they noted that 'in all countries of the world persons living in poverty face significant

Finally, the corporate entity status of the corporations has been identified as a barrier to justice in Africa.[243] This occurs through the abuse of the doctrine of corporate personality which allows one company to hold shares in another company in such a way that the company with majority shares can escape liability for adverse decisions that can be traced to both of them.[244] This is what occurred in *Akpan and Others v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria, Ltd*,[245] where Royal Dutch Shell, a parent company of Shell Petroleum Development Company of Nigeria escaped liability for the failure of both companies to prevent oil spills from 'a wellhead in Nigeria' which occasioned environmental damage to the plaintiff's land.

3.6 Enforcement of international human rights treaties under the national law

The UNGP identified some international human rights as 'the benchmarks against which … the human rights impacts of business enterprises' can be assessed.[246] It provides that in certain circumstances, there may be need to include other human rights instruments.[247] If Africa is the focus, the list of such additional instruments should include the African Charter.[248] Therefore this section attempts to interrogate the question whether the national courts in Africa can protect human rights through the application of international human rights treaties.

To put the question in a simple form, can the national courts directly apply human rights treaties? While this question has been exhaustively addressed by scholars with respect to Africa,[249] their finding nullifies the conventional classification of domestic law into monist

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barriers that seriously impede or discourage them from seeking justice', available at *http://formin.finland.fi/public/download.aspx?ID=126504&GUID=%7B6A61135F-7C53-45BB-A434-DE24D6AB5557%7D*, accessed on 2 June 2015.

[242] Ibid.

[243] See Mwaura op cit note 10 at 95 noting that provision in the constitution 'extending human rights obligations to legal persons' is commendable but 'it does not tackle the obstacle of the corporate veil within corporate groups'.

[244] Ibid at 87.

[245] (2013) LJN BY9854 (30 January 2013); for a discussion of the case, see Cedric Ryngaert 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v Shell Litigation in the Netherlands' (2013) 8 *MIJSDLP* 247–259.

[246] See UNGP op cit note 1, Principle 12 with commentary. These are Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

[247] Ibid.

[248] African Charter is the main regulatory framework for human rights protection in Africa, see the African Charter 1981which entered into force on 21 October 1986 and ratified by all member states of the African Union including Eritrea which acceded to the Charter in January 1999.

[249] See for example, Richard Frimpong Oppong 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30 *FILJ* 296–345; J

and dualist states.[250] As their outcome shows, African countries with monist constitutions may shun application of human rights treaties, whereas countries with dualist constitutions may in some situations make use of human rights treaties 'in adjudicating human rights matters'.[251] It seems the monist and dualist classification is reaching its death knell, particularly when it has also been put in to question by some scholars of Western origin.[252]

However, this study is concerned not with the classification but with the implication of the finding to Africa in respect of human rights protection. Its implication is that direct application of human rights treaties in national courts of Africa is rare.[253] This is due to the fact that 'constitutional bills of rights are now in place in all African countries' with full codification of most of the international and regional human rights treaties.[254] So what the states need is not the direct application of human rights treaties but interpretation of constitutional provisions in line with the spirit 'of treaties and resolutions associated with them'.[255] Judicial decisions from other climates could help in such interpretation, although such precedents in most legal traditions are merely persuasive.

That takes us to where this study commences the importance of constitutions in human rights protection. But findings in the previous studies show that not all constitutions recognise corporate human rights obligations of the companies. In addition, those that recognise it also adopt a voluntary model of corporate governance to actualise it. The outcome is that the regulatory framework of corporate accountability in states of Africa requires reform.

Osogo Ambani 'Navigating Past the "Dualist Doctrine": The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya' in Magnus Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 25–36; Michelo Hansungule 'Domestication of International Human Rights Law in Zambia' in Magnus Killander (ed) 71–82; Emmanuel K Quansah 'An Examination of the use of International Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana' in Magnus Killander (ed) 37–56; Chacha Bhoke Murungu 'The Place of International Law in Human Rights Litigation in Tanzania' in Magnus Killander (ed) 57–70; Busingye Kabumba 'The Application of International Law in the Ugandan Judicial System: A Critical Enquiry' in Magnus Killander (ed) 83–108.

[250] On the distinction between the two see David Sloss 'Domestic Application of Treaties' (2011) 1–27 at 2–3 noting that 'Dualist states are states in which no treaties have the status of law in the domestic legal system; all treaties require implementing legislation to have domestic legal force. Monist states are states in which some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation', available at *http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs,* accessed on 1 June 2015.

[251] Magnus Killander & Horace Adjolohoun 'An Introduction' in Magnus Killander (ed) op cit note 249 at 16.

[252] See Sloss op cit note 250 at 9–10.

[253] Ibid at 10.

[254] Ibid at 14.

[255] Ibid. Direct application can only be relevant in cases of human rights not codified.

3.7 Conclusion

This chapter has examined the regulatory framework for corporate accountability in the states of Africa. It is obvious that while a regulatory framework exists for corporate accountability in most states, they are not adequate. The regulatory framework in most states suffers from many defects ranging from weak regulations, weak enforcement mechanisms, and antiquated laws. In addition, all states in Africa rely on their constitutions as the fundamental law of the land to protect human rights, even in the corporate sector. This is laudable, but that is also where the problem of the Africa regulatory framework lies. In some states constitutions are made but not implemented.[256] In other states, they are implemented at the whim and caprices of the government. Consequently, governments can amend the constitutions to suit their tastes.[257]

The conclusion is that the rule of law and constitutionalism are rare, but nonetheless are taking a fledgling root in few African states.[258] Unfortunately, that positive aspect is yet to make an appreciable impact on the administration of justice in the whole continent. The result is that the victims of corporate human rights violations in Africa are still seeking remedy at the home states of the MNCs.[259]

[256] Eritrea is an example of this, see the discussion above.
[257] See Economic Commission of Africa (ECA) *African Governance Report III Elections & the Management of Diversity* (2013) 40 describing how presidents are amending the constitutions to remain in power after their terms expired.
[258] For example states like South Africa.
[259] Litigating cases abroad is boosted with settlement of cases by MNCs with huge of money. See John Vidal 'Shell announces £55m pay out for Nigeria oil spills' *The Guardian* (7 January 2015). 'The law firm (Leigh Day) which represented the Bodo community said the settlement of 55m pay will trigger other Nigerian oil spill cases being heard in the London courts rather than in Nigeria'. He said further 'This will open the door. We have four or five other cases which we have been asked to look at. We and others will look to bring other cases', available at *http://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills*, accessed on 3 June 2015.

CHAPTER 4
THE COMPLIMENTARY ROLE OF THE AU AND OTHERS IN ENSURING CORPORATE ACCOUNTABILITY IN AFRICA

4.1 The OAU

The previous chapter examined the regulatory framework for corporate accountability in the states of Africa. This chapter continues with the inquiry by interrogating the regulatory framework for corporate accountability and human rights at the AU, which was an offshoot of the Organization of the African Union (OAU).

Before the establishment of the OAU in 1963, two important trends emerged in the political scene of the continent: a move to unite all the independent states together within the same 'colonial boundaries' and a Pan African group desiring to bring the willing states or groups together for a specific or general purpose.[1] Although the strategy and mechanism to attain the vision of the continental organisation differed,[2] the two groups shared a similar view of a people yearning for a common bond, under the same umbrella. A common purpose for such a continental organisation was succinctly enunciated at the 16 session of the General Assembly when Ethiopia declared that it would be a forum 'where-by problems which arise on the continent and which are of primary interest to the region could' firstly be dealt with by Africans, 'in an African forum, free from outside influence and pressure'.[3]

Actually, the major problems besetting the region at the time revolved around the issue of political sovereignty. There was a need to help those states under the bondage of colonialism to secure their independence. At the same time, those countries that had secured their independence were apprehensive of external interference and therefore sought to consolidate their new-found freedom.[4] In that state of uncertainty and apprehension faced by the newly independent states counterbalanced by the need to love their neighbours as themselves by helping other African states to secure their independence from colonial tutelage,[5] the OAU was established on 25 May 1963 as an intergovernmental organisation.[6]

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[1] B Andemicael *The OAU and the UN: Relations between the OAU and the United Nations* (1976) 9.
[2] Those who belong to 'Monrovia' bloc desired a loose form of association in contrast with that of the Casablanca bloc'.
[3] General Assembly Official Records (GAOR) 16th session (A/PV.1020) 1020th Plenary Meeting (2 October 1961) 177.
[4] Gino J Naldi 'Future Trends in Human Rights in Africa: The Increased Role of the OAU' in Malcolm Evans & Rachel Murray (eds) *The African Charter on Human and Peoples' Rights The system in Practice 1986–2000* (2008) 1 & 2.
[5] See P Mweti Munya 'The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation' (1999) 19 *BCTWLJ* 537–592 at 542

Admittedly, the OAU was a child of its history as it resolved in its preamble 'to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neocolonialism in all its forms'. In the same vein, it acknowledges its responsibility to explore 'the natural and human resources' in Africa for the development of the people in every facet of life.[7] However, its failure to consider and elevate the protection of human rights to one of its major objectives is a setback to the attainment of its overall goals at its inception. The act of exploring human and natural resources often leads to human rights violations of the people by the government in complicity with corporations[8] and the absence of a mechanism to protect same is a deplorable missing link in the OAU charter. A quick look at its structures shows an institution committed to a spirit of fraternity and camaraderie between states without recourse to checks and balances of the excesses and abuse of those governments.

Through the Assembly of Heads of State and Government (AHSG), the OAU had the power to deliberate on general issues of interest to member states and take decisions that would harmonise the 'general policy of the organization'.[9] The Council of Ministers, which was the second in its hierarchy, prepared conferences and executed AHSG decisions.[10] The General Secretary controlled the affairs of the secretariat[11] while the fourth organ, the Commission of Mediation, Conciliation and Arbitration, dealt with resolution of disputes.[12]

4.2 From OAU to AU, a shifting paradigm

The attitude of African heads of states to human rights in their respective states is a reflection of the feature of inadequacies and defects that inherently characterised the OAU Charter. Though, ironically the OAU as an organisation took up the gauntlet and responded adequately to human rights violations associated with colonial rule and apartheid, it ignored and shunned with impunity human rights violations that were grossly perpetuated by its members.[13] Coups to overthrow democratically-elected governments of the day occurred

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[6] See Frans Viljoen *International Human Rights Law in Africa* (2012) 155.
[7] See the Preamble to the African Charter 1981which entered into force on 21 October 1986 and ratified by all member states of the African Union including Eritrea which acceded to the Charter in January 1999.
[8] See ED Oruonye 'Multinational Oil Corporations in Sub Sahara Africa: An Assessment of the Impacts of Globalization' (2012) 2(4) *IJHSS* 152–161 at 154.
[9] See African Charter op cit note 7 Article VIII.
[10] Ibid Article XIII.
[11] Ibid Article XVI.
[12] Ibid Article XIX.
[13] See Corinne AA Packer & Donald Rukare 'The New African Union and its Constitutive Act' (2002) 96 *AJIL* 365−379 at 366.

incessantly;[14] constitutions were suspended to give way for tyrannical governments;[15] opposing views were silenced, and people imprisoned and killed; and the common wealth of the states was looted and siphoned into individual pockets.[16] This era in the history of Africa saw the emergence of the most brutal dictators in the world, and yet the OAU was silent.[17]

Today, such silence is likely to be frowned upon. In addition to condemnation, the OAU is likely to be accused of complicity in the human rights violations that occurred during the period. However, it is important to appreciate the reason why the OAU as an organisation was hamstrung to take any proactive steps and preferred to look away. The main reason is because of its commitment to the principles of sovereignty and equality of states, through a sacrosanct pledge, not to interfere in the internal affairs of each state.[18] The consequence is that the OAU, as constituted by its original Charter, has outlived its usefulness. Since many African states have got their independence[19] a new dynamic goal that meets the contemporary needs of the African people must be set for the organisation to thrive.[20] Indeed, if Africa wants to court the respect of the world, it must seek a coherent continental policy that will facilitate 'stronger economic growth' and a stable democratic government at the state level.[21]

Therefore, in order to point the moribund organisation in the right direction, the Assembly preferred a total revolutionary change of what the OAU stood for. Consequently, at its extraordinary session, in the Sirte (Libya) in 1999, it decided to change its name from the OAU to the AU signalling a radical departure from the past. To show that a change of name

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[14] See Claude Welch 'The OAU and Human Rights: Towards a new Definition' (1981) 19 *MAS* 401−420 at 404; Mathurin C Houngnikpo *Guarding the Guardians: Civil-Military Relations and Democratic Governance in Africa* (2010) 18; Abadir M Ibrahim 'Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post-Tahrir Assessment' (2012) 12 *AHRLJ* 30–68 at 38–39.

[15] For a discussion of this issue, see C Anyangwe 'Revolutionary overthrow of constitutional orders in Africa' (31 August 2010) an inaugural lecture delivered at the Walter Sisulu University, available at *http://www.wsu.ac.za/research/Prof%20Anyangwe/Prof%20Anyangwe's%20lecture.pdf*, accessed on 18 June 2015.

[16] See Edmund Sanders 'Africa's "new generation" likened to old' *Los Angeles Times* (20 February 2006), available at *http://articles.latimes.com/2006/feb/20/world/fg-bigmen20*, accessed 19 June 2015; Stephen Buckley 'Nigeria suffers in silence' *The Washington Post* (3 April 1995), available at *http://www.washingtonpost.com/archive/politics/1995/04/03/nigeria-suffers-in-silence/50111d78-8ea1-4581-90c6-53fdbac74853/*, accessed on 19 June 2015.

[17] For example, Idi Amin in Uganda, Jean-Bedel Bokassa in ex-Central African Republic, Mobutu Sese Seko in Zaire, and Macias Nguema in Equatorial Guinea, etc; see Nsongurua J Udombana 'Can the Leopard Change Its Spots? The African Union Treaty and Human Rights' (2001) 17 *AUILR* 1177–1261 at 1211–1212.

[18] See Packer op cit note 13 at 367 noting that '[e]xperts agreed that the OAU Charter needed revision the most, specifically with regard to the principles of sovereignty and "noninterference" because since its inception, African leaders had watched civil wars erupt and destroy states and their populations'.

[19] Vincent Nmehielle 'The African Union and African Renaissance' (2003) 7 *SJICL* 412–446 at 416–417.

[20] Ibid 426-427. He refers to this dynamic goal as 'African Renaissance'.

[21] See OXFAM International 'African Union Compendium' (2012), available at *http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/oxfam-african-union-compendium-3aug2012_3.pdf*, accessed on 21 June 2015.

was not a mere change of nomenclature, it adopted the Constitutive Act of the Union at the Lome Summit of 2000. The blueprint containing the strategy and mechanism to implement the goals and vision of the AU was mapped out at its Lusaka Summit in 2001. That paved the way for the Summit of 2002 convening for the first time, the first AHSG in Durban, South Africa, where the AU was launched with fanfare, marking the beginning of a new dawn for the continent.

Rather than jettisoning the principle of non-interference in the internal affairs of member states, which was the stumbling block behind the wheel of progress of the OAU, the AU opted to retain it,[22] however not in its entirety as the AU in an exceptional circumstance – particularly on humanitarian grounds, can intervene in domestic affairs of member states.[23] The AU seeks to defend the territorial integrity of every state in the continent in order to consolidate their hard-earned freedom. Unlike the OAU, the AU's major preoccupation is neither how to secure political freedom from a colonial empire or apartheid enclave nor how to shun what could be termed as external interference in the internal affairs of each member state. The AU seeks to attain a multi-faceted and interrelated goal that will bring values to the continent and put it in an appropriate position to meet its international obligations in the international community. Thus, it seeks to attain continental economic integration,[24] protect all human rights instruments, work to make the whole continent peaceful, stable, secure and democratic, while at the same time speaking as one voice on issues of common interest in the comity of nations.[25]

Article 5 of the AU establishes nine organs which are tasked with carrying out different functions in order for the AU as a whole to achieve its goals and objectives. The AHSG is the highest organ of the AU. It comprises the executive president of each member state or their authorised representatives. Its task is to take and oversee decisions on the common policies of the union. Similarly, the Executive Council, which comprises the Foreign Affairs Ministers of each member state or any designated authority by the government, has the power to harmonise decisions made by all AU organs if necessary. It also implements AHSG decisions and takes its own decisions on issues of common interest to

[22] See Article 4(g) of the Constitutive Act of the African Union, adopted at the 36th ordinary session of the AHSG of the OAU, 11 July 2000 at Lome, Togo, available at *http://www1.uneca.org/Portals/ngm/Documents/Conventions%20and%20Resolutions/constitution.pdf*, accessed on 20 May 2015.
[23] Ibid Article 4(h).
[24] See Chidi Anselm Odinkalu 'Future Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' in Evans & Murray op cit note 4 at 188.
[25] See Sabelo Gumedze 'The African Union and the Responsibility to Protect' (2010) 10 *AHRLJ* 135–160 at 147–148.

the member countries. Other AU organs are the Pan-African Parliament, the Court of Justice, the African Commission also known as the Secretariat, the Permanent Representatives Committee, Specialized Technical Committees, the Economic, Social, and Cultural Committee and the Financial Institutions. The list of the organs increased from four in the OAU to nine in the AU. This actually shows the extent of 'the breadth of the OAU's reformation and metamorphosis into the AU'.[26]

4.3 The existing regulatory framework and its impacts

As noted in Chapter 1, the major objective of this study is to seek the means by which Africa as a continent, through the AU, can deal with the issue of CHRR and accountability. This chapter aims to interrogate how the AU protects human rights and the impacts of that protection on corporate human rights responsibilities and accountability at state and the continental level. The chapter, therefore, will focus on the legal and institutional frameworks set up to ensure human rights protection.

4.3.1 African Charter on Human and Peoples' Rights

Certain notable events were responsible for the OAU's change of attitude to human rights protection. To mention some of them, the support from the UN, NGOs' campaigns, and the view of some African leaders within the organisation that the issue of human rights in the states should fall within the dealings of the organisation, catapulted the initial lackadaisical attitude of members to enthusiastically adopt the African Charter in 1981.[27] The Charter is uniquely drafted as it combines African historical, cultural and philosophical perspectives with Western notions of human rights. Nsongurua Udombana describes it as 'a synthesis of universal and African elements'.[28] In fact, the uniqueness of the African Charter lies in the fact that it represents the African perception of rights.[29] Its entry in to force in 1986, marked the beginning of human rights protection in the OAU, even if then it was only in skeletal form, because of the principle of non-interference in the internal affairs of member states.[30] In what appears then, to be a deliberate and strategic ploy to isolate the works on human

[26] See Carolyn Scanlon Martorana 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights?' (2008) 40 *TGWILR* 583–610 at 589.
[27] See Rachel Murray *Human Rights in Africa from the OAU to the African Union* (2004) 22.
[28] See Nsongurua J Udombana 'Between Promise and performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40 *SJIL* 105–142 at 110.
[29] Onje Gye-Wado 'A Comparative Analysis of the Institutional Framework for the Enforcement of Human Rights in Africa and Western Europe' (1990) 2(2) *AJICL* 187–201 at 191.
[30] See Murray op cit note 27 at 22.

rights from the works of other organs of the organisation, the headquarters of the African Commission was taken to The Gambia in Banjul.[31]

The adoption of the ACHPR under the OAU failed to usher in a significant protection of human rights in Africa due to its notable failure to enforce the Charter.[32] As a result, many scholars have criticised the Charter. In fact, UO Umozurike initially compared it to a dog that could not bite and argues that its enforcement might lie solely in the court of public opinion.[33] Richard Gittleman notes that the Charter is 'incapable of supplying even a scintilla of external restraint upon a government's power to create laws contrary to the spirit of the rights granted'.[34] Despite the critical comments actuated by the lackadaisical attitude of the OAU to enforce its own Charter, the positive legacy of the Charter is legendary. The Charter is broad in its recognition of human rights. It recognises the first, second and third generation of human rights. It lists them together on the same pedestal as if they are on equal status; a method though, Umozurike argues, is deceptive and prone to ambiguity[35] is nonetheless a mark of distinction between the African Charter and other human rights instruments. In fact, it is a signpost illustrating the path that Africa wishes to take, with respect to enforcement of those rights.[36]

Indeed, seven years after the adoption of the Charter, the African approach received universal acceptance at the Vienna Declaration on Human Rights. There, the whole world acknowledged the equal treatment of all human rights by the African Charter as the correct approach, and denounced the categorisation of human rights into a hierarchical status as nauseating and unacceptable; as all human rights are the same and they should be accorded equal treatment.[37] As noted earlier, uniqueness of the African Charter is unquestionable; its focus is not only on human rights and the duties of the states, but goes beyond the ambit of Western law to reflect the duties of the individuals in the family, which Africa holds sacrosanct.

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[31] Ibid. The headquarters of other organs were in Addis Ababa.
[32] Christopher Clapham *Africa and the International system: The Politics of State Survival* (1996) 191.
[33] UO Umozurike 'The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights' (1988) 1 *AJIL* 65–83 at 82–83.
[34] Richard Gittleman 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *VJIL* 667–714 at 694.
[35] Oji Umozurike *The African Charter on Human and Peoples' Rights* (1997) 45–49 & 51–61.
[36] See Christof Heyns & Magnus Killander 'The African Regional Human Rights System' in Felipe Gómez Isa & Koen de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges* (2006) 507, 514–515. They noted that the charter combines civil and political rights with social economic and cultural rights to depict the seriousness of developmental issue and the indivisibility of human rights in Africa.
[37] See Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993, noting 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.

Again, most scholars have commented on the broad requirements of the Charter with regard to *locus standi* as one of the most positive attributes that could throw the door of litigation open to the individuals and NGOs, other than the actual victims of the human rights violations.[38] There is no doubt that the OAU by adopting the Charter has given Africa an indigenous framework by which human right violations can be curtailed and a foundation on which equity, justice and development can be built. Some scholars argue that it is the most reliable and innovative document of all human rights Charters in the region[39] and that it is imbued with the capacity to truncate the worldwide notion of universality of international law concepts.[40] If indeed the Charter reflects Africa and is correctly interpreted by those that enforce it, then there could be no better and suitable epithet.

4.3.1.1 Civil and political rights

Civil and political rights of African citizens have been violated by states in complicity with corporations. Chapter 2 of this thesis has shown the involvement of states and corporations in the violation of civil and political rights during the era of slavery, colonialism, apartheid, post-independence etc. This sub-section examines civil and political rights that are protected by the Charter. The AU recognises the rights of individuals and people to the enjoyment of civil and political rights and seeks to protect same in its Charter. Civil and political rights are considered of paramount importance in the genre of human rights classification.[41] The International Covenant on Civil and Political Rights (ICCPR) and the UDHR protect the rights of every individual against the tyranny and arbitrary power of the state.

Article 2 of the Charter, which is on par with Article 2 of the ICCPR, prohibits individual discrimination of any form in order to ensure 'the enjoyment of [all] rights and freedoms'. Other provisions in the Charter, for example Articles 3 and 19, which make provision for equality of every individual in the eye of the law irrespective of their state of origin, also prohibit discriminatory acts for the same purpose. Therefore, what is captured by the word non-discrimination in terms of prohibition is very wide, more so, when the Charter

[38] See Umozurike op cit note 35 at 78; Naldi op cit note 4 at 8. He notes that the Commission's rule of Procedure 114(2) which has been deleted clearly express this by stating that 'The Commission may accept such communications from any individual or organization irrespective of where they shall be'. This issue will be discussed further in Chapters 6 and 7 of the study.
[39] Wolfgang Benedek 'Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights' in Philip Kunig, Wolfgang Benedek &Costa Ricky Mahalu (eds) *Regional Protection of Human Rights in International Law: The Emerging African System* (1985) 89 at 61.
[40] Rachel Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 11.
[41] All rights are the same in Charter see Vienna Declaration op cit note 37.

deliberately fails to distinguish between a fair and unfair form of discrimination.[42] For example, while considering the effects of Articles 2, 3, 13 and 19 of the Charter on the domestic law of Zambia, the African Commission[43] found that the Republic of Zambia had violated the provisions of Articles 2, 3(1) and 13 of the African Charter, regarding the issue of non-discrimination by amending its constitution to include discriminatory provisions in Articles 34 and 35 which sought to disqualify and disenfranchise some 35 per cent of the population from contesting in the election for the office of the president of Zambia. The right to respect the sanctity of human life and the integrity of the human person is provided for in Article 4. It prohibits arbitrary deprivation of life. A breach of Article 4 will occur, with or without a loss of life, if an act is capable of causing injury that may eventually lead to the death of the victims[44] or expose him or her to any form of indignity, including those occasioned by incessant detentions.[45] Article 5 further protects the dignity of the human person and prohibits all forms of indignity such as slavery, torture and slave trade. Punishments, even if lawful, must not be degrading or dehumanising. More likely than not, it may be considered as a violation of this Article. Thus, for example, the African Commission decided that keeping Ken Saro-Wiwa in dirty cells under inhumane and degrading conditions without access to his family amounted to a violation of Article 5.[46] The right to liberty and security of every individual is guaranteed and infraction to that right is not allowed except as provided for by law. Thus, no one shall be deprived of his or her right to liberty and security.[47]

Article 7 deals with varied rights relating to dispensation of justice at national level with a view to ensuring fair trial and speedy justice in an atmosphere devoid of partiality, miscarriage of justice and arbitrary power. It makes provision against the wrongful conviction or arrest of a person, which is rampart in Africa.[48] Consequently, it prohibits a system of criminal justice by which a person can be punished for the offence committed by another person, mainly on account of his or her relationship with the offender, particularly on

[42] See Christof Heyns 'Civil and Political Rights in the African Charter' in Evans & Murray op cit note 4 at 145.
[43] 211/98 – *Legal Resources Foundation v Zambia*. For similar decision, see also, 212/98 – *Amnesty International v Zambia.*
[44] See, Communication 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organization v Nigeria*, Twelfth Activity Report (1998-1999) Annex V (Documents of the African Commission) 729 para 104.
[45] See Communication 205/97, *Kazeem Aminu v Nigeria* para 18, the Commission notes that the article protects the type of 'constant fear and /or threats' which the complainant in the case experienced.
[46] Ibid.
[47] See African Charter op cit note 7 Article 6.
[48] The case of arrest of wrong person is common in Africa. Even in South Africa the sum of R350 000 was awarded against the police for unlawful detention of the plaintiff, see the judgment of D Chetty J in *Mzimkulu Eric Manziya v Minister of Police* Case No: 2233/2011.

the ground of marriage or consanguinity. It also prohibits conviction of an individual for bogus offences that are not known to the law of the land[49] and provides that individuals can only be punished for the breach of a 'legally punishable offence at the time it was committed'.[50] The same Article also includes other rights such as: the right to be heard (*audi alteram partem*);[51] the right that every accused is presumed innocent until the contrary is proved by the judgment of a competent court or tribunal;[52] the right to a speedy trial by a competent, as well as an impartial, court or tribunal;[53] and the right of an individual to defend himself to the extent of securing a counsel of his choice.[54] Other rights protected by the Charter are: the right to freedom of conscience; the profession and free practice of religion;[55] the right to obtain information and freedom of expression;[56] the right to associate subject to compliance with the law by the beneficiary;[57] right of assembly with others;[58] and the right of residence in any state; as well as the right of egress and ingress within a particular territory provided the beneficiary of such right in another country complies with the law of that particular territory.[59] Similarly, Article 13 deals with political rights – every citizen has the right to take part in the government of his or her country, either by standing as a candidate for election or by exercising his right of franchise in electing those who will govern them. The same Article[60] also accords all citizens equal right of access to public service of the country. Most of the rights recognised by the Charter are not absolute; they are statutorily limited by claw-back clauses in the Charter itself.[61]

4.3.1.2 Social Economic and Cultural rights

SEC rights are interwoven with civil and political rights; to separate them, when it comes to protection and enforcement, is an impossible enterprise comparable to a situation that could arise when one engages in a frivolous attempt to separate smoke from fire. Consequently, the protection of the right to development and ESC rights are very important to the African Charter to the extent that they are regarded as *sine qua non* in the Charter. The Charter states

[49] See the African Charter op cit note 7 Article 7(2).
[50] Ibid Article 7(2).
[51] Ibid Article 7(1).
[52] Ibid Article (7)1b.
[53] Ibid Article (1d).
[54] Ibid Article (1c).
[55] Ibid Article 8.
[56] Ibid Article 9.
[57] Ibid Article 10.
[58] Ibid Article 11.
[59] Ibid Article 12.
[60] Ibid Article 13.
[61] They make the enjoyment of most of the rights depend on or susceptible to the application of domestic law.

that their protection must be guaranteed, if other rights like civil and political rights are to be enjoyed.[62] Additionally, some rights categorised as civil and political rights are actually 'cross-cutting rights' because they provide access for the enjoyment of social economic rights.[63] An example of such rights is the right to human dignity. In *Bandhua Mukti Morcha v Union of India and Others*[64] the Supreme Court of India held that the right to human dignity must carry with it the:

> 'protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief'.

The Charter guarantees the right to property with a claw-back clause that the right can 'only be encroached upon', [65] if the public interest of the community requires it or the property is required for public need. In whatever case, the claw-back clause must be exercised in compliance with the national law. The Charter subjects the issue of confiscation of property to the national law and accords overriding interest of the community. It fails to mention the issue of compensation because it assumes that a domestic law of any country in Africa should have provided for such. It is contended that the failure to add the issue of compensation is a great omission; most states even at the time the Charter was made were under military rule, which usually suspends the entire constitution or the chapter dealing with human rights. In such a situation, to leave the issue of confiscation of property to national law without mentioning the issue of compensation is to remove the efficacy and the potency of the right protected. The Charter also protects the right of every individual to work 'under equitable and satisfactory conditions', the right to 'receive equal pay for equal work',[66] the right to 'enjoy the best attainable state of physical and mental health',[67] the right to education,[68] and freedom to 'take part in cultural life of the community'.[69]

[62] Ibid. Preamble to the African Charter op cit 7 para. 8.
[63] See Odinkalu op cit note 24 at 188.
[64] (1984) 2 SCR 67.
[65] See African Charter op cit note 7 Article 14.
[66] Ibid Article 15.
[67] Ibid Article 16.
[68] Ibid Article 17(1).
[69] Ibid Article 17(2). Note that other provisions that deal with cultural rights include Articles 17(3), 18(1&2) and 61.

One notable flaw in the SEC provisions is the sterile manner the provisions were drafted without attention to detail. The rights are couched in phrases like 'right to education', right to 'equitable and satisfactory conditions', 'equal pay for equal work', 'the best attainable state of physical and mental health', 'take part in cultural life of the community'. The implication of these austere provisions, according to Manisuli Ssenyonjo, is that it will 'require interpretation in the light of the present day conditions to enable the State Parties to understand their obligations under the African Charter'.[70] On the other hand, it is arguable that the lack of specificity in the Charter may constitute a great advantage to enforce SEC rights since its flexibility will pave the way for broader interpretation that may give room for importation of cross-cutting rights not expressly mentioned in the Charter. Thus in *SERAC and CESR v Government of Nigeria*[71] the African Commission inferred the protection of the right to food from other rights that are expressly enunciated in the Charter like the right to life, right to dignity, right to health, and the right to economic, social and cultural development.[72] Similarly, the African Commission also inferred the right to housing or shelter from the provisions in the Charter relating to health, property, and family.[73] Furthermore, in Sudan through the human rights organisation, the Centre on Housing Rights and Evictions (COHRE),[74] the African Commission inferred the right to water,[75] social security and sanitation[76] from the Charter.

4.3.1.3 Right to development

The Charter recognises the right of '[a]ll peoples to "their economic, social and cultural development" with respect to their freedom and identity and in the equal enjoyment of the common heritage of mankind'[77] and also confers a duty on them individually or collectively to ensure that their right to development (RTD) is protected.[78] The meaning of the word 'development' can be gleaned from the address of President Senghor of Senegal to the drafting Committee of the African Charter in 1979, when he argued that RTD integrates all

[70] See Manisuli Ssenyonjo 'Analyzing the Economic, Social and Cultural Rights Jurisprudence of the African Commission' (2011) 29(3) *NQHR* 358–397 at 363.
[71] See Communication 155/96.
[72] See African Charter op cit note 7 Articles 4, 5, 16 & 22; ibid *SERAC* para 60.
[73] Ibid Articles 13, 16 & 18.
[74] 279/03-296/05: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, available at *http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf*, accessed on 20 June 2014.
[75] This is implied from consideration of Articles 4, 5, 6, 15, 16 & 18 of the African Charter op cit note 7.
[76] Ibid. This too was implied from a consideration of Articles 4, 5, 15, 16, 22 & 24 of the African Charter.
[77] Ibid Article 22.1.
[78] Ibid Article 22.2.

other rights whether civil or political or SEC and that it means 'first and foremost a change of quality of life and not only an economic growth required at all cost, particularly in the blind repression of individuals and peoples'.[79] This right is a collective right 'endowed on a people'. Therefore understanding the meaning of 'a people' is essential to enjoyment of the right. Unfortunately, 'a people' is not defined in the Act but the African Commission has defined it as characteristics like culture, dialect, religion, language, 'common history, ethno-anthropological factors' etc by which people identify themselves or others as people.[80] The enforcement of the RTD and the critiques of scholars as to the extent of its protection shall be discussed under the sub-section dealing with the obligations of the states and under the African Commission.

4.3.1.4 Rights of indigenous people

Indigenous communities have been victims of corporate human rights violations by states with complicity of MNCs.[81] Most often they are displaced from their ancestral lands unlawfully by governments in order to give room for the operation of the MNCs' businesses.[82] Any attempt made to resist the unlawful eviction leads to an escalated violation of their human rights by the government in concerted efforts with the MNCs. This sub-section of the research examines whether the African human rights system protects these vulnerable groups. The inquiry was necessary in view of the critical stance taken by African countries to the negotiations of the UN Declaration on the Rights of Indigenous Peoples (DRIP), before it was adopted by UN General Assembly Resolution 61/295 in 2007.[83]

Indeed, the Assembly had to defer the consideration of the text in 2006 because of the objections raised by the African countries to the text,[84] on a number of issues relating to the questions of self determination, land ownership in a sovereign state, exploitation of resources, the establishment of distinct political and economic institutions, definition of 'indigenous' people and the issue of national and territorial integrity through an aide-memoir dated 9th

[79] Address of 28 November 1979 to meeting of experts preparing the draft African Charter, OAU Doc. CAB/LEG/67/5 P.5.
[80] See *Sudan Human Rights* case supra note 74.
[81] See the discussion of this in chapter two of this thesis sub-sections 2.5.2 & 2.5.3.
[82] Ibid, particularly see sub-section 2.5.3.
[83] See UN United Nations DRIP Resolution adopted by the General Assembly (without reference to a Main Committee (A/61/L.67 and Add.1), available at *http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf*, accessed on 20 May 2015.
[84] See UN 'General Assembly adopts declarations on the rights of the indigenous peoples' GA/10612, 61st General Assembly Plenary, available at *http://www.un.org/News/Press/docs/2007/ga10612.doc.htm*, accessed on 20 May 2015.

November 2006.[85] Grappling with these contentious issues and encouraged by the favourable response to the DRIP, the ACHPR set up a Working Group of Experts on Indigenous Populations/Communities (WGIP) to 'examine the issue of Indigenous Populations and advise it accordingly'.[86] The WGIP report was debated at its 41st ordinary session in Accra Ghana between 16 and 30 May 2007 and a resolution was passed to the effect that there had been an extended study and debate on the issue of Indigenous Populations in the continent leading to the adoption of a report by the ACHPR in November 2003 at its 34th ordinary session.[87] In fact as early as 2000, there was a 'Resolution on the Rights of Indigenous Populations/Communities in Africa' which the ACHPR adopted at its 28th ordinary session held in Cotonou, Benin in October 2000.[88]

At the 34th ordinary session of the ACHPR held on 6 to 20 November 2003, the WGIP in Africa presented its report to the African Commission based on the resolution that was adopted at its 28th ordinary session. The report revealed gross violations of human rights perpetuated against indigenous peoples in Africa. It notes, 'dispossession of land and natural resources is a major human rights problem for indigenous peoples' and gave examples of many who were driven out of their ancestral homes to satisfy the 'economic interests of other more dominant groups and large-scale development initiatives' in an ignominious way that impoverished the lives of indigenous peoples and tore their cultures apart.[89]

Even though the WGIP report was adopted, another resolution was passed which again established a working group of experts for the first term of two years with the mandate to promote and protect the right of the vulnerable populations/communities in Africa[90] due to the fact that there was no institution at the AU mandated to protect the rights of indigenous peoples. The summary of the report titled 'Indigenous Populations/Communities in Africa' was part of the ACHPR activities included in its 17th Annual Activity Report,[91] which was

[85] See ACHPR 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' (2007), available at *http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/*, accessed on 20 May 2015.
[86] Ibid.
[87] Ibid.
[88] See ACHPR 'Resolution on the Adoption of the "Report of The African Commission's Working Group on Indigenous Populations/Communities"' (2003), available at *http://www1.umn.edu/humanrts/africa/resolutions/rec70.html*, accessed on 20 June 2015.
[89] ACHPR & International Working Group for Indigenous Affairs (IWGIA) *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) 20.
[90] Ibid.
[91] ACHPR 'Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights' (2003–2004), available at *http://www.achpr.org/files/activity-reports/17/achpr34and35_actrep17_20032004_eng.pdf*, accessed on 20 May 2015.

approved and endorsed for publication by the 4th ordinary session of the AHSG of the AU.[92] The revelation of gross violation of human rights against indigenous peoples, the unquenchable zeal of the UN to see the logical end of its Declaration which eventually sailed through when it was adopted in 2007, and the discovery that there had been positive moves in the past to protect the indigenous people of Africa made the ACHPR to accept the UN Declaration. At its 42nd ordinary session,[93] it notes:

> 'The UN Declaration on the Rights of Indigenous Peoples is in line with the position and work of the African Commission on indigenous peoples' rights as expressed in the various reports, resolutions and legal opinion on the subject matter. The African Commission is confident that the Declaration will become a very valuable tool and a point of reference for the African Commission's efforts to ensure the promotion and protection of indigenous peoples' rights on the African continent'.[94]

The human rights provisions relating to indigenous peoples and the jurisprudence of ACHPR on the issue shall be discussed under the section dealing with the obligations of the states and under the African Commission.

4.3.1.5 Concept of duties under the African Charter

The distinction between public and private law has contributed to the regulatory deficit of corporations at the international level.[95] As Claire Cutler argues, this division is anchored on the premise of linking 'authority with the state, government, and the "public" sphere and its consequent disassociation with the "private" sphere of individuals and their market activities'.[96] One of the implications of that division is that corporations, apart from the states are not assigned any responsibility to protect human rights at the international level.[97] On the surface, that implication can be interpreted to mean that they do not have duties and

[92] See ACHPR op cit note 85.
[93] Held from 15 to 28 November 2007 in Brazzaville, Republic of Congo where the ACHPR adopted a resolution.
[94] See ACHPR '121: Resolution on the United Nations Declaration on the Rights of Indigenous Peoples' (2007), available at *http://www.achpr.org/sessions/42nd/resolutions/121/*, accessed on 20 May 2015.
[95] For the study on the origin of the distinction see Morton J Horwitz 'The History of the Public/Private Distinction' (1982) 130 *UPLR* 1423–1428 at 1423–1424.
[96] See A Claire Cutler 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *RIS* 133–150 at138.
[97] An attempt to fill this governance gap leading to the adoption of United Nation Guiding Principles on Business and Human Rights (UNGP) which imposes responsibility on corporations to respect human rights see discussion of this study in Chapter 1 section 1.2 and the entire Chapter 5.

obligations to the society at the same level. Indeed, the idea of a water-tight division between public and private law has been questioned.[98] The EU has taken steps that erode the value of this division[99] in order to protect their citizens from human rights violations from non-state actors. With regard to Africa, it is possible that the African Charter provides regulatory frameworks to hold corporations accountable. Ruggie acknowledges this when he notes that African Charter 'is unusual' in the sense that 'it imposes direct duties on individuals'.[100] The problem however lies on the lack of clarity and precision as to the effect of these duties on the corporations.[101] However, this thesis holds the view that the duties apply to the corporations. A contrary view is not in the interest of corporate accountability. In fact, it will provide an escape route for corporations to avoid their responsibility to respect human rights. In view of the importance of this concept of duties to corporate accountability, this sub-section deals with the concept of duties to the individuals in the African Charter.

The African Charter is the most comprehensive human rights instrument on the duties of the individual.[102] Admittedly, this is not unconnected with the fact that in African tradition and culture, duties go hand in hand with rights. Consequently, the Charter fashioned in the tradition of Africa provides not only rights that are to be enjoyed, but duties that must be performed by every individual in order that the rights might be accessible to all. Makau Mutua argues in support of this approach when he observes that 'Individual rights cannot make sense in a social and political vacuum, devoid of the duties assumed by individuals'.[103] Similarly, the sixth clause of the preamble to the Charter explains why duties and rights should be imposed concurrently when it provides in a

[98] On how the criticism emerged, see Horwitz op cit note 95 at 1426.
[99] On this, see Daniela Caruso 'Private Law and State-Making in the Age of Globalization' (2006) 39 *NYUJIL* 1–74 at 32–56.
[100] See Un General Assembly 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council" Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie' (A/HRC/4/35) (19 February 2007) para 43.
[101] Ibid. Ruggie argues that 'opinions vary on their effect and whether they apply to groups, including corporations'.
[102] Though, the UDHR imposes 'duties to the community' on every individual, yet it is not as comprehensive as that of the African Charter. See also, Amnesty International *Protecting Human Rights: International Procedures and How to use them: The Organization of African Unity and Human Rights* (1991) noting that 'Other international and regional conventions on human rights contain provisions referring to the duty of individuals to respect the rights guaranteed to other individuals. However, unlike other major human rights treaties the African Charter also specifies duties to the state' at 11.
[103] Ibid at 340.

philosophical African proverbial tone that to enjoy the benefits of human rights, everyone must be ready to perform his own part of the duties.[104]

In this regard different kinds of duties are imposed by the Charter on individuals.[105] First, every individual has a duty to the family to seek its sustainability, harmony, development and to accord due respects and support to one's parents.[106] Second, a duty to one's state of origin, which implies that one, must be loyal and committed to the state. Similarly, the duty to the state also means that one must be ready to 'preserve and strengthen the national independence and the territorial integrity of that state and to work in contributing the best of one's ability to the defence and security of one's country in accordance with the law of the land.[107] Third is a duty by everyone not to be a defaulter but to pay all taxes imposed by law in the interest of society.[108] Fourth, every individual has a duty to serve one's national community with one's talent and physical ability.[109] Fifth, a duty to the international community, Africa in particular, to preserve its cultural values and seek the moral well-being of the society through cordial inter-personal relationships with other members of the society and to contribute to the best of one's abilities at all times and at all levels to the promotion and achievement of African unity.[110] Sixth, the duty to respect your fellow beings.[111] Finally, the seventh, to observe due care in the use of one's duty so as not to trample on the rights of others.[112] All these duties are nothing but a recapitulation of duties imposed by African society in the pre-colonial era when there was a high sense of responsibility by every individual to society.[113]

Admittedly, the following questions arise and require further clarification: Why should duties be included with rights in this modern time where the global emphasis lies mainly on rights; how can they be protected? What are the implications of their inclusion? This sub-section of the thesis attempts to do this. In the first instance, the inclusion of duties with rights in the African Charter has attracted controversial comments from scholars. Okoth-Ogendo argues that the inclusion is tantamount to elevating and entrenching the 'state rights

[104] See Preamble to the African Charter op cit note 7.
[105] Ibid Articles 27–29.
[106] Ibid Articles 27(1) & 29(1)
[107] Ibid Article 29.
[108] Ibid Article 29.
[109] Ibid Article 29.
[110] Ibid Article 29.
[111] Ibid Article 28.
[112] Ibid Article 27.
[113] See Makau W Mutua 'The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *VJIL* 339 at 368.

and privileges' above that of individuals and peoples.[114] Amnesty International echoes a similar tone, when it observes, 'It will be necessary to ensure that such duties are not misused by any government seeking to deny the fundamental individual rights which the African Charter was created to protect'.[115] Timothy Rushenberg expressed his ignorance on the African system of protecting and promoting human rights, when he noted 'reading this gave me the idea to post this language on my refrigerator for my kids to read'.[116] John Knox was also critical of the Charter, because according to him, it 'includes much looser restrictions on governments' authority to limit the exercise of rights'.[117]

However, on the other end of the spectrum, Makau notes that the lack of appreciation of the concept of duty in Africa stems from a misunderstanding of the African system of governance both during the pre-colonial era and under the Charter. He explains that unlike in the communist state, where the state is the bearer of rights, in the pre-colonial era, family and community are the bearers of rights and not the state.[118] Since, the state is the bearer of rights in the socialist state duties are owed to the state. However, in the pre-colonial era and under the Charter duties are owed to the family in conjunction with the community and not the state. Perhaps in response to those who might think that such a precedent is dangerous and might lead to an arbitrary exercise of power, he further argues that the power conferred on the community/family in the pre-colonial era was 'rarely misused or manipulated to derogate from human rights obligations'.[119]

Admittedly, the difference between the Western and the African concept of human rights is very wide and may be responsible for the lack of appreciation for the inclusion of duty in the African Charter. Reflecting on that gap, Rachel Murray observes that 'the notion of a state detached from the individual is not the same as it is in the west. The pre-colonial structure emphasized the community rather than the individual, and thus did not see a divide between the individual and the state'.[120] On closer scrutiny, two points are important to sum up this issue. One, as earlier noted, Africa is not the first to include duties in human rights

[114] See Okoth-Ogendo 'Human and Peoples' Rights: What Point Is Africa Trying to Make?' in Ronald Cohen, Goran Hydenn & Winston P Nagan (eds) *Human Rights and Governance* (1993) 74, 78–79.
[115] Amnesty International op cit note 102 at 14.
[116] Timothy J Rushenberg 'Product Review of a Book Titled *International Human Rights in a Nutshell*' by Thomas Buergenthal, Dinah Shelton & David Stewart, available at *http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/2006_jan_feb_productreview.htm*l, accessed on 20 May 2015.
[117] See, John H Knox 'Horizontal Human Rights Law' (2008) 102 *AJIL* 1 at 14.
[118] Mutua op cit note 113 at 372–373.
[119] Ibid.
[120] See Rachel Murray op cit note 40 at 38.

instruments, the implication being that its inclusion is neither strange nor absurd.[121] Two, whether mentioning in passing or in detail or totally neglected, the drafters of almost all human rights instruments cannot but acknowledge the role of duties in attaining the objective and purpose of human rights.[122] Therefore Africa is not the only exception in this matter. Even in India, the most revered former president, Gandhi notes that, 'Rights accrue automatically to him who duly performs his duties. In fact the right to perform one's duties is the only right that is worth living … It covers all legitimate rights'.[123] Similarly, it must be noted that the history of the making of UDHR shows an intense struggle in taking a decision between enacting a comprehensive detail of duties along with human rights or either to make a spatial reference to it.[124] However, the drafters of the UDHR reject either an elaborate list of duties or even a list of 'individual duties to the state' to avoid a situation in which a state can use enforcement of duties as a ploy to commit human rights violations.[125] At least, with respect to Africa, that is not the case. Most, if not all, human rights violations committed by states in post-independent Africa were not at the instance of the state enforcing the duties of individuals in the Charter. Presently, globalisation has paved the way for foreign investment and the emergence of MNCs in Africa; most of the human rights violations committed in Africa are done either by the states alone or in complicity with MNCs, or by the private parties alone with the government doing nothing about it.[126] In such a predicament, which is a common experience peculiar to developing and least developed countries, particularly Africa, (not because corporate human rights violations occur only in Africa but because of the unwillingness, incapacity or complicity of the states in Africa to protect human rights violations by private parties), the concept of duty in the African Charter provides the best

[121] See Yvonne von Stedingk 'Rights and Responsibilities of the Individual to the Community and Others' a paper presented at a UPF conference on Leadership and Good Governance: Innovative Approaches to World Peace, Paris, France (May 2006), available at *http://www.upf.org/united-nations/human-rights/1738*, accessed on 20 May 2015; International Council on Human Rights Policy (ICHRP) *Taking Duties Seriously: Individual Duties in International Human Rights Law; A Commentary* (1999) 48.

[122] Article 29(1) of the Universal Declaration of Human Rights provides that *every individual owe duties to the community where he can attain full development of his personality.* The first paragraph of the Preamble to the American Declaration of the Rights and Duties of Man of 1948 provides that 'The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty; Similarly, Art, 32(1) of American Convention on Human Rights, 1969 provides that 'every person has responsibilities to his family, his community and mankind'.

[123] Ibid.

[124] Johannes Morsink *The Universal Declaration of Human Rights* (1999) 239–240, 248.

[125] See Knox op cit note 117 at 9.

[126] If government fails in its duty to protect, it is still complicity, because most often when they are silent, it is because it is to their advantage.

jurisprudence to address the situation. The African Charter apportions duties and rights to private actors.

As earlier noted, the African Charter does not see the state alone as the bearer of rights. Private entities are also right bearers, in fact, every individual, and natural or artificial persons have a duty along with states to promote human rights. Indeed, Murray argues correctly that 'public/private division is inappropriate for the African system where the notion of a state does not presume, to the same extent, such a dichotomy. An African stance may take in to account a wider range of violations involving non-state actors'.[127] According to Knox, the idea of apportioning duties to private parties has several important benefits by addressing the violation of human rights by private actors without opening the door to converse private duties owed to states.[128] The implication of this concept of duty in the African Charter on corporate accountability in Africa will be discussed, along with the emerging regulatory regime in international law, in Chapter 7. The next section deals with the institutional framework for protection of human rights in Africa.

[127] Murray op cit note 40 at 39.
[128] Knox op cit note 117 at 2.

4.4 Institutional framework for protection

This section discusses the mechanism adopted by the AU to protect human rights in the continent, particularly against human rights violations by corporations. It notes that the AU relies on the principle of state responsibility to do this and then subjects the principle to rigorous analysis through examinations of relevant decisions by the African Commission. In addition, it discusses all other means by which the AU as a continental body protects human rights in the corporate sector in order to assess their accuracy.

4.4.1 State responsibility for human rights violations of non-state entities, including MNCs

As noted above, the African Charter itself does not regard the state alone as the bearer of duty.[129] It does not subscribe to the view that individuals cannot be questioned for their roles under the Charter. Therefore, the Charter can be used to question state and non-state actors, particularly MNCs, for their role in violating the rights protected by the Charter. Having said this, one must note that the Charter is very complex to interpret and no one can claim infallibility in its interpretation. The complexity and difficulty in interpreting the Charter has been acknowledged by scholars and the African Commission, which is responsible with the task of interpreting it.[130] Perhaps the result of the difficulty is not unconnected with the approach the African Commission takes with regard to the issue of bearer of duty.

The African Commission follows the path of state responsibility in its interpretation of the Charter, an approach that is compatible with traditional international law. The African Commission may have no choice in this issue because state responsibility is the principle embraced by all regional and international organisations and as Murray notes, 'it would be illegitimate' for the African system to jettison the 'underlying concepts of international law'.[131] State responsibility is a double-edged sword; it places the burden of protecting human rights on the state and makes the state liable for violation of human rights committed either by its agents or non-state entities within its territory.

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[129] See the discussion on sub-section 4.3.1.5.

[130] Murray observes that the difficulty lies in 'the use of differing words interchangeably with no clear statement as to whether they are synonymous' while Odinkalu affirms that 'foremost among the problems that the Commission has encountered is the very text of the African Charter its self, which like the Rules of Procedure, is opaque and difficult to interpret; see Rachel Murray 'Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter American and European Mechanisms' (1999) 17 *NQHR* 109 at 133; see Chidi Odinkalu 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment' (1998) 8 *TLCP* 359 at 406.

[131] See Murray op cit note 40 at 50.

Historically, state responsibility emerged from different theories of state equality, state sovereignty and social contract theory to confer the highest authority in the state for the purpose of protecting the peoples within its territory and to make it answerable to no other state but to international law on the way it uses its power. The articles on the responsibility of states for wrongful actions codified the existing case law and state practice on state responsibility and were adopted in 2001 by ILC, which is the body responsible for its making.[132] Since they are not a treaty, the draft articles are not directly binding[133] but may assume a binding status indirectly as customary international law.[134]

They deal with the secondary rules instead of primary rules of international law and provide the mechanism to determine when the obligation of state has been violated and the legal consequences of such violation to other states.[135] It has been proved that two elements trigger the question of state responsibility: one, when, a state commits a wrongful act in the sense that conduct, which may be that of action or omission, is attributable to it under international law; and two, the conduct must be a breach of its obligation under the same law.[136] Admittedly, it is reasonable that the conduct of organs of the state shall be attributable to the state,[137] but for purposes of this section it is crucial to determine when the conduct of private entities can be attributable to states. On this, Article 5 provides that the conduct of a non-state entity shall be attributable to the state if such entity is vested 'by the law of that State to exercise elements of the governmental authority' under international law and if at the actual time of the conduct or omission, the said entity is 'acting in that capacity'. The definition of entity in this respect has been interpreted widely and liberally to include 'all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation ..., whether or not they have any connection to the government'.[138]

[132] ICC 'Articles on Responsibility of States for internationally wrongful acts' adopted by the Commission at its fifty-third Session (2001), available at *http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf*, accessed on 20 May 2015.
[133] Danwood Mzikenge Chirwa 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *MJIL* 1–36 at 5.
[134] See Viljam Engström 'Who is Responsible for Corporate Human Rights Violations?' (2002) Online Publications (2) 335k Institute for Human Rights Åbo Akademi University, Finland, available at *http://www.abo.fi/fakultet/en/onlinepublications*, accessed on 20 June 2015.
[135] ILC 'Commentaries to the Draft Articles, extract from the Report of the International Law Commission on the work of its Fifty-third session' Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2), available at *http://www.ilsa.org/jessup/jessup06/basicmats2/DASRcomm.pdf at 61*, accessed on 20 May 2015.
[136] See Article 2 of draft articles supra note 132; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran*) (judgment) [1980] ICJ Rep 3, 30 (*Diplomatic and Consular Staff* case).
[137] See ICC op cit note 132, Article 4.
[138] See ILC op cit note 135 at 80.

Consequently, the conduct of MNCs shall be taken to be the conduct of the state if they are vested by the law of the state to exercise any kind of governmental power.

Article 8 also provides another instance for conducts' attribution. It deals with situations, where conduct that is authorised by a state organ or executed under its 'direction or control' can be attributed to state. Ordinarily, it means, the conduct of private persons is attributable to the state, only if it can be proved that they perform governmental power or the state exercises control over them. In these two scenarios, control seems to be the most probable ground for attributing conduct of corporations to the state. This is because corporations seldom perform governmental power, but are often subject to governmental control. However, control is still difficult to prove under international law, as shown by the recent judgment of the International Commission of Jurists (ICJ) in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*).[139] In that case, the ICJ considered its jurisprudence in two earlier cases[140] and, relying on the case of Nicaragua, held[141] that the acts of genocide committed by the Bosnian Serb armed forces could not be attributed to the Federal Republic of Yugoslavia because the Serb armed forces had not completely depended on the Federal Republic of Yugoslavia for their conduct. Therefore, as noted by the court, it is difficult for the conduct of private entities to be attributable to the state. It requires proof of 'a particularly great degree of State control over them', and this can only be discharged by proving 'complete dependence'.[142]

Even, if the private entity is a company owned by the state, the difficulty still subsists and the burden of proof must be discharged. Of course, international law acknowledges the doctrine of corporate personality and its legal attribute under the domestic law and will not do away with it unless the company is a sham.[143] If, however, the domestic law of the state regards such company as its organ or in the alternative, the company performs part of the governmental power of the state, then its conduct shall be that of the state, without further proof. However, it is important to bear in mind that if a company performs governmental

[139] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (the *Bosnia* case) 2007 I.C.J. 140 (26 February 2007).
[140] In Military and Paramilitary Activities in and against *Nicaragua (Nicaragua v United States of America*) (Merits), [1986] ICJ Rep 14 (the *Nicaragua* case); *Prosecutor v Tadic* (Appeals Chamber judgment) IT−94–1–A (15 July 1999).
[141] Ibid.
[142] Ibid.
[143] See case concerning Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970, 3, 39, paras 56–58.

powers, that conduct must be attributable to the state and not in any 'other private or commercial activity in which the entity may engage'.[144]

Furthermore, one must note that there are two parts to state responsibility under the international law. The first is the attribution of conduct and the second is the breach of obligations. Consequently, Chapter I of the ICJ Articles discusses the rules guarding attribution of conduct in a positive tone, without linking it with wrongfulness. On the contrary, the cumulative effect of Chapter II shows that 'a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects'. The Bosnia case[145] could be used as an example. The ICJ found that the conduct of the perpetrators of genocide that occurred in Srebrenica in July 1995 could not be attributable to that of Serbia. However, despite of decision, the court still held that Serbia had violated its obligation to prevent the genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. It is on the basis of the ambivalent nature[146] of the human rights protection mechanisms under international law, which hovers between attribution of conduct and the particular obligation that is alleged to have been breached, that we will now discuss, i.e. how does African jurisprudence deal with human rights violations by non-state actors in Africa?

The first important point to note is that that the Charter imposes duties on states to respect, protect, promote and fulfil human rights within their jurisdiction.[147] Even before enumerating the rights in the Charter, Article 1 gives priority to enforcement and therefore provides that states should recognise the rights contained in the Charter and requires them to take legislative and other measures to implement and enforce them. To recognise is to respect and protect, while to take measures to implement is to take steps not only to enforce but to protect, promote and fulfil the rights in their jurisdiction. The Charter also provides some specific guidelines on the measures that could be taken by states to fulfil these rights. Examples of such measures is to: extend medical attention to the sick;[148] explore wealth and mineral resources in a way that will protect the unity and solidarity of Africa;[149] regulate foreign business transactions in order to remove foreign exploitation of economic resources

[144] See ICL op cit note 135 at 94.
[145] See *Bosnia* case supra note 139.
[146] Its nature is ambivalent in the sense that they are closely related and yet they are distinct. See ILC op cit note 135 at 81.
[147] See *SERAC* case supra note 71.
[148] See African Charter op cit note 7 Article 16(2).
[149] Ibid Article 21(4).

to the full benefits of the people;[150] promote the teaching of the Charter[151] and set up state institutions for the attainment of same purpose; protect rights generally; and ensure independence of the judiciary.[152]

These extended provisions for state responsibility in the African Charter, in line with the traditional conception of international law, have contributed immensely to determine the jurisprudence path the African Commission has taken on the issue of protection of human rights in Africa. This thesis shall consider three cases to illustrate this with regard to human right violations by non-state actors.

The first case, *Zimbabwe Human Rights NGO Forum v Zimbabwe*,[153] explains the meaning and status of non-state actors in the African Commission jurisprudence as well as the extent of a state's responsibility for human rights violations committed by non-state actors. In this case, the human rights NGO Forum, which comprises a consortium of 12 human rights groups in Zimbabwe, brought the communication against Zimbabwe. It alleges that the involvement of the state in the murder of 82 people, rape of women, destruction of properties, kidnapping, torture and other mass atrocities committed between June 2000 and November 2001 by the supporters of Zimbabwe's ruling party the African National Union Patriotic Front, ZANU (PF). According to the consortium, ZANU (PF) was led by the Zimbabwe Liberation War Veterans Association (War Veterans) against the people of Zimbabwe who were perceived to be supporters of opposing political parties. The consortium further alleges that the state was involved in this violence through Zimbabwe Republic Police (ZRP), the Zimbabwe National Army (ZNA) and the Central Intelligence Organization (CIO) by invading farms, by granting amnesty to some of the perpetrators, and by refusing to prosecute the majority of the perpetrators who could not be granted amnesty because of the grievous nature of their crimes.

In determining the case, the African Commission identified three issues for determination: first, to examine the meaning of the non-state actors and decide whether ZANU (PF) and the War Veterans are qualified to be non-state actors; two, to examine the extent of a state's responsibility for human rights violations or acts committed by non-state actors; and third, whether the clemency[154] granted amounted to a violation of Zimbabwe's obligations under Article 1 of the Charter. In answering the first question, the African

[150] Ibid Article 21(5).
[151] Ibid Article 25.
[152] Ibid Article 26.
[153] 245/2002 (2006) AHRLR 128 (ACHPR 2006) (21st Activity Report) (*NGO Forum* case).
[154] The AC examined the clemency order which was Order no.1 of 2000 Zimbabwe.

Commission notes that the need to expand the primary subjects of international law to accommodate other actors who are capable of 'impairing the enjoyment of the human rights of others', for the purpose of being questioned directly or indirectly through the states for their roles in human rights abuse coined the term 'non-state actors'.

Citing examples of the term to include a single person or corporate bodies such as organisations, institutions, companies and other bodies operating outside the enclave of 'the State and its organs', the African Commission held that ZANU (PF) and the Zimbabwe Liberation War Veterans Association are non-state actors. This study is of the view that the African Commission erred in the approach it adopted to reach that decision. It concludes that ZANU (PF) is a separate entity different from the government of Zimbabwe instead of overwhelming evidence that leadership in both organisations is interwoven. 'There are members of government who are members of the party and members of the party who are war veterans'.[155] In fact the president of Zimbabwe was the patron of the War Veterans at the time of the incident and was also the president of the party and its former secretary. Top members of his cabinet were also top members of the party. The issue of control should not be difficult to prove in this case. But the African Commission insisted on the proof of control by documentary evidence, an approach condemned by Olufemi Amao as not only wrong but frustrating, arguing 'human rights violators using non-state actors as proxies hardly leave paper trails'.[156] In that regard, he concludes that the case departs from the ICJ decisions in the Nicaragua[157] and Bosnia[158] cases where it was held that 'control' is a major deciding factor in determining state responsibility.[159]

On the issue of extent of human rights violations by the non-state actors, the African Commission approves the standard laid down in *Velásquez Rodriguez v Honduras*[160] by the Inter-American Court of Human Rights (IACHR) as the correct yardstick to determine 'whether a State has acted with sufficient effort and political will to fulfill its human rights obligations'.[161] In that case, the court established the due diligence principle for the first time and held that a state will fail in its duty to exercise due diligence if it fails to protect people in its territory from attacks from private parties, or fails to sanction private parties for human

[155] See 245 (2002) (*NGO Forum* case) supra note 153 paras 88, 94–95, 106.
[156] See Olufemi Amao *Corporate Social Responsibility, Human Rights and the Law, MNCs in Developing Countries* (2011) 185.
[157] See *Nicaragua* case supra note 140.
[158] See *Bosnia* case supra note 139.
[159] See Amao op cit note 156 at 184.
[160] 1988 IACHR (ser. C) No. 4 (29 July 1988) (the *Honduras* case).
[161] See *NGO Forum* case supra note 153 para 146.

rights violations committed in its territory and more so if it is unable or unwilling to restore the rights of the victims violated and fails to compensate them. Consequently, Honduras was held to have failed in its obligation to exercise due diligence in the sense that it failed to protect its citizens from torture, killings, disappearance and series of violence that were perpetuated by the Armed Forces of Honduras between 1981 and 1984. The court considered the failure to protect its people as a breach of Honduras obligations under the American Convention and compensations were ordered to be paid by the state of Honduras to the families of the victims.

Relying on the principle laid down by the case, the African Commission classifies acts of conduct into two: acts or omission by states, and acts by private parties. On acts or omission by states, it notes that Article 1 of the African Charter is an important ingredient to determine the extent of liability of the states to human rights violations, therefore any action or omission on the part of a state to assume 'responsibility in the terms provided by the African Charter' constitutes an act imputable to the state.[162] In the same way, it argues that the act of non-state entities too can trigger responsibility of the state, though, unlike the first category, it is 'not because of the act itself', but because of the failure to exercise due diligence either in preventing the violation or failure in taking 'the necessary steps to provide the victims with reparation'.[163]

On the strength of that argument, it states further that 'the standard for establishing State responsibility in violations committed by private actors is more relative. Responsibility must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action'.[164] Regrettably, however, applying the standard to the case at hand, the African Commission held that the complainant failed in three aspects: it fails to prove that the state colluded with the militias in committing crimes; it fails to prove that the state aids or abets the non-state actors in perpetuating violence; and it fails to show that the state remains unconcerned about the violence that occurred.[165] Therefore, the state was not found to have failed to comply with its obligation under Article 1 of the African Charter, with regard to the violence unleashed by the militias.

A relevant question that demands attention at this juncture is whether it was necessary for the applicants to prove collusion between the state and the militias in order to trigger the issue of state responsibility. The answer, according to Chaloka Beyani, is no. He argues that

[162] Ibid para 142.
[163] Ibid para 143.
[164] Ibid para 160.
[165] Ibid para 163.

the correct interpretation of the case[166] is that where the state fails in its duty to prevent violations by non-state actors, the responsibility of the state for human rights is triggered if the possibility of violation of human rights is reasonably foreseeable.[167] Consequently, an attempt by the African Commission to elevate private conduct to a constructive act of the state and its quest for evidence of collusion was unnecessary.[168]

Finally, in the same case but on the issue of clemency law, the African Commission held that Zimbabwe violated its obligation under Articles 1 and 7(1) of the African Charter'[169] because its clemency order made it impossible for the victims to seek remedies in the state and the order could be interpreted to mean that the state supports a position of impunity.

The second case, *SERAC and Another v Nigeria*[170] deals with state responsibility for human rights violations of corporations. In this case, a petition filed by two NGOs on behalf of the people of Ogoni community alleges the military government of Nigeria, which was in power at the time, was directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC) as the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that the consortium engaged in oil operation in a crude manner, without regard to the safety of the peoples and which caused environment degradation and destroyed the means of livelihood by poisoning the soil and water upon which the main business activities (farming and fishing) of the people revolved.

The government of Nigeria was also accused of complicity for failing in its duty to protect the Ogoni people from gross violations of their rights by the non-state entity and by protecting the oil companies with state security apparatus so that it could continue to do business. The government security forces wantonly destroyed properties and killed many innocent Ogoni people. Protests against the oil companies led to the execution of nine Ogoni leaders.

The African Commission found Nigeria to have breached its four-fold obligations guaranteed by the African Charter and was therefore found to have violated the right to enjoy Charter-guaranteed rights and freedoms without discrimination,[171] the right to life,[172] the right

[166] See *Honduras* case supra note 160.
[167] See Chaloka Beyani 'Recent Developments in the African Human Rights System 2004–2006' (2007) 7 *HRLR* 582–608 at 606.
[168] Ibid.
[169] See *NGO Forum* case supra note 153 para 215.
[170] See *SERAC* case supra note 71.
[171] African Charter supra note 7 Article 2.
[172] Ibid Article 4.

to property,[173] the right to health,[174] the right to housing,[175] the right to food,[176] the right of peoples to freely dispose of their wealth and natural resources,[177] and the right of peoples to a 'general satisfactory environment favorable to their development'.[178] It is noteworthy that in this case, the African Commission did not touch the issue dealing with proof of collusion or complicity between the state and the government of Nigeria as it did in the Zimbabwe case. Amao argues that while it seems that the former approach adopted in the Nigerian case may raise an expectation that the African Commission is setting a flexible yardstick to determine state responsibility for human rights violations by corporations, the fact is that 'such suggestion would not be compelling in the face of the later decision'.[179]

Indeed, it appears that the exact standard is not clear. It may oscillate between being flexible or strict depending on the facts of the case. However, there is no doubt that the African Commission is reluctant to jettison the request for proof and generate the doctrine of state responsibility from the conduct of the private parties unless there is overwhelming evidence that the state wholly supports the activities of the private parties to the extent that it fails totally to take any measures, even if only cosmetic, in fulfilment of its obligations under the Charter. Thus, the African Commission notes[180] in the Nigerian case that the Nigerian government abandoned its obligations under the Charter and gave the 'green light' to the private entities, particularly the oil companies that they had a free ride to devastatingly violate the rights of the Ogoni. Such a decision was not arrived at in the Zimbabwe case, because the government indulged in some cosmetic measures to put an end to the violence embarked upon by the private parties.

Another issue worthy of discussion in the *SERAC* case[181] is the idea of holding the Nigerian government liable for complicity in the violation of human rights perpetuated by the non-state entities (corporations) on the grounds of state responsibility, without attributing any blame to the corporations involved. Joseph Oloka-Onyango condemns this approach, as he argues that the 'main focus of condemnation' by the African Commission was the government of Nigeria, 'little attention was given to the obligations and responsibilities (in human rights terms) of the companies that were intimately involved … in many of the human

[173] Ibid Article 14.
[174] Ibid Article 16.
[175] Ibid Article 18(1).
[176] Ibid Implicit in Articles 4, 16 & 22.
[177] Ibid Article 21.
[178] Ibid Article 24.
[179] Amao op cit note 156 at 192.
[180] *SERAC* case supra note 71 para 58.
[181] Ibid.

rights violations that occurred there'.[182] At the end, there is no doubt, that the decision of the African Commission was one-sided, making the Nigerian government responsible for all the atrocities that occurred. Perhaps the position of the African Commission is understandable as it could not have focused on the corporations involved (SDPC) when the African human rights system, like all other regional human rights systems, is in fact state-based. In addition, the corporations are not parties to the Charter.

The problem lies with the state-based structure and it will be unfair to expect the African Commission to condemn the structure that ensures its legitimacy. Since the responsibility to change the structure lies with the AU and not with the African Commission. As acknowledged by Onyango himself and as stated earlier in this thesis, the African Commission's approach in this case is compatible with state responsibility doctrine of international law as enunciated by some other international tribunals. In fact, the African Commission referred to the *Honduras* case,[183] the *X and Y v Netherlands* case[184] and its own decision in the *Commission Nationale des Droits de l'Homme et des Libertes v Chad*[185] to hold that a state is liable for its failure to protect its citizens from the hands of private parties. In the *Chad* case, the African Commission held that there had been serious and massive violations of human rights in Chad and that the state had failed to protect the rights in the Charter from violation by other parties and so the state had violated Articles 4, 5, 6, 7 of the African Charter.

On the other hand, though the case is ground-breaking, it can be argued that it performed poorly in the area of corporate accountability. The African Commission has a mandate to protect human rights and should go to any length to ensure its effective protection and not adopt cosmetic measures that cannot work in Africa. The African Commission should interpret the Charter to suit the peculiar circumstances of Africa's developing countries. The peculiar circumstance of Africa, identified by many scholars, is that of an inability or unwillingness to regulate 'multinational business activity' in the states.[186] In such a situation, to ignore the corporation involved and concentrate on the state could not solve the

[182] Joseph Oloka-Onyango 'Who's Watching "Big Brother" Globalization and the Protection of Cultural Rights in the Present Day Africa' (2005) 27 *HRQ* 1245 at 1272.
[183] See *Honduras* case supra note 160.
[184] See 91 ECHR (1985) (ser. C, no. 4 FACT. The court held that failure of the state to provide opportunity to a minor who had learning disabilities to institute criminal proceedings against the perpetrator of sexual assault on her is a breach of her Article 8 rights.
[185] (2000) AHRLR 66 (ACHPR No. 74/92, 1995).
[186] See Helen Lauer 'Reasons for Treating Global Economic Justice as an Essentially Contestable Concept' (2013) *ESJSEE* 610–623 at 618. He noted that 'Elected officials in modern African democracies are regarded among the worst offenders in this respect of suppressing interests that might conflict with MNC profits', available at *http://eujournal.org/index.php/esj/index*, accessed on 20 June 2015.

problem. The effects of this case shall further be discussed in Chapter 6. However, this study is of the view that the African Commission's decision would have been better off if it had considered corporate law, human rights theory, the emerging trends in international law, and the jurisprudence of the African Charter itself with regard to the attribution of duties and responsibilities to all actors.

In the third case, what is important is the jurisprudence of the African Commission with human rights violations that arises as a result of the relationship between private parties or in the private sphere. In *Kevin Mgwanga Gunme et al v Cameroon,*[187] the communication was brought by the representatives of two Anglophone separatist organisations, the Southern Cameroons National Council (SCNC) and Southern Cameroons Peoples Organization (SCAPO) against the Republic of Cameroon. The main complaint dealt with the issue of self-determination, which is not the focus of this study. However, they also claimed that many discriminatory practices were directed against their companies due to decision taken by the state of Cameroon to join Organisation pour l'Harmonisation des Droits d'Affaires en Afrique (OHADA), a treaty for the harmonisation of business legislation amongst Francophone countries in Africa.

According to them, contrary to the constitutional recognition of English and French as the official languages in the state, OHADA prescribes that the treaty shall be interpreted in French and companies not registered under the OHADA law cannot open bank accounts in Cameroon. Consequently, they could not register their companies whose articles of association were written in English. They therefore allege that the membership of Cameroon in OHADA with its attendant language victimisation amounts to a violation of their rights.

In its ruling, defining businesses as 'corporate bodies or legal persons', the African Commission reasoned that since the state of Cameroon had taken steps to ameliorate the hardships caused by the language barrier, the mere fact that the state ratified the OHADA treaty could not be deemed to be a violation of Article 2. The African Commission dealt with the effects of the conduct between two private corporations when it held further that it was not right for financial institutions like banks to impose the clause of language conditionality by insisting that Southern Cameroon based companies should translate their articles of incorporation from English into French. The African Commission was of the view that the banks could have done the translation themselves. Therefore, it held that since the state of Cameroon did not do anything here 'to address the concerns of Southern Cameroonian

[187] 266/2003 26th Activity Report of ACHPR.

businesses, which were forced to re-register under OHADA' the state had violated Article 2 of the African Charter.[188] It is also essential to note that the African Commission recommended that compensation be paid to non-state actors, the companies in English-speaking Cameroon, as damages for discriminatory treatment meted against them by banks.

Furthermore, it is also essential to note that the African Commission did not only issue recommendations to the state, it did the same to non-state actors as it advised the complainants, particularly the SCNC and SCAPO to stop secessionist moves, to transform into political parties, and to take the path of 'constructive dialogue with the Respondent State on the Constitutional issues and grievances'.[189]

The liberal way in which the African Commission dealt with non-state entities in this case as if they were parties to the treaty were commendable and should raise hope of better prospects in its jurisprudence on non-state actors in future, but Gina Bekker[190] argues otherwise. She argued that the reason why the African Commission issued the recommendations to non-state entities had to do with 'OAU/AU's traditional fixation on the preservation of sovereignty and territorial integrity of the State', rather than 'a generous interpretation of its mandate in respect of remedies'. The soundness of that argument can be seen in a later case,[191] where the African Commission did not issue recommendations to non-state entities. However, that position must still be taken with a pinch of salt; there is no guarantee that the African Commission cannot take such an approach in future, particularly since the approach is compatible with the African Charter of apportioning duties to all stakeholders.

[188] Ibid para 108.
[189] Ibid para 215(2).
[190] Gina Bekker 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' (2013) 13 *HRLR* 499–528 at 524.
[191] *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

4.4.2 African Commission on Human and Peoples Rights

Article 30[192] of the Charter establishes the African Commission to protect and promote human rights in Africa. To perform this primary task effectively, Article 45 assigns specific duties to it that are incidental to the attainment of the main goals. These are: the promotion of human rights through sensitisation of the public and institutions by organising conferences and seminars and by offering advice and recommendations to governments;[193] setting of standards, principles and rules aimed at solving contemporary legal problems relating to human rights and freedoms of the peoples upon which the states may rely to enact their own domestic law;[194] co-operating with other similar institutions in Africa and at the global level who have the same objective to pursue attainment of human rights;[195] interpreting the provisions of the Charter; and performing any other duties or tasks that may be given to it by the AHSG.[196]

The major instrument of protection by the African Commission is the consideration of communications that are brought by states and non-state entities and its decisions or recommendations are presented along with other matters in a report to be submitted to the AHSG of the AU annually and the whole report shall remain confidential until such time that it has been considered and authorised for publication by the AHSG.[197] The African Commission also has special powers in line with the direction of the AHSG to conduct a thorough investigation into cases in which, in its view, reveal the existence of gross or massive violations of human rights.[198] Such cases would include violation of different types of rights or gross violation of a single right.[199]

In interpreting the provisions of the Charter, the African Commission is enjoined to be guided by the inspiration of international law dealing with human and people's rights from human rights instruments adopted by the UN and African countries.[200] In addition, 'as subsidiary measures, the AC is also authorized to consider to determine the principles of law', other general or particular international conventions, rules and African practices and

[192] See African Charter op cit note 7 Article 45(1) & (2).
[193] Ibid Article 45(1a).
[194] Ibid Article (1b).
[195] Ibid Article (1c).
[196] Ibid Article 45(4).
[197] Ibid Articles 47–59.
[198] Ibid Article 58. For discussion this Article, see Murray op cit note 130.
[199] Ibid Murray at 110.
[200] African Charter op cit note 7 Article 60.

doctrines compatible with international norms on human and people's rights, customary law, general principles of law, legal doctrines and precedents recognised by African states.[201]

Indeed, the African Commission may decide to conduct investigations in any manner it chooses. It can seek to be enlightened from the Secretary General of the OAU or from any other expert in the area of its investigation.[202] It monitors compliance of laws enacted by states to the Charter by examining state reports, submitted every two years, in terms of the rights enshrined in the Charter.[203]

The African Commission consists of 11 African personalities of the highest reputation, who are acknowledged 'for their high morality, integrity, impartiality and competence in matters of human and peoples' rights' with special consideration being given to those with legal experience.[204] Once elected by the AHSG, they serve part-time in their individual capacity for a term of six years.[205] The quorum is formed when seven members are present and when there is a tied vote, the Chairman has a casting vote.[206]

With regard to performance of its primary duty as guardian of the Charter and the watchdog of human rights in Africa, scholars have rated the African Commission poorly. To refer to a few such critical comments, Mohammed Abdelsalam A Radwan argues 'the African Commission has been apparently weak in promoting, protecting and implementing the Charter provisions'.[207] Similarly, Onyango agrees with the view when he notes that the functions of the African Commission 'do not even marginally affect the status quo' of human rights violations in Africa and that the so-called state reportage 'which is supposed to be the bedrock of the system [and] has proven a dismal failure'.[208] Nsongurua Udombana, who has been consistent in making critical comments against the African human rights system, argues that the African Commission has proved to be incapable of safeguarding the 'basic human rights of Africans'.[209] As exemplified in the critical comments by these scholars, there is no way the African Commission can be exonerated from blame, indeed, the African Commission has neither been able to put an end to human rights violations in Africa, nor has

[201] Ibid Article 61.
[202] Ibid Article 46.
[203] Ibid Article 62.
[204] Ibid Article 31(1).
[205] Ibid Articles 31(2), 33 & 36.
[206] Ibid Article 42(2)(3) & (4).
[207] See, Mohammed Abdelsalam A Radwan 'Article 58 of the African Charter of on Human and Peoples Rights: A legal analysis and how it can be put in to more practical use' a paper delivered at the (1996) Annual Conference of African Society of International and Comparative Law 290–309.
[208] Joseph Oloka-Onyango 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?' (2000) 6 *BHRLR* 39 at 71.
[209] Nsongurua J Udombana 'Towards the African Court on Human and Peoples' Rights: Better Late Than Never' (2000) 3 *YHRDLJ* 45–111 at 73.

it been able to interpret the Charter in a unique manner that departs from the state-based approach to international law.

Nonetheless, one must note that the African Commission has been able to attain some measure of protection, even if minimal. For example, with regard to 'claw-back' clauses in the Charter which many, as noted earlier, have regarded as instruments that could be used to subvert human rights protection, the African Commission has frustrated such loopholes by engaging in an holistic interpretation of the Charter that ensures domestic laws are not used by states to subvert or limit their obligations under the Charter.[210] Similarly, in the *SERAC* case,[211] the African Commission interpreted the Charter to include the rights to food, shelter and housing which are not expressly available in the Charter. As Dejo Olowu questions, it is uncertain at present to see how the African Commission will apply this decision to African countries who are not parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), but in spite of that uncertainty, there is no doubt as he himself admits that the decision is likely to become the *classicus omnibus* for implementation of economic, social and cultural rights in the African regional system.[212] In sum, the understanding of difficult terrain under which the African Commission performs its task will justify the assertion by some liberal scholars[213] that the African Commission in spite of its constraints has established itself as a supervisory institution in Africa. Even though the African Commission may not have performed to our expectation, a reflection on its humble beginnings and a liberal look at its initial problem of attaining independence within the institutional structure of the AU would show that with its efforts so far the African Commission has indeed established itself as a regional supervisory organ protecting human rights in Africa.

[210] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).
[211] See the discussion of the case in Chapter 1 section 1.2 and in this chapter sub-section 4.4.1.
[212] As a result of uncertainty he advocates a new approach that can be used to enforce the new rights. See Dejo Olowu *An Integrative Rights-Based Approach to Human Development in Africa* (2009) 154.
[213] See Odinkalu op cit note 130 at 398. He notes 'The Commission has tried, with substantial success, to address these shortcomings through its practice, evolving procedures, and jurisprudence'; VincentNmehielle 'Development of the African Human Rights System in the Last Decade' (2004) 11(3) *HRB* 1 at 6–11. He notes 'The protective mandate of the Commission has progressively developed to some degree, to the point where it has arguably entrenched itself as an institutional supervisory mechanism'.

4.4.3 Special mechanisms for the protection of corporate human rights violations

In November 2009 at its 46th ordinary session, the African Commission specifically established the WGEIEHR, to examine the extent of human rights violations by non-state actors in Africa and the effects of the operation of extractive industries on the rights protected by the African Charter.[214] Furthermore, the WGEIEHR has a mandate to inform the ACHPR of its findings relating to mechanisms of holding non-state actors liable and its prescription on what should be an adequate compensation for corporate human rights violations. In addition, it must design a strategy and framework to protect human rights of the people, particularly the rights protected in Articles 21 and 24 of the Charter[215] from being violated by corporations. Six experts were appointed to join the group within the period of 2009 and 2011.[216] After the expiration of the initial two years, three new members were added to the WGEIEHR.

With the setting up of this working group, the ACHPR recognises the inadequacy of its jurisprudence to protect human rights violations by corporations in Africa through clutching to the principle of state responsibility. To ameliorate the negative effects of its jurisprudence, it set up a sub-group to interrogate the question of how to ensure that corporations are liable for human rights violations in Africa by developing a legal framework within the AU that protects human rights in the business sector and also provide adequate remedies for breach of human rights violations by companies.

Unfortunately, despite the laudable goals, four years later, in 2014 to be precise, WGEIEHR is still at the teething stage and has not done anything substantial. Its chairperson, in a report of its achievements in 2012, stated that 'unlike other special mechanisms, the Working Group on Extractive Industries does not have as much to report on concerning its achievements'.[217] In fact, the inability of the WGEIEHR to work speedily on the mandates was not actuated by the inefficiency of the members but was due to financial problems that

[214] See, ACHPR '148: Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2009), available at *http://www.achpr.org/sessions/46th/resolutions/148/*, accessed on 20 June 2015.
[215] Ibid. The rights of the peoples to 'freely dispose of their wealth and natural resources and to a general satisfactory environment favorable to their development'.
[216] Ibid.
[217] Pacifique Manirakiza 'Report of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2012), available at *http://www.achpr.org/sessions/52nd/intersession-activity-reports/extractive-industries/*, accessed on 20 June 2015. Note that Commissioner Pacifique Manirakiza was reappointed as the chairperson at 54th ordinary session in November 2013.

put the inaugural meeting of the group on hold until November 2011.[218] This study will further examine the rationality for the existence of this group in Chapter 7.

4.4.4 African regional courts

Most critics of the African human rights system are of the view that a court rather than a commission should have been tasked with the responsibility of protecting human rights in the continent, as is the case with other similar regional human rights instruments.[219] They, therefore, hold the view that the failure of the Charter to establish a court is the major reason behind the inability of the African Commission to protect human rights effectively in the continent.[220] As a result, there was a reverberated clamour for the establishment of a court in Africa.[221]

4.4.4.1 African Court on Human and Peoples' Rights

In response to this demand, the Protocol establishing the African Court on Human and Peoples' Rights (the Court)[222] was adopted on 9 June 1998 in Burkina Faso, and came into force on 25 January 2004 after ratification by more than 15 countries. The Court has jurisdiction to hear disputes and matters brought to it that relate not only to the interpretation and operations of the Charter, but to the Protocol and any other significant human rights instruments ratified by states that have brought disputes.[223]

The opinion of scholars differs on the utility of this provision. While, Barney Pityana[224] notes with misgiving that the provision serves as a limitation on the jurisdiction of the Court restricting the categories of cases it can decide to human rights issue. For example, Ndombana[225] and Robert Eno[226] are of the view that the provision will bolster the protection of the people as the court has a plethora of human rights instruments to manoeuvre for that

[218] The inaugural meeting was held in, in Nairobi, Kenya between 28 and 30 November 2011.
[219] For example, European Court of Human Rights (ECHR) a regional court based in Strasbourg was established in 1958.
[220] See Udombana op cit note 209 at 46–47.
[221] For example in 1961, 194 judges, lawyers, and scholars from 23 African countries had convened in Lagos, Nigeria under the aegis of the International Commission of Jurists for the African Conference on the Rule of Law to call for the establishment of a court in Africa to protect human rights in the continent. See *Law of Lagos*, 7 January 1961 para. 4, reprinted in 3 *JICJ* 9 (1961).
[222] Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol).
[223] Ibid Article 3(1).
[224] See N Barney- Pityana 'Reflections on the African Court on Human and Peoples' Rights', available at *www.unisa.ac.za/contents/about/principle/docs/Municipal_Law.doc*, accessed on 20 May 2015.
[225] See Udombana op cit note 209.
[226] Robert Wundeh Eno 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *AHRLJ* 223–233 at 226.

purpose. Both views are correct, it must be noted, however, that the Protocol establishing the Court recognises the existence of the African Commission and consequently it must handle some matters. The problems that are meant to be solved with the emergence of a court in Africa are the problems of human rights and not actually general issues like boundary disputes devoid of human rights. Even in spite of that assertion, it must be noted that another different court entirely is still envisaged in the Constitutive Act of the AU, so the provision as it is drafted is not fatal to an African system of justice.

However, in cases of objection to the jurisdiction, the Court is vested with the power to decide if it has jurisdiction or not.[227] It also has the power to provide advisory opinions on any legal issues dealing with the Charter and any other appropriate human rights instruments, on condition that the legal issues concerned do not arise from the matters being considered by the African Commission.[228] That condition prevents abuse of the system, promotes the smooth working of the two institutions and avoids conflict of interest between the ACHPR and the Court. The independence of judges[229] of the Court is secured by a secret balloting system of election,[230] security of tenure of office,[231] oath of office committing to be impartial,[232] and a rule dealing with conflict of interest that excludes any judge from hearing a matter in which they are the same nationality as a party bringing a matter to Court.[233] The Court, situated in Arusha, Tanzania, consists of 11 judges.[234]

The major problem of the Court is the restriction of victims of human rights violations to seek justice in the Court. Access to the Court is open to two categories of litigants. It is mandatory for the Court to hear cases brought by the first category, which consists of the states and African institutions and inter-governmental organisations.[235] The second category of litigants includes victims of human rights violations and NGOs. The jurisdiction of the Court to hear the latter is optional and can only be triggered on two conditions: first, if the individuals and the NGOs concerned have observer status with the ACHPR; second, if their states have made a declaration acceding to the jurisdiction of the Court to hear them in a declaration made either at the time of ratification or any time thereafter.[236] These conditions

[227] The Protocol op cit note 222 Article 3(2).
[228] Ibid Article 4 (1).
[229] Ibid Articles 17 & 18.
[230] Ibid Articles 12 to 14.
[231] Ibid Articles 15 &19.
[232] Ibid Article 16.
[233] Ibid Article 22.
[234] Ibid Article 11(1).
[235] Ibid Article 5(1).
[236] Ibid Articles 34(6) & 5(3).

have become barriers to the wheels of justice and have shut out many victims from seeking redress from the Court.[237]

Aside from the problem of conditions and its denial of access to the Court, another problem with regard to corporate human rights violations is the principle of state responsibility. The implication is that only states can be brought to the Court. Corporate entities can still not be brought to the Court for violation of human rights, as the jurisprudence is still state-based. Therefore, the Court may not be able to do more, even if it attempts to, than going beyond the jurisprudence of the African Commission in the *SERAC* case on the issue of corporate human rights violations.[238]

4.4.4.2 African Court of Justice and Human Rights

The Constitutive Act (the Act)[239] of the AU provides for the establishment of the Court of Justice and refers to it appurtenant protocol for the statement of its 'statute, composition and functions'.[240] The Court of Justice is positioned to be the major judicial organ of the AU[241] and has the jurisdiction to determine all disputes and matters dealing with the Constitutive Act and the Court of Justice Protocol,[242] specifically, matters relating to the interpretation and the workings of the Act and AU treaties, the status of AU treaties, and other legal instruments adopted within the AU framework are within its jurisdiction.[243] For that purpose, it has power to consider matters arising from any agreements entered into by States Parties if the agreement confers jurisdiction on the Court of Justice.[244] The purpose of that power is to examine any act by the State Party which amounts to a breach of its obligation owed to a State Party or to the AU. Consequently, it can award adequate reparation for such breach.[245] Finally, it has the power to determine all disputes emanating from activities of all the organs of the AU and any question of international law.[246]

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[237] For analysis of these problems, see Eno op cit note 226; Dan Juma 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper' (2007) 4(2) *EHRR* 1–21; Andreas Zimmermann & Jelena Bäumler 'Current Challenges facing the African Court on Human and Peoples' rights' (2010) 7 *KIR* 38–53.
[238] See the discussion in Chapter 1 section 1.2 and in this chapter sub-section 4.4.1.
[239] Entered in to force on 26 May 2001, available at *www.african-union.org*, accessed on 20 June 2015.
[240] Ibid Article 18.
[241] Article 2(2) of the Protocol of the Court of Justice of the African Union, adopted at the 2nd ordinary session of the Assembly of the Union, Maputo, 11 July 2003 which entered into force in 2009.
[242] Ibid Article 19(1).
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Ibid.

When the plan to establish the Court of Justice was underway, the then chairperson of the Assembly of the AU suggested the idea of merging the two courts in order to save costs and reduce the growing rate of institutions under the AU to its manageable capacity.[247] Consequently, at a summit of the AU Assembly in 2008, a protocol merging the two courts to become the African Court of Justice and Human Rights (ACJHR) was adopted. [248] The new court will assume the status of African Court of Justice as articulated in the Constitutive Act, to become the main judicial organ of the AU.[249] It is proposed to have three separate chambers, which means, apart from the initial two separate chambers dealing with General Affairs and Human Rights section as envisaged in the statute of the ACJHR, another criminal chamber dealing with international criminal law has been added by the proposed Amendments to the Protocol on the Statute of the ACJHR.[250]

The initial criticism against the proposed merger of the courts has increased intensely with the emergence of another issue of extending the jurisdiction of the ACJHR to cover international criminal law.[251] Whether the controversy is justifiable or not will be examined in Chapter 6. In addition, another question touching implementation, relating to whether the amendments should be streamlined or wholly adopted considering not only the ability of the AU to implement but the necessity for such an expansive criminal jurisdictional framework will also be examined in Chapter 7. Chapter 7 discusses the ideal complementary role of the AU in corporate human rights accountability. In the interim, suffice to express the view that in spite of the controversy surrounding the extension of the ACJHR's jurisdiction, the most interesting thing that will happen to the human rights system in Africa is the vesting of ACJHR with jurisdiction over corporate entities, as done in Article 46(c) titled 'Corporate

[247] See Coalition for an effective African Court on Human and Peoples' Rights 'The African Court of Justice and Human Rights, available at *http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=6:afr-court-integrate&catid=7:african-union&Itemid=12*, accessed on 20 May 2015.

[248] See Article 2 of Chapter one of the protocol establishes a single court, available at *http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf*, accessed on 20 May 2015.

[249] Ibid Article 3 of Chapter 1.

[250] See 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' adopted by AU Heads of State and Governments on 27 June 2014, available at *http://www.au.int/en/content/protocol-amendments-protocol-statute-african-court-justice-and-human-rights* accessed 20 July 2015.

[251] See for example Frans Viljoen 'AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol' (2012) *Africa Law*, available at *http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/*, accessed on 20 May 2015; Ademola Abass 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects'(2013) 60 *NILR* 27–50.

Criminal Liability'. The issues of access to this court and other issues that will enhance its delivery will also be discussed in Chapter 7.

4.4.5 NEPAD and its African peer review mechanism

NEPAD is about evolution of developmental goals and a vision for Africa, an indigenous mechanism constructed by African leaders to deliver the continent from poverty, starvation and the so-called resource curse.[252] It is an amalgamation of a blue-print document espousing African renaissance by the former president of South Africa in 2000 under the economic initiative known as Millennium Action Plan (MAP) and a regional economic integration plan under other economic auspices known as OMEGA.[253] AHSG approved the merger of the two documents in July 2001 to form the New African Initiative (NAI) and in October 2001, the AHSG also approved its policy framework under the new acronym NEPAD.[254] NEPAD seeks to address challenges facing Africa and endeavours to end them by working towards the attainment of sustainable development for Africa, the empowerment of women, the elimination of common and severe poverty in the continent, and by re-strategically positioning Africa for recognition in the multilateral global world.[255]

The most important mechanism to attain the NEPAD objectives is the APRM. It is a process by which states submit themselves to self examination and scrutiny by peer-review of experts to see if through their policies, programmes and general activities, they comply with and do not deviate from human rights parameters, economic indices, democratic ethos and social trends, which have generally been adopted as the best standards for governance. For the purpose of assessment of the reports submitted by states, with regard to corporate governance,[256] the AU has approved eight codes.[257] APRM promotes the use of the codes in order to ensure that corporations' actions are fair to all stakeholders and are receptive to efficient regulatory frameworks that respect social and human rights responsibility, a

[252] See George O Pabo *One Man's Dream* (2011) 88; see NEPAD 'History', available at *http://www.nepad.org/history*, accessed on 20 May 2015.
[253] Ibid NEPAD 'History'.
[254] Ibid AU ratified it in 2002.
[255] Ibid.
[256] It has other three areas of review which are democracy and political governance, economic governance and management and socio-economic development.
[257] See NEPAD 'The Objectives, Standards, Criteria and Indicators for APRM', available at *http://www1.uneca.org/Portals/nepad/Documents/Objectives-Standards-Criteria-Indicators%20for%20APRM.pdf*, accessed on 20 March 2015. Those approved by the Heads of State and Government of the AU are Principles of Corporate Governance (OECD and Commonwealth), International standards on accounting reporting, International standards on auditing, Core principles of Effective Banking Supervision, Core principles for Securities and Insurance Supervision and Regulations, African Charter on Human and Peoples' Rights, Labour Codes of the International Labour Organization (ILO) and Codes on industrial and environmental safety and hygiene of the World Health Organization.

sustainable environment, and corporate and managerial accountability for conduct that falls below the standards set by the codes.[258] There is no doubt that the APRM has become another means of protecting human rights in Africa. A look at reports[259] of some states that put themselves up for the monitoring process show that that the 'human rights landscape' of Africa would be transformed if recommendations emanating from the exercise were implemented. However, such transformation may be a mirage in the sense that the APRM is voluntary and many states may abandon the process, while those who choose to take the path may renege or fail at the implementation stage. This APRM will be properly examined in Chapter 7 to see how it can contribute meaningfully and efficiently to corporate accountability in Africa.

4.4.6 Sub-regional human rights protection mechanism

REC in Africa and the AU are partners that should be working together to facilitate and eventually attain the same objectives, particularly with regard to corporate human rights responsibilities. One of the objectives of the AU that is central to this thesis is the promotion and protection of human rights as enunciated by the African and other human rights instruments.[260] The AU recognises the strategic positioning of the REC in the attainment of its objectives and therefore seeks to unite and streamline the existing and impending policies of REC in order to attain the goals of the AU.[261] Articles 28 and 88 of the Abuja Treaty[262] seem to emphasise the same purpose that REC are a means of attaining the continental vision of the AU. Consequently, in a study of this nature, seeking entrenchment of corporate human rights responsibility in the continent, a look at how the REC complement the role of the AU in protecting human rights accountability of corporations at the sub-regional level, even if briefly, is essential.

It would be wrong to omit this sub-regional level, more so, when the UN Charter recognises, the fact that 'regional arrangements or agencies' which include REC have the imprimatur to take action in their regions in response to situations that are inimical to

[258] See APRM 'corporate governance', available at *http://aprm-au.org/thematic-area/corporate-governance*, accessed on 20 May 2015.
[259] Particularly, reports from Ghana, Kenya, Rwanda and South Africa, see Minority Rights Group International 'African Court on Human and Peoples' Rights: Ten years on and still no justice' (24 September 2008), available at *http://www.refworld.org/docid/48e4763c2.html* 6, accessed on 20 May 2015.
[260] Article 3(h) of the Constitutive Act op cit note 239.
[261] Ibid Article 3(l); see also Article 33(2).
[262] See Treaty Establishing the African Economic Community, available at *http://www.au.int/en/sites/default/files/TREATY_ESTABLISHING_THE_AFRICAN_ECONOMIC_COMMUNITY.pdf*, accessed on 20 June 2015.

international peace and security[263] once the approval of the UN Security Council is sought.[264] However, since the focus of the thesis is on human rights protection, the study will examine only three RECs that have or propose to have human rights protection mechanisms that can complement AU human rights protection at the continental level. These are the Economic Community of West African States (ECOWAS), SADC and the EAC.

4.4.6.1 ECOWAS

ECOWAS, a regional inter-governmental organisation consisting of 15 member states[265] was established on 28 May 197, when its 1975 Treaty was signed in Lagos. It seeks to facilitate co-operation amongst the member states in order to establish an economic regional integration for the purpose of improving 'the living standards of its peoples', and to attain and maintain a viable economic stability, while contributing its own quota, at the same time, to the well-being and growth of Africa as a whole.[266] On 24 July 1993 in Cotonou, it consolidated its reform and transformation to turn the organisation into a supranational entity by revising its 1975 Treaty and changed its Executive Secretariat into a commission.[267]

With regard to corporate accountability to human rights, at present, one instrument and one institution of ECOWAS are important sources of reference. In line with Article 31(1) of the 1993 Treaty which provides for harmonisation and co-ordination of regulations and policies dealing with the mining of natural resources for member states, ECOWAS issued a Directive[268] Code on mining which sets out to protect the human rights of individuals and the community in mining-related business activities in the region. The Code provides for human rights consideration before and after the grant of a mining right to a corporation and for the involvement of the community at both stages.[269] Therefore, corporations are required to respect and obey the right of the community to development and to control their natural resources.[270]

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[263] RECs are included in the category of 'regional arrangements', see the Charter of the United Nations 1945 Article 52.
[264] Ibid Article 53.
[265] They are Benin, Burkina Faso, CapeVerde, Côte d'Ivoire, The Gambia, Ghana, Guinea-Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone, Togo, Guinea and Niger.
[266] Article 3(1) of the 1975 Treaty op cit note 262.
[267] See ECOWAS Revised Treaty 1993; for its discussion, see Jadesola Lokulo-Sodipe & Abiodun Jacob Osuntogun 'Quest for a Supranational Entity in West Africa: Can the Economic Community of West African States attain the Status?'(2013) 16 *PELJ* 255–392 at 277–392.
[268] See ECOWAS 'Directive.C/DIR. 3/05/09 on Harmonization of Guiding Principles and Policies in the Mining Sector' (ECOWAS Directive) Member states have until 1 July 1 2014 to comply with Directives, available at *http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf*, accessed on 20 May 2015.
[269] ECOWAS Directives Articles 4, 5, 11, 15(2) & 16.
[270] Ibid Article 16(1) & (2).

In addition, they must adhere to rules and regulations of the states where they operate and comply with international instruments relating to best environmental practices, sustainable development, public safety and health.[271] Finally, corporations have a positive and negative responsibility to respect and promote varieties of human rights, starting with the rights of women and children and of their workers.[272] In the case of disputes relating to infringement of this Directive, the individual must first lodge a complaint to the state concerned for resolution of the matter, and if the outcome is not satisfactory can proceed to lodge the same complaint with the president of ECOWAS who has the mandate to submit the complaint to the ECOWAS Court of Justice.[273] It is interesting to note that the utilisation of these mechanisms for resolution do not stop the same individual from approaching other regional or international courts like the ACJHR or other arbitration panels, for settlement of the same dispute.[274]

The second source is the ECOWAS Community Court of Justice. Even though the 1975 Treaty makes provision for a tribunal,[275] the Community Court of Justice was not established until 1993 when the 1975 Treaty was revised and replaced with 1993 Treaty that eventually establishes the court.[276] The reason for procrastination in establishing a court has been attributed to the unwillingness of Nigeria to lose its dominance over the regional organisation.[277] However, with the new revised treaty aiming to turn the organisation into a supranational entity, the establishment of a court was inevitable.

In fact, the jurisdiction of the court which was initially prescribed in its enabling protocol was amended twice[278] and supported further with directives[279] to equip the court with jurisdiction to hear cases from individuals who are victims of human rights violations that occurred within the member states.[280] The court is liberal in its approach to adjudication, an applicant needs not to prove that it has exhausted the local remedies and access to court is

[271] Ibid Articles 4 & 6.
[272] Ibid Article 15(1).
[273] Ibid Article 17(1).
[274] Ibid Article 17(2).
[275] See 1975 Treaty op cit note 262 Articles 11 and 56 of the Treaty.
[276] See 1993 Treaty op cit note 262 Articles 6 and 15 of the revised treaty.
[277] See Kofi Oteng Kufuor *The Institutional Transformation of the Economic Community of West African States* (2006) 44.
[278] Community Court of Justice Protocol A/P1/7/91 of 6 July 1991 was amended in 2005 by Community Court of Justice Supplementary Protocol A/SP.1/01/05 of 19 January 2005 and another in 2006 by Community Court of Justice Supplementary Protocol A/SP.2/06/06 of 14 June 2006.
[279] See Regulation of 3 June 2002 on Community Court of Justice jurisdiction; Community Court of Justice Supplementary Regulation C/REG.2/06/06 of 13 June 2006.
[280] For the history of how the court was established and its political interplay relating to its new found jurisdiction see Karen J Alter, Laurence R Helfer & Jacqueline R McAllister 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *AJIL* 737–779.

guaranteed once a victim can prove violation of any human rights instruments ratified by the member states.[281] Consequently, in a number of cases, the court has protected the victims of human rights violations against states.[282] Its decisions and judgments are binding on all institutions of the community, member states, corporations and individuals.[283] The problem of the court, however, lies in its focusing on state's responsibility for corporate human rights violations. Its jurisprudence on this issue does not differ from that of the African Commission, as discussed in this study. The effect of focusing on state responsibility is that corporations cannot be held to account in the court for their complicity in human rights violations jointly committed by them with the states.

Thus, in *Ocean King Nig Ltd v Republic of Senegal*[284] the court held that the plaintiff, a corporate body, had no *locus standi* to sue as a victim of human rights violations under the provisions of Article 10(d) of the 1991 Protocol.[285] Similarly, in *SERAP v Federal Republic of Nigeria*[286] the complaint filed action against the Federal Republic of Nigeria and seven corporations[287] for their complicity in human rights violations of the Niger Delta people of Nigeria. Due to frequent oil spills by the corporations extracting oil from the Niger Delta and failure of the oil companies to effectively clean up the spills, the health of the people of Niger Delta has been greatly affected and their means of livelihood destroyed. On its part, the government failed to use its authority to prevent the companies from toying with the rights of the Niger Delta people. Before the case was heard on merit, the court upheld the preliminary objection which the companies raised and held that it had no jurisdiction to try corporations for human rights violations and thus struck off their names from the list.[288] In its ruling, the court relied on international law, arguing that:

> 'Objection calls for the consideration by the Court of one of the most controversial issues in International Law which relates to the accountability of Companies, especially multinational

[281] See Community Court of Justice 'About Us', available at *http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=*, accessed on 20 June 2014.
[282] See the cases of *Hadijatou Mani Koraou v Niger*, Case No. ECW/CCJ/APP/08/07, *Manneh v The Gambia*, Case No. ECW/CCJ/APP/04/07, *Musa Saidykhan v. The Gambia*, ECW/CCJ/APP/04/07 & *SERAP v Nigeria* ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10.
[283] See the Revised Treaty op cit note 267 Article 15(4).
[284] ECW/CCJ/APP/05/08.
[285] The Protocol was amended by the supplementary protocol to give redress to individuals whom the court interpreted to mean human beings alone.
[286] Judgment N° ECW/CCJ/JUD/18/12.
[287] Which are Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil.
[288] *SERAP v President of Nigeria & Others*, ECW/CCJ/APP/08/09; Rul. No: ECW/CCJ/APP/07/10.

corporations, for violation or complicity in violation of Human Rights especially in developing countries. In fact, one of the paradoxes that characterize International Law presently is the fact that States and individuals can be held accountable internationally, while companies cannot'.[289]

The decision as noted earlier is similar to the jurisprudence of African Commission and state-centric view of international law. Thus in its judgment, the court held that the Federal Republic of Nigeria, by failing to call the corporations to order and put a stop to gross violations of human rights perpetuated by the companies failed in its duties and obligations under the African Charter and consequently was found to have violated Articles 1 and 24 of the Charter.

4.4.6.2 SADC

One of the institutions established for the attainment of the objectives of SADC is the tribunal.[290] The tribunal has jurisdiction to interpret the provisions of the treaty and subsidiary instruments, including its protocol and to also adjudicate on all other matters that may arise from any other multilateral or bilateral agreements between member states within the community or amongst members themselves.[291] The judgment of the tribunal is not only final but also binding.[292] The court was not conferred expressly with jurisdiction to adjudicate on human rights violations but indirectly. Article 4 of the treaty provides that member states must hold certain principles as sacrosanct in their relationship with one another. One such principle is human rights.

The court can also hear disputes brought by individuals if such a person has exhausted local remedies or if he has not done so but its inability to do so is occasioned by a stumbling block at the state level which prevents him from proceeding under the domestic jurisdiction.[293] Consequently the tribunal, which became functional in 2005, was of the view that it had jurisdiction to pronounce on issues of human rights. Thus, it assumed jurisdiction

[289] Ibid para 65.
[290] See Article 9(1f) of the treaty establishing SADC, available at *http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf*, accessed on 20 June 2015; Article 14 of the Protocol on Tribunal in the SADC, available at *http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pd*, accessed on 20 May 2015.
[291] Ibid see Article 16 of the Treaty.
[292] Ibid Article 16(5) of the Treaty.
[293] Ibid Article 15 of the Protocol.

in a case of human rights dealing with confiscation of property of a Zimbabwean under the Lands Reform policy of the state.

In *Campbell (Pty) Ltd. v The Republic of Zimbabwe*,[294] the tribunal held that there was no opportunity for the victim to sue the government in Zimbabwe because the jurisdiction of the court had been ousted.[295] It held further that the state of Zimbabwe committed a breach of its obligations under Articles 6(2) and 4(c) of the treaty. The tribunal then ordered Zimbabwe to take steps 'to protect the possession, occupation and ownership of the land' and that fair compensation should be paid on or before 30 June 2009 to the three applicants. Rather than complying with the judgment, the aftermath is that the state decided not to recognise the tribunal again or have anything further to do with it. In *Louis Karel Fick and Others v The Republic of Zimbabwe*[296] the tribunal again held that the state of Zimbabwe had breached its obligation under the treaty[297] by failing to provide an opportunity for the applicant to enforce the decision of the tribunal. In fact in that case, Zimbabwe sent a written note to the Tribunal stating that it had resolved not to submit to its jurisdiction again and that all its past decisions were of no effect and non enforceable in its territory. That was the death knell of the tribunal. On 20 May 2011, the tribunal was eventually dissolved, stripped of its jurisdiction and unable to render its judicial performance.[298] To date, the tribunal remains in limbo. The consequence of that proscription is that there is no institution currently championing the protection of the rights of the people in the SADC.

[294] (2008) AHRLR 199 (SADC 2008).
[295] The Constitution of Zimbabwe was amended to oust the power of the court with respect to the said confiscation, see, section 16(B) of Amendment 17 of the Constitution of Zimbabwe (2005).
[296] SADC (T) 01/2010.
[297] Specifically in breach of Articles 32(1), (4), (5) of the SADC Treaty.
[298] They took a decisions 'not to reappoint members of the Tribunal whose term of office expired on August 31, 2010; and not to replace members of the Tribunal whose term of office will expire on 31 October 2011. See the communiqué of the Summit of Heads of State and Government of SADC held in Windhoek, Republic of Namibia on May 20 2011, available at *http://www.swradioafrica.com/Documents/SADCSummit240511.pdf*, accessed on 20 May 2015.

4.4.6.3 The EAC

EAC is undergoing its second phase in history; it was initially established in 1967 but in 1977 after ten years of its existence became defunct.[299] In 1999, it re-emerged and was re-established under a new treaty from the ashes of its past, with its membership increased to five instead of its original three.[300] The Treaty establishing the EAC came into force on 7 July 2000 has been amended twice[301] in order to implement its policy of common market, which involves the movement of goods, persons, capital, services, and the rights of residence.[302] There seems to be no way the common market, monetary union and political federation envisaged by the EAC can be realised without recourse to human rights protection mechanisms. The EU is an example of that illustration. Although, it fails initially to provide for human rights in its economic integration agenda, it later emerges as a regional orginization where human rights can be protected.[303] This transformation is due to its realization that protection of human rights is essential instrument in the realization of economic freedoms. Of course, the European court of Justice (ECJ) is a great contributor to that transformation. Even before the emergence of the Maastricht Treaty, it has shown through its jurisprudence that there is a close proximity between the common market principles and human rights.[304] For example, in R v. Ministry of Agriculture[305] the court notes that economic freedoms in the Union are not absolute but must be considered 'in relation to their social function'. Thus, the 'establishment of the rule of law with protection for contracts and property rights' are inevitable if 'security for international investment and

[299] On why it collapsed, see Dan Nabudere *Imperialism in East Africa, Volume II: Imperialism and Integration* (1982) 157. Noting that EAC failed because of 'the forces of international monopolistic Competition' and economic exploitation by MNCs; Peter Twagira 'Why the first EA Community collapsed' *Sunday Monitor* (30 December 2012), available at *http://www.monitor.co.ug/OpEd/Letters/Why-the-first-EA-Community-collapsed-/-/806314/1653726/-/oipj5n/-/index.html*, accessed on 20 June 2015.

[300] Burundi and Rwanda joined the three original members who are Kenya, Tanzania and Uganda.

[301] The Treaty which was signed in Arusha, Tanzania on 30 November 1999 was amended in December 2006 and in August 2007. See Treaty establishing East African Community (EAC) as amended 2007, available at *http://www.eac.int/treaty/index.php?option=com_content&view=article&id=44:about-the-treaty&catid=34:yootheme&Itemid=53*, accessed on 20 May 2015.

[302] The Protocol on the Establishment of the East African Community Common Market entered into force on 1 July 2010, available at *http://eacj.org/wp-content/uploads/2012/08/Common-Market-Protocol.pdf*, accessed on 20 June 2015.

[303] Ernst- Ulrich Petersmann calls the EU transformation with respect to human rights as 'a progressive evolution', see Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," (2002) 13 *EJIL*621-650 at 630.

[304] Sybe A. de Vries 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 *ULR* 169-192 at 169; Case C-112/00, *Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich* [2003] ECR I-5659; Case C-438/05, *International Transport Workers' Federation v Viking*, [2007] ECR I-10779; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin des Bundesstadt Bonn*, [2004] ECR I-9609.

[305] Case C-44/94, *R v. Ministry of Agriculture* ECR 1995 1-3115 para 28.

trade' must be guaranteed.[306] Similarly, human rights are central to the attainment of the objectives of the EAC, even though it was initially put in abeyance.[307] Fortunately, even in that state of abeyance, the Community Court of Justice has assumed jurisdiction in cases of human rights[308] and its courageous stance has been applauded, particularly with the EAC making practical moves to entrench the culture of human rights protection.[309] It has established protocols on good governance, the EAC bill on human rights, zero draft extension of jurisdiction of the East African Court of Justice (EACJ) to include human rights and international crimes, and issued directives to the partner states on corporate governances.

The protocol on good governance was put in place to ensure that partner states promote human rights[310] and adopt a sound economic regulatory framework conducive to indigenous environment and guided by best practices and standards capable of facilitating private sector development.[311] The protocol seeks at the state level, to protect human rights by encouraging fraternity within national human rights institutions and by ensuring that their reports are implemented by states.[312] At regional level, it seeks to adopt peer-review mechanisms in order to access compliance of states with human rights principles[313] and to ensure that the protocol on the bill of rights is backed by strong and effective mechanisms for its protection.[314] On corporate governance, the protocol mandates the partner states to enact domestic laws and put in place policies that will promote corporate governance principles and create an environment favourably disposed to investment.[315] Thus states must ensure

[306] See Ernst-Ulrich Petersmann op cit note 303.
[307] For example see EAC Treaty op cit note 301 Article 27 of the EAC Treaty provides that the court can exercise an initial jurisdiction to interpret its treaty until the jurisdiction will be extended in future to cover human rights jurisdiction.
[308] For a compendium of cases decided by the court, see Open Society Justice Initiatives 'Case Digests Human Rights Decisions of the East African Court of Justice' (June 2013), available at *http://www.opensocietyfoundations.org/sites/default/files/east-african-court-digest-june-2013-20130726.pdf*, accessed on 20 May 2015; Solomon Ebobrah & Armand Tanoh (eds) *Compendium of African Sub-Regional Human Rights Documents* (2010); Solomon Ebobrah 'Human Rights Developments in African Sub-Regional Economic Communities during 2011' (2012) 12 *AHRLJ* 223, 225–239.
[309] A member of EAC Legislative Assembly from Kenya Mr Peter Mathuki, notes 'Even though it lacks a human rights mandate as clear as that of the Ecowas court, EACJ has had a very progressive human rights judgment to its credit where the basic rights of individuals under the Treaty are respected'; see Christabel Ligami 'EACJ to Handle Criminal Offences The East African' (7 December 2013), available at *http://www.theeastafrican.co.ke/news/EACJ-to-handle-criminal-offences/-/2558/2103006/-/bkbsq5/-/index.html*, accessed on 20 May 2015.
[310] See Article 2(1a) of the East African Community Protocol on Good Governance (Draft), available at *http://federation.eac.int/index.php?option=com_content&view=article&id=181&Itemid=144*, accessed on 20 May 2015.
[311] Ibid Article 2(1)(m & n).
[312] Ibid Article 6(2)(b, d, e, f, g & n).
[313] Ibid Article 6(o).
[314] Ibid Article 6(c).
[315] Ibid Articles11(d) & 12.

corporate governance in companies that are listed in the community and make sure they recognise the rights of the stakeholders and consider their interests.[316]

In addition, corporate governance must be adopted to ensure that companies evaluate risks associated with their business operations and measures adopted to curtail the risks in the interest of the environment are implemented.[317] Protection of the environment is given priority in the community. Partner states must ensure that they abide with a comprehensive management policy on the environment and natural resources enshrined in the community protocol in order to protect the right of the people to a clean environment and sustainable development.[318] States must secure their involvement in the process of taking decisions relating to the management of the environment and extraction of natural resources.[319]

The 2012 Bill of Rights[320] is a synthesis of human rights provisions of the African Charter with other instruments, especially, that of the UN Charter. It is comprehensive in scope covering civil, political and social, cultural and economic rights beyond what the African Charter expressly documented with effective and efficient protection mechanisms both in the territories of the partner states and at the regional level.[321] Though the Bill of Rights is still awaiting the approval of the Heads of States and Governments of the region, Solomon Ebobrah argues[322] that the implication, if the instrument is adopted, is that the EAC may abandon the African Charter and concentrate on the interpretation of the document for protection of human rights in the region. If this happens, he claims, it is unclear if it will lead to reducing the potency of human rights protection that prevails under the African Commission jurisprudence.[323]

In spite of his apprehension being a matter of conjecture, the ominous signs of human rights violations in the partner states of the region, despite the avowed moves to entrench the culture of human rights protection at the regional level, are not only worrisome, but give the impression that the coast is not yet clear for efficient and adequate human rights protection in

[316] See Articles 8(k) & 22 of Directive 2013/13/ EAC of the Council of Ministers on Corporate governance for listed companies.
[317] Ibid Articles 8(d) & 60(1a).
[318] Ibid Article 8.
[319] See EAC Protocol on Environment and Natural Resource Management, available at *http://www.environment.eac.int/index.php?option=com_content&view=article&id=122:eac-protocol-on-environment-and-natural-resource-management&catid=3:key-documents&Itemid=212*, accessed on 24 June 2015.
[320] See The East African Community Human and Peoples' Rights Act of 2012.
[321] See, sections 11, 15, 16, 19, 22, 29, 31, 32, 35, 36, 37, 39 & 41 of the Draft Bill which protects the rights of the youth, the minority, housing, water, food, and even right to privacy and fair administrative action that are not expressly protected in the African Charter. See sections 11, 15, 16, 19, 22, 29, 31, 32, 35, 36, 37, 39 & 41 of the Draft Bill.
[322] See Ebobrah op cit note 308 at 227.
[323] Ibid.

the region. The EAC Secretariat may seem to be confirming this assertion when it notes that the delay in implementing the decision of the Council to extend the jurisdiction of the court to cover human rights protection is a challenge and that the 2012 Bill of Rights suffers the same fate of procrastination.[324]

The implication of the delay is that the EAC does not currently protect human rights violations of its peoples in its region. As decided by the appellate division of the EACJ in *Independent Medical Unit v Attorney-General of Kenya*[325] human rights violations per se are not and could not be a basis or a course of action under the treaty. The court held that what could trigger the court's jurisdiction in the community must be found in the interpretation of the treaty, particularly the responsibility of the state towards its citizens and the violation of that responsibility and not on human rights violations. With that judgment, it can be argued that the court's jurisprudence is leaning towards the responsibility of the state doctrine of African Commission jurisprudence.

However, since oil and certain mineral resources have been discovered in some states of the region, there is possibility that the region might begin to experience some potential form of human rights violations by corporations.[326] Thus, the issue for consideration, at this juncture is to examine whether there is a human rights mechanism in the region that can adequately address the issue of corporate human rights violations. The examination, so far, of regional institutions that protect human rights in the region, in this thesis, has shown that the EACJ should be the most veritable means of protecting human rights violations by non-state actors at the regional level. However, with the state responsibility doctrine and the fact that the EACJ does not have direct jurisdiction on human rights adjudication, adequate and efficient protection for corporate human rights violations in the region is slim.

Another reason for this view is that non-state actors like corporations cannot be sued for their complicity in human rights violations acquiesced to by states. In the *Independent Medical Unit* case, the EACJ as the court of first instance, struck off the name of the fifth respondent and refused to join the second to fourth respondents as defendants because only

[324] At the time of this study, the protocols on good governance, Bill of Rights 2012 and that of extension of the jurisdiction of EACJ are not yet operation. See the Report of the meeting of the EAC forum of National Human Rights Commission held between 23 and 24 April 2014 in Arusha, Tanzania para 3.0.

[325] Judgment of Appeal No. 1 of 2011 delivered on 15 March 2012, available at *http://www.worldcourts.com/eacj/eng/decisions/2012.03.15_Atty_Gen_Kenya_v_IMLU.pdf*, (accessed on 20 May 2015.

[326] Ibid para 5(2a); see also Global Business Initiative on Human Rights 'Implementing Corporate Respect for Human Rights' The report of East African Roundtable for Business Leaders, held in Nairobi, Kenya, on 8 November 2012, available at *http://www.global-business-initiative.org/wp-content/uploads/2013/02/Business-Roundtable-Report-East-Africa-8.11.2012.pdf*, accessed on 20 June 2015.

partner states and not private parties are members of Article 30 of the treaty.[327] Similarly, in *Prof. Peter Anyang' Nyong'o and 10 Others v the Attorney General of the Republic of Kenya and 5 others*[328] the court, while striking off the names of the second, fifth and sixth respondents from the case, explained the reason for closing the gate of litigation against private parties was that Article 30 of the treaty is not an action in tort, which provides remedies for misfeasance of another person. The court insisted that redress under the treaty be limited to action occasioning breach by omission or commission committed mainly by an organ or partner state of the community and not a means of seeking redress for collusion, complicity and connivance of any private party. Thus, it is obvious that seeking corporate accountability for human rights responsibilities or redress for victims of human rights violations committed by private parties at the EAC regional court is an herculean task if not an exercise in futility.

However, at a moderate level, states can be questioned for direct breach of their obligations under the treaty that occasion human rights violations as decided by the court in *James Katabazi and 21 Others v EAC Secretary General and Attorney General of Uganda.*[329] An attempt made to review the judgment of the court and change the present status quo of no direct protection of human rights in the EAC, on the ground that it has caused and will cause injustice to victims of human rights violations, was refused by the court.[330] It means the status quo remains with its attendant injustice to victims of human rights violations.

4.5 Conclusion

This chapter has examined the complimentary role of the AU and RECs in ensuring corporate accountability in Africa. It began by tracing the origin of the OAU, the metamorphosis to the AU and explained its significance. Thereafter, it examined how the AU protects human rights and the impacts of that protection on corporate human rights responsibilities and accountability at the states and at the continental level. Consequently, it discussed the legal

[327] See ruling in *Independent Medical Unit v Attorney-General of Kenya and Others* delivered on 29 June 2011, available at *http://caselaw.ihrda.org/doc/03.2010_jun/view/*, accessed on 26 April 2015.
[328] Case Ref. No. 1 of 2006, judgment delivered on 27 November 2006.
[329] Reference No. 1 of 2007, judgment of 1 November 2001.
[330] See the ruling of the court in the matter of Application No. 2 of 2012 arising from appeal No. 1 of 2011 in the *Independent Medical Unit* case, available at *http://www.worldcourts.com/eacj/eng/decisions/2013.03.01_IMLU_v_Atty_Gen_Kenya.pdf*, accessed on 20 April 2015.

and institutional framework for protection of human rights in the AU for the African states and at the continental level. It found that while the AU has a regulatory and accountability framework for the protection of human rights and has designated some organs for the protection of human rights, yet the mechanisms are deficit in operation and its result has minimal impact on protection of human rights generally. Finally, it notes that the most interesting thing that will happen to human rights system in Africa is the vesting of ACJHR with jurisdiction over corporate entities.

CHAPTER 5
THE RUGGIE FRAMEWORK AND ITS GENERAL PRINCIPLES FOR CORPORATE ACCOUNTABILITY

5.1 Before the Ruggie Framework: The failed attempts in the UN at hitting a solution

Due to the negative effects that business can have on human rights,[1] the UN has come up with different initiatives aimed at addressing the thorny issue of corporate human rights violations. It is worth noting that the UN's intervention has not been a recent occurrence. Its footprint can be seen in the historical phases of global parties of state relations. In the 1970s, for example, the so-called third world countries challenged the market-dominated international trade regime.[2] Their objection was based on the fact that the then global trade regime benefitted the MNCs[3] to the exclusion of the new independent states. Their political independence, they argued, was bereft of economic independence and general development.[4]

5.1.1 The UN codes

On that note, the UN commissioned an enquiry into the activities of MNCs in the newly independent states.[5] A group of 'eminent persons' entrusted with the enquiry recommended that a commission be established under the UN to monitor the activities of the MNCs by

[1] For example, over 3 000 people died on 3 December 1984 from the toxic gas leak in India city of Bhopal. See Edward Broughton 'The Bhopal Disaster and its Aftermath: A Review' (2005) 4 *Environ Health*, available at *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/*, accessed on 20 May 2015; BBC Home '1984: Hundreds die in Bhopal chemical accident', available at *http://news.bbc.co.uk/onthisday/hi/dates/stories/december/3/newsid_2698000/2698709.stm*, accessed on 20 May 2015; Amnesty International 'Clouds of injustice: Bhopal disaster 20 years on' (2004), available at *http://www.amnesty.ch/de/themen/wirtschaft-menschenrechte/bhopal/dok/2009/25-jahre-bhopal/clouds_of_injustice_2004.pdf*,(accessed 20 May 2015).

[2] Fred Bergsten *The Future of The International Economic Order: An Agenda for Research* (1973) 11. He notes that the global economic policy operating internationally for the past 150 years is conceptualized by the objective 'to maximize the level and growth of international economic transactions by relying on market forces and minimizing barriers to them'.

[3] See K Venkata Raman 'Transnational Corporations, International Law, and the New International Economic Order' (2013) 6 (1) *SJIL* 17 at 21. He notes that since market forces are largely being controlled by MNCs, the forces controlling global trade regulatory framework are within 'the elusive domain of the invisible private corporate structure'.

[4] Kwadwo Appiagyei-Atua 'Bumps on the Road: A Critique of how Africa got to NEPAD' (2006) 6 *AHRLJ* 524 at 530. Thomas Waelde 'A Requiem for the "New International Economic Order". The Rise and Fall of Paradigms in International Cconomic Law' (1995) 1/2 *IJCEPMLP*, available at *http://www.dundee.ac.uk/cepmlp/journal/html/about.html*, accessed on 20 May 2015.

[5] ECOSOC was actually the brain behind the establishment of the UN Commission on Transnational Corporations (CTNC) see Karl P Sauvant 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations Experience and Lessons Learned' (2015) 16 *JWIT* 12–87 at 13; Peter T Muchlinski *Multinational Enterprises & the Law* (2007) 593–597.

enacting a regulatory code of conduct.[6] That marked the first attempt by the UN to enact a binding code of rules to regulate the means of conducting business activities by the MNCs.[7] However, the attempt failed to yield the expected result,[8] even though two commissions were established to regulate the activities of the MNCs[9] and the codes were eventually drafted[10] in consonance with the recommendations of the so-called 'group of eminent persons'.

Of course, the gargantuan role played by the UN institutions like UNCTAD, the Economic and Social Council (ECOSOC)[11] and the Commission on Transnational Corporations (CNTC)[12] to entrench a regulatory culture for MNCs at the international level ended in a fiasco as it was difficult to muster full support for the endorsement of the codes at the UN[13] due to stiff opposition from the home states of the MNCs.[14] Another contributory factor to the failure of the codes was the global phenomenon of free trade and foreign investment which occasioned a shift in the attitude of the developing nations.[15] Instead of their initial hostility to MNCs and their quest for an international accountability framework to regulate them, many in response to that global phenomenon embarked on a deregulated

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[6] Ibid.

[7] John Gerard Ruggie 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *AJIL* 819–840 at 820; Patricia Feeney 'Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda' (2009) 6 *SUR IJHR* 160–175 at 162; on the codes of conduct, see the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at *http://www1.umn.edu/humanrts/links/norms-Aug2003.html*, accessed on 20 May 2015.

[8] David Coleman 'The United Nations and Transnational Corporations: From an Inter-nation to a "Beyond State"' (2003) 17 *MEGS* 339–357 at 340. Describing the drafted codes which were the outcome of the attempt as 'eventually fruitless'.

[9] The Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations (UNCTC) was established in 1974, at the recommendation of the United Nations Group of Eminent Persons' See Louis Emmerij & Richard Jolly 'The UN and Transnational Corporations' (2009) *UNIHP* (Briefing Note No 17), available at *http://www.unhistory.org/briefing/17TNCs.pdf*, accessed on 20 May 2015.

[10] See ECOSOC Official Records 'CNTC Report on the Special Sessions' Supplement No.7 (1983), available at *http://unctc.unctad.org/data/ec101983s5a.pdf*, accessed on 20 May 2015. Paragraph 13 of the Draft codes urges MNCs to 'respect human rights and fundamental freedoms where they operate'.

[11] See Raman op cit note 3 at 10.

[12] Theodore Moran 'The United Nations and Transnational Corporations: A Review and a Perspective' (2009) 18 *TC* 91–112 at 93 explaining the plight of CNTC, how it struggled in vain from 1975 to 1992 to ensure that the codes were endorsed by the UN.

[13] See, Feeney op cit note 7 at 162. She argued that 'Despite support from many governments in the global South, the UN Code of Conduct project was first side-lined and then over time derailed'; see Tagi Sagafi-Nejad & John H Dunning *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (2008)122 saying that by 1992, it was obvious that the negotiations over the codes 'came to naught'. He also quoted the then Secretary-General of the General Assembly, Boutros Boutros-Ghali saying concerning the codes that 'no consensus was possible', and as a result 'the final nail was driven into the code's coffin'.

[14] Feeney op cit note 7 at 162 noting that 'This UN Code of Conduct process, however, faced stiff resistance from powerful governments in the North, where many TNCs had their headquarters'.

[15] See Katarina Weilert 'Taming the Untamable? Transnational Corporations in United Nations Law and Practice' (2010) 14 *MPYBUNL* 445–506 at 463; David Kinley & Rachel Chambers 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) *HRLR* 455 at 456.

economic policy, after the end of the cold war, in favour of MNCs seeking to attract foreign investment by giving all kinds of concessions to MNCs.[16]

5.1.2 The UNGC

After the failure of the codes, the second significant attempt[17] made to regulate MNCs at the UN was the introduction of the UN Global Compact (UNGC) and its voluntary codes of conduct.[18] The UNGC was conceived by the then UN Secretary General, Kofi Annan who was preoccupied with the major issue of how to inculcate a set of 'shared values' into the 'global market'.[19] Unlike the UN code, which was negotiated by government functionaries to the exclusion of business actors and civil societies in order to tame the corporations,[20] the UNGC was aimed at facilitating a collaborated and collective effort between the business sector and the UN in order to attain its vision.[21] That unique quality is responsible for its wide endorsement by the global business community. As Peter Utting argues, it is the largest 'CSR initiative' in the world[22] with over 10 000 companies from 145 countries involved in its scheme.[23] It provides that companies adopt, support and inculcate, within their operation, a set of ten principles relating to 'human rights, labour standards, the environment and anti-

[16] Ibid; Scott Jerbi 'Business and Human rights at the UN what might happen Next?' (2009) 31 *HRQ* 299–320 at 303.

[17] In August 2006, before the emergence of Global Compact, an attempt was made by the Sub-Commission on the Promotion and Protection of Human Rights to do something in that direction by setting up a working group to study the mechanisms and activities of transnational corporations in response to the paper presented by EL Hadji Giusse on the impacts of the MNCs. But before the Working Group could do something, Global Compact emerged. See Jerbi ibid at 299–320; Désirée Abrahams 'Regulations for corporations A historical account of TNC regulations' (October 2005), available at *http://business-humanrights.org/en/doc-regulations-for-corporations-a-historical-account-of-tnc-regulation*, accessed on 20 May 2015; Surya Deva 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises an Imperfect Step in to the Right Direction (2004) 10 *ILSA JICL* 493–523 at 494–498; David Weissbrodt & Muria Kruger 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *AJIL* 901–922 at 904; Larry Backer 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *CHRLR* 287–390 at 329.

[18] Olufemi Amao *Corporate Social Responsibility, Human Rights and the Law, MNCs in Developing Countries* (2011) 37.

[19] See Press Release 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in address to World Economic Forum in Davos' SG/SM/6881 (31 January1999), available at *http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html*, accessed on 20 May 2015.

[20] Andreas Rasche 'The United Nations and Transnational Corporations: How the UN Global Compact has changed the debate' in Joanne T Lawrence & Paul W Beamish (eds) *Globally Responsible Leadership: Business According to the UN Global Compact* (2012) 33–49 at 35.

[21] See the UNGC website 'Overview of the UNGP', available at *http://www.unglobalcompact.org/AboutTheGC/index.html*, accessed on 20 May 2015.

[22] See Peter Utting 'Activism, Business Regulation and Development' in Ananya Mukherjee-Reed, Darryl Reed & Peter Utting (eds) *Business Regulations and Non-State Actors: Whose Standards? Whose Developments?* (2012) 38, 43.

[23] The UNGC Website 'Business Participation', available at *http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html*, accessed on 20 May 2015).

corruption'.[24] Therefore, they must respect and protect internationally recognised human rights in all their business operations.[25] To this end, they must refrain from any act that may amount to violation of human rights in the workplace[26] and complicity in the abuse of such rights in the environment.[27] Finally, they must also avoid corruption which negatively affects the enjoyment of human rights.[28]

It is important to note that UNGC works 'through an interactive and multi-layered process' to entrench the culture of human rights in the corporate sector.[29] However, in spite of the general acceptance of the UNGC by the business sector from all over the world, most human rights commentators and scholars have condemned it as an inadequate means of facilitating corporate accountability.[30] According to them, its major weakness lies in the voluntary nature of the principles and its lack of precision.[31] They further argue that the

[24] See UNGC op cit note 21.
[25] Ibid Principle 2.
[26] With regard to labour, they should hold as sacrosanct the freedom of association and the right to collective bargaining. They must eliminate child labour, discrimination in respect of employment and occupation of workers and never indulge in any form of forced and compulsory labour. Ibid Principles 3–6.
[27] On the environment, they must be cautious and careful in their response to 'environmental challenges'. They must embark on programmes that will sustain 'greater environmental responsibility' and support 'the development and diffusion of environmentally friendly technologies'. Ibid see Principles 7–9.
[28] Ibid, Principle 10 which provide that they must shun corruption in whatever way it disguises its self be it in extortion or bribery; on corruption and how it affects enjoyment of human rights, see Barcelona Panda 'Multinational Corporations and Human Rights Violations Call for Rebuilding the Laws of Twenty-First Century' (2013) 20 *JFC* 422–432 at 426; on how corruption has caused violation of human rights in Africa, see Kolawole Olaniyan *Corruption and Human Rights Law in Africa* (2014) 193–272.
[29] UNGC works through a commitment voluntarily made by the Chief Executive Officer of a company or its equivalent officer supported by its governing board to inculcate the ten principles in to the policy framework of the organization is a condition for enlistment in to the UNGC. Once enlisted, the company has a duty to publish an annual progress report of its implementation of the ten principles. The reports are used as learning tools and capacity building for implementation of human rights responsibilities in series of dialogues or outreaches facilitated by the UNGC or by the companies themselves where participants have the opportunity to learn from one another's experiences. On how the UNGP works, see Andreas Rasche '"A Necessary Supplement" – What the United Nations Global Compact is and is not' (2009) 48 (4) *BS* 511–537 at 517–520; The UNGC 'The UNGC Strategy 2014-2016', available at *http://www.unglobalcompact.org/docs/about_the_gc/UNGlobalCompactStrategy2014-2016.pdf*, accessed on 25 June 2015; William H Meyer & Boyka Stefanova 'Human Rights, the UN Global Compact and Global Governance' (2001) 34 *CILJ* 501–517 at 515.
[30] They are of the opinion that it is inadequate and its wide endorsement from the business community is due to its inadequacy. See Justine Nolan 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights? (2005) 24 UQLJ 445–466 at 460; David M Bigge 'Bring on the Bluewash – A Social Constructivist Argument against Using Nike v Kasky to Attack the UN Global Compact' (2004) 14 *ILP* 6 at 12; Surya Deva 'Global Compact: A Critique of UN's "Public- Private" Partnership for Promoting Corporate Citizenship' (2006) *SJILC* 107–151 at 144–149; David Weissbrodt 'Business and Human Rights' (2005) 74(1) *UCLR* 55–73 at 66; Ethical Corporation 'Debate: UN Global Compact – Is the Compact raising corporate responsibility standards?', available at *http://www.ethicalcorp.com/content/debate-un-global-compact-%E2%80%93-compact-raising-corporate-responsibility-standards*, accessed on 20 August 2014; Rasche op cit note 29 at 19–22.
[31] Ibid. Nolan at 460, noting that 'The lack of clarity of the Compact's principles, its limited accountability and transparency and an overemphasis on the value of the voluntary approach to corporate responsibility are all factors which damage the credibility of the Global Compact model'; Deva at 129; Weissbrodt at 66 revealing that the UN norms are more comprehensive on human rights issue than the UNGP that contains 'ten short

process of reporting without efficient verification mechanisms to authenticate the reports is not only deceptive but turns the whole exercise into a mere propaganda gimmick used by the companies to improve their public image.[32]

Another criticism hurled against the UNGC relates to the undue advantage it gives the business community in the UN. The critics observe with disdain that the negative implication that flows from the process of the UNGP is that it allows the business community to capture the soul of the UN.[33] Indeed, attempts have been made by some scholars to defend the UNGC against these criticisms but they were not successful. Their defence merely scratches at the surface of the shortcomings of the UNGC without adequately addressing them. With regard to the issue that corporations have more influence in the UN as a result of the UNGC, Andreas Rasche argues that corporations were already in a good relationship with the UN before the UNGC and that the UNGC was not the beginning of rapprochement between the two.[34] Perhaps a good defence but even if the UNGC is not the facilitator of fraternity between the two, it could not be denied that it opens another vista of influence in the UN and accords business the global legitimacy without further ado. Similarly, on why the UNGC adopts a voluntary rather than a regulatory approach, John Ruggie argues that it was 'a second-best solution' to avoid a situation in which an ideal regulatory framework if proposed could fail to be approved.[35] In fact, Rasche could not fathom the reasons why scholars should engage in critiquing UNGC. He argues: 'one cannot and should not criticize the Compact for something it has never pretended or intended to be'.[36]

Admittedly, the UNGC stated at its commencement that it is 'not a regulatory instrument'[37] and therefore the issue of policing the companies for enforcement of its codes

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sentences'; Papa Louis Fall & Mohamed Mounir Zahran 'United Nations corporate partnerships: The role and functioning of the Global Compact' Joint Inspection Report (JIU/REP/2010/9) (2010).They noted that 'there is no system in place to make an independent assessment' available at *https://www.unjiu.org/en/reportsnotes/archive/United%20Nations%20corporate%20partnerships%20-The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf* accessed 27 July 2015..

[32] Ibid. Deva at 146; Nolan at 462; Rasche op cit note 29 at 19; Oliver F Williams 'The UN Global Compact: The Challenge and the Promise' (2004) 14 *BEQ* 755–774 at 762.

[33] Ann Zammit *Development at Risk: Rethinking UN-Business partnerships* (2003) 222. He explains that the UNGP gives corporations public legitimacy that they do not deserve and 'additional scope for exercising influence over global policy'.

[34] See Rasche op cit note 29 at 14.

[35] See John Gerard Ruggie 'The Theory and Practice of Learning Networks Corporate Social Responsibility and the Global Compact' (2002) 5 *JCC* 27–36 at 32, explaining that three reasons were responsible for the choice, one the fear that the General Assembly may not approve such a regulatory approach, two, the apprehension over the 'logistical and financial' capacity of the UN to monitor MNCs and their subsidiaries and the likelihood of opposition from the business community.

[36] Rasche op cit note 29 at 19.

[37] See Kofi Annan 'The Global Compact: Corporate Leadership in the World Economy' (2002) 2 *SEIM* 1 at 8, available at *http://www.unimib.it/upload/gestionefiles/symphonya/lasteng/f20022/annaneng22002.pdf*, accessed

should not be expected. However, aside from the issue of a controversial regulatory framework, the inability of the UNGC to entrench its ten principles into business operations through its voluntary method, 14 years since its inception is tantamount to failure of its promise to entrench the culture of 'shared values' in order to address the imbalance in the market.[38] Similarly, Amao argues that UNGC norms are 'fluid, uncertain' and 'its use as a standard setting mechanism doubtful'.[39]

5.1.3 The UN Draft Norms

In spite of the criticism, the UNGC continues with its operation. At the same time, the quest for a viable regulatory framework to deal with CHRR and accountability is not abated leading to the emergence of the UN norms.[40] The UN Draft Norms were approved by the United Nations Sub-Commission on the Promotion and Protection of Human Rights on August 13 2003.[41] They symbolise the outcome of combined efforts by various organs of the UN to address this issue through a supra-national legal regime.[42] It deals with legal principles of international law that could be used in holding corporations accountable for human rights violations.[43] Thus, it covers extensively treaties, instruments and even global voluntary codes[44] dealing with humanitarian,[45] environmental,[46] consumer,[47] anti-corruption,[48] and labour law[49] issues as well as human rights[50] among others. It imposes three levels of duties

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on 20 May 2015; John Ruggie 'Taking Embedded Liberalism Global: The Corporate Connection' in David Held & Mathias Koenig-Archibugi (eds) *Taming Globalization: Frontiers of Governance* (2003) 93.

[38] S Prakash Sethi & Donald H Schepers 'United Nations Global Compact: The Promise-Performance Gap' (2014) 122 *JBE* 193–208 at 200–207. Describing UNGP as 'mile wide and half an inch deep: long on promises, short on performance'; but for contrary view, see Andreas Rasche & Sandra Waddock 'Global Sustainability Governance and the UN Global Compact: A Rejoinder to Critics' (2014) 122 *JBE* 209–216.

[39] See, Amao op cit note 18 at 40.

[40] See Jerbi op cit note 16 at 304–305, noting that 'as the Global Compact took shape' UN norms were developed.

[41] UN Sub-Commission on the promotion and protection of human rights.

[42] See Backer op cit note 17 at 137–138.

[43] See, David Weissbrodt & M Kruger 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (2003) 97 *AJIL* 901–922 at 901.

[44] See Upendra Baxi 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 5 *HRLR* 1–26 at 5. Noting that the UN norms contains citations from 56 instruments, out of which there were 18 treaties, 11 multilateral instruments, 13 codes from companies, 5 guidelines from NGOs and 3 accountability codes from trade unions initiatives.

[45] See UN codes supra note 7 paras 3, 5, 6, 7; ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc.E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003) para 3, available at *http://www1.umn.edu/humanrts/links/commentary-Aug2003.html*, accessed on 20 June 2015.

[46] Ibid UN codes para 14; also Commentary to the Norms para 14.

[47] Ibid para 13; Commentary to the Norms para 13.

[48] Ibid paras 10 & 11; Commentary to the Norms para 11.

[49] Ibid paras 2, 5, 6, 7, 8 & 9; Commentary to the Norms paras 2, 5, 6, 7, 8 & 9.

[50] Ibid paras 3, 4, 6, 7, 11, 12 & 23; Commentary to the Norms paras 3, 4, 10 & 12.

on corporations: a duty not to partake in the benefits that accrue from human rights violations; a duty to implement; and a duty to use their influence to promote and protect human rights.[51] Unlike the UNGP, the UN Draft Norms were well received by the rank and file of human rights groups[52] but the business community vehemently opposed it[53] and as a consequence the UN failed to endorse it. Ironically it's binding nature which attracted the human rights commentators[54] also discouraged the business community and the UN whose decision to reject it led to its failure.[55] Nevertheless, scholars have examined the reasons behind the pitfalls of the UN Norms.[56] As it is with all human endeavours, the UN Norms are not a perfect document, it has its own shortcomings,[57] but those shortcomings are not irredeemable to warrant its outright rejection. They can be addressed, if there is sincerity and a will to sustain it.[58] The fact however is that the UN was not ready for a binding regulatory framework for CHRR and accountability and that occasioned the unceremonious treatment of the UN Draft Norms.[59] However, as Larry Backer argues irrespective of the fate befalling the

[51] See Baxi op cit note 44 at 9.

[52] Backer op cit note 17; Karl-Heinz Moder 'Background paper to the FES side event at the 60th session of the UN-Commission on Human Rights' (25 March 2005), available at *http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf*, accessed on 20 May 2015, noting that the 'major support for the Norms is mainly coming from civil society organisations, above all from the human rights spectrum'.

[53] The International Organisation of Employers (IOE) & the International Chamber of Commerce (ICC) 'Joint views of the IOE and ICC on the Draft UN Norms'. Alleging that the UN norms were like putting the horse before the cart by coming out with a solution without first considering the problem and thus concluded that the solution cannot work (22 July 2003), available at *http://business-humanrights.org/en/pdf-joint-views-of-the-ioe-and-icc-on-the-draft-norms-on-the-responsibilities-of-transnational-corporations-and-other-business-enterprises-with-regard-to-human-rights*, accessed on 20 May 2015; Julie Campagna 'United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers' (2004) 37 *JMLR* 1205–1252 at 1207, noting 'The international business community virulently opposes the Norms because of their enforceability'; Ibid see, Karl-Heinz, similarly noting that the 'Critiques on the Norms have been made since the very beginning of the work on them, above all from private businesses and their organisations'.

[54] Ibid.

[55] The position of most western members of the UN was that the UN norms by opting for a regulatory regime were not consistent with principles of international Law because corporations were objects and not subjects of international Law, see Backer op cit note 17 at 181.

[56] See for examples, David Kinley, Justine Nolan & Natalie Zerial 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *CSLJ* 30–42; Kinley op cit note 15 at 16–33; Justine Nolan 'With Power Comes Responsibility: Human Rights and Corporate Accountability' (2005) 28 *UNSWLJ* 584–605; Campagna op cit note 53 at 1205–1252; Baxi op cit note 44 at 1–26; Backer op cit note 17 at 101–192.

[57] There were so many arguments canvassed against the UN norms but most of them were unreasonable. The real shortcomings of the Norms were the use of some treaties that have not yet been ratified by states as the regulatory framework for corporate accountability, the vagueness of some terms like 'sphere of influence' and 'complicity' and the indirect unconventional means of making international law. For these or more of the real defects, see Ibid Kinley et al at 33–38; Backer op cit note 17 at 173–184.

[58] Ibid, Kinley et al at 37, noting that its shortcomings can be ironed out and clarified and that to call for its 'outright rejection … is an extreme reaction'.

[59] According to Backer, the reaction of the US captures the position of the western members of the UN that the UN norms were not consistent with the principles of international Law by making corporations as subjects of international Law. See Backer op cit note 17 at 181.

UN Norms, the search for corporate accountability which it seeks to attain is not likely to vanquish[60] from the realm of global discourse until the demand is fully met. Thus, in 2005 as discussed in Chapter 1, the SRSG for Business and Human Rights was appointed to satisfy the same quest.[61]

5.1.4 The SRSG

In 2008, the SRSG came forward with a fabric of the framework known as the Protect Respect and Remedy Framework[62] and in 2011 developed the framework into a single comprehensive synthesis known as the UNGP.[63] A thin departure marked the Protect Respect and Remedy Framework conceptualised in 2008 and the Protect Respect and Remedy Framework finally adopted in the UNGP as the latter tilted towards a voluntary and not regulatory framework for corporations.[64] The 2006 Interim Report was nothing but a treatise appraising the rationality behind the mandate and appointment of Ruggie as the SRSG.[65] His mandate was necessary in the light of many factors such as the rising status of MNCs[66] and their ability and capacity to act 'at a pace and scale that neither governments nor international agencies can match'.[67] Another contributing factor is the aiding role of globalisation in the rising status of the MNCs[68] and its effects on the regulatory role of the states. It leads to unequal distribution of positive and negative effects of a globalised economy on the

[60] Backer op cit note 17 at 141 noting 'whatever the immediate fate of the Norms, it is unlikely that the ideas represented by the Norms, as originally submitted, will disappear'.
[61] See Chapter 1 section 1.2.
[62] Ibid.
[63] Ibid. Note that between 2005 and 2011 when the UNGP was finally endorsed, the SRSG presented 6 reports including the UNGP.
[64] See Larry Catá Backer, Nabih Haddad, Tomonori Teraoka & Keren Wang 'Democratizing international business and human rights by catalyzing strategic litigation: The Guidelines for multinational enterprises and the UN Guiding principles of business and human rights from the bottom up' (2014) Working Paper 12(1) Coalition for Peace and Ethics 1–34 at 6–7. Noting 'However, the broadest reach of the innovation of the Guiding Principle's three-pillar structure also proved threatening to the dominant law-state framework and the privilege of law as the only legitimate basis for regulatory undertaking. As a consequence, the final version of the Guiding Principles represented a retreat, to some extent, from the broadest implications of corporate regulatory autonomy'; Larry Catá Backer 'From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance' (2012) 25 *PMGBDLJ* 69 at 86; Press Release UN Office of the High Commissioner of Human Rights, New Guiding Principles on Business and Human Rights (UNGP) endorsed by the UN Human Rights Council on 16 June 2011, available at *http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf*, accessed on 20 May 2015.
[65] See John Ruggie 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2006) UN Doc. E/CN.4/2006/97, available at *http://www1.umn.edu/humanrts/business/RuggieReport2006.html*, accessed on 20 June 2015.
[66] Ibid see illustration of MNCs by Ruggie in paras 11 & 14 of the Report.
[67] Ibid para 16.
[68] Ibid see paras 11 & 12.

developed and developing countries of the world.[69] According to the report, two examples of such negative effects are human rights violations by companies[70] and the imbalances 'between the scope of the markets' vis a vis corporations and the in ability of the community to sustain its values.[71]

In a critical manner, Ruggie in the report also examined the existing voluntary initiatives,[72] including the UN Norms[73] and concluded that 'a state based international order' has outlived its usefulness in the present global system where new factors which are beyond the control of the territorial state have emerged 'to play' considerable 'public roles'.[74] In the mean time, while acknowledging the axiomatic belief that the rule of law should go hand in hand with economic development,[75] he raised the hope that extra territorial jurisdiction by home states of MNCs was a vital point to be considered in the new framework[76] which it described as a 'principled form of pragmatism' in order to adopt the best practicable means that adequately protect and promote human rights in the corporate sector.[77] He noted that respect for human rights should be the fundamental objective of any government whether at the state, regional or international level without regard for private and public divide.[78]

The 2007 Report[79] dealt with how the state can effectively regulate corporations, the standards of appraising CHRR and accountability for corporations and of determining complicity in human rights violations.[80] It identified examples of 'best' practices in human rights responsibilities for states and companies.[81] Five standards of CHRR recognised by this report were developed and expanded to become the Protect Respect and Remedy Framework of the UNGP.[82] The standards are subjected to three forms of governance which are legal,

[69] Ibid para 13.
[70] Ibid para 15.
[71] Ibid para 18.
[72] Ibid see paras 31–53, 73–75, 77 & 78 for discussion on all the voluntary initiatives.
[73] Ibid see paras 56–61 & 63–69 for discussion on the UN Norms.
[74] Ibid paras 9 &10.
[75] Ibid para 21.
[76] Ibid para 71.
[77] Ibid para 81.
[78] Ibid para 19.
[79] General Assembly of the UN 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises' Human Rights Council (9 February 2007), available at *http://business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf*, accessed on 20 May 2015.
[80] Ibid, see summary to the Report.
[81] Ibid.
[82] The standards are 'State duty to protect', 'Corporate responsibility and accountability for international crimes', 'Corporate responsibility for other human rights violations under international law', 'Soft law mechanisms' and 'Self-regulation'; Ibid see paras 10–81 of the Report; Larry Catá Backer 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a

social and moral.[83] Unwavering in his commitment to protect human rights in the business sector, the SRSG argued that governments and social actors must combine efforts in working together to correct the present misaligned situation in which corporate abuse will go un-redressed without 'adequate sanctioning or reparation' as a result of incapacity of the society to regulate the market even if they have to use social and market institutional frameworks to achieve this.[84]

The tripartite Protect Respect and Remedy Framework of the UNGPs were actually developed in the 2008 Report.[85] The SRSG had considered and rejected some other approaches to CHRR and accountability before he adopted and embraced the tripartite framework.[86] Some of those approaches he considered and later rejected were the mechanisms 'dependent on the production and enforcement of a specific list of human rights affecting businesses' and the 'rules-based approaches-characteristic of American efforts'.[87] The framework, particularly its major pillar dealing with state duty to protect, follows the classical law philosophical leaning, depicting states as duty bearers of human rights under international law.[88] Nonetheless, the report is not a total victory for the critics of the UN Norms (corporations and some governments) as it adopts a horizontal corporate accountability strategy to protect human rights across the globe.[89]

The 2009 Report[90] continued with the same line of reasoning as the 2008 Report and both dealt with 'the duty's legal foundations, policy rationales and scope' of the framework.[91] The 2009 Report constructed the mechanisms and operational strategies of attaining the

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Global Governance Context' (2011) 9 *SCJIL* 37–80 at 55. He noted that the first cluster, the State Duty to Respect remains the same, while the second and third clusters merged to become the Corporate Responsibility to Respect in the new framework and the fourth and fifth clusters are now Pillar 3 of the framework, which is access to remedies.

[83] Ibid para 6.

[84] Ibid supra note 27 (the 2007 Report) paras 3 & 4.

[85] John Ruggie 'Protect, Respect and Remedy: a Framework for Business and Human Rights' Report of the SSRG on the issue of human rights and transnational corporations and other business enterprises (7 April 2008) Human Rights Council, available at *http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf*, accessed on 20 May 2015.

[86] Backer op cit note 82 at 58.

[87] Ibid.

[88] Karin Buhmann 'Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the "Protect, Respect, Remedy UN Framework" (2012) 1(1) *ILR* 88–101 at 97.

[89] Ibid 97–98.

[90] John Ruggie 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (22 April 2009) Human Rights Council, available at *http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf*, accessed on 20 May 2015.

[91] John Ruggie 'Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' Report of the SSRG on the issue of human rights and transnational Corporations and other business enterprises Human Rights Council (9 April 2010) para 16, available at *http://198.170.85.29/Ruggie-report-2010.pdf*, accessed on 20 June 2015.

protection of human rights duties, obligations and responsibilities of states and corporations developed in 2008.[92] Thus, states are encouraged to use a regulatory and judicial framework in performing their responsibilities, while corporations must use due-diligence mechanisms.[93] Of course, the 2009 Report went beyond the scope of previous reports on CHRR and accountability by leaving the door of emerging norms for corporate human rights responsibilities open.[94] The report noted that the door should remain open as there may be some circumstances calling for 'additional responsibilities' on the path of the companies.[95] However, while leaving the door open due to unimagined situations, the report expressed a note of caution and pegged the baseline for all corporations at the 'responsibility to respect'.[96] In spite of that baseline, it has been argued that the report 'opens up the possibility that corporations also have some positive obligations to protect and to fulfill human rights'.[97]

Indeed in its 2010 Report, the SSRG claimed that the framework was intended to fill the missing link in the governance gap in the market regulation that permitted corporate human rights violations to go un-redressed without effective sanctioning.[98] As requested by the Human Rights Council,[99] the 2010 Report devised further means that can perform the primary duties and obligations of states to protect their citizens from corporate human rights violations.[100] It also elucidated, clarified and provided tangible operational guidance on the responsibility of companies to respect human rights[101] and recommended different means by which victims of corporate human rights violations can have unhindered access to effective remedies.[102] With regard to states, five important measures were identified:[103] one, they must not do anything that will erode their capacity and ability to protect corporate human rights

[92] See Backer op cit note 82 at 60; Ruggie op cit note 90 (2009 Report) para3.
[93] Ibid Backer at 60; 2009 Report para2.
[94] Jernej Letnar Černič 'Two Steps Forward one Step Back: The 2010 Report by the UN Special Representative on Business and Human Rights' (2010)11 *GLJ* 1264–1280 at 1267–1268; Ruggie op cit note 90 (2009 Report) para 46.
[95] Ibid.
[96] Ibid.
[97] See Jernej Letnar Černič 'A Short Comment on the Report of the 2009 UN Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' Libertas Working Paper (2009), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491548&download=yes*, accessed on 20 May 2015); Ruggie op cit note 90 (2009 Report) paras 59, 61–65.
[98] See Ruggie op cit note 91 (2010 Report) para 2.
[99] Ibid paras 88, 54 & 16.
[100] Ibid paras 20–53.
[101] Ibid paras 54–87.
[102] Ibid paras 88–113.
[103] Ibid para 19.

violations in their jurisdiction;[104] two, they must know that as economic actors themselves, they can promote human rights while doing businesses with corporations;[105] three, aside from their roles as economic actors, they can create a culture of human rights responsibilities in their jurisdictions;[106] four, in states affected by conflict, early rapprochement with embassies of home states of companies can do much to nip in the bud the issue of corporate complicity in human rights violations;[107] and five, it is preferable for states to 'make greater efforts' to ensure their corporations do not take part or contribute to human rights violations abroad and if they do should provide means of redress and a strategy for sanctioning.[108]

The proffered solution lies in multi-remedial judicial and non-judicial grievance mechanisms for corporate human rights violations by states as well as by companies.[109] Complimentary 'regional and international mechanisms' must also be provided in order to 'strengthen common standards for states and companies across jurisdictions'.[110] Finally, all states must embrace 'adjudicative extra-territorial jurisdiction' and should equally consider the interest of the 'claimant, defendant and states' in a situation where there is a high possibility that the host states are unable to provide redress to the victims.[111] The 2010 Report has been criticised by some scholars who yearned for a binding international legal framework for CHRR and accountability.[112] By contrast, the report has also been applauded by some liberal scholars[113] who are of the opinion that it is better to start from somewhere until the desired goal is eventually attained and definitely by those who are at the camp of the corporate class.[114]

As noted earlier, it is crucial to note that 2010 Report is not final. However, as the harbinger to the final report, the SSRG gives hindsight of what remained to be done to perfect the whole report. According to him, the 2011 Report, must inculcate 'a set of guiding

[104] Ibid paras 20–25.
[105] Ibid paras 26–32.
[106] Ibid paras 33–43.
[107] Ibid paras 44–45.
[108] Ibid paras 47–49. On corporate human rights responsibility, the report defined responsibility, diagnosed the existing position of self- regulation through codes by the companies and dwelt extensively on how corporations can violate human rights under three headings of foundations, legal compliance and due diligence. See paras 55–78 & 79–86. Similarly, with respect to access to remedy, the report examined challenges and problems that victims of corporate human rights violations can face in their bid to secure justice and provided solution to the problems. Paras 103–112, 107, 113 & 114–116.
[109] Ibid paras 114–116.
[110] Ibid para 115.
[111] Ibid para 107.
[112] For detailed discussion of this critique, see Černič op cit note 97 at 94 at 1173–1179.
[113] For views in support of the Report, see Černič Ibid; Backer op cit note 82 at 68 & 80. He described the report as being 'innovative framework for supra-national governance' in the sense that it spread its tentacles of operations beyond the state level to the economic actors in the private sector.
[114] Ibid.

principles', 'interactive elements and processes' for the operation of the framework.[115] In addition, in order not to leave the mandate open without a monitoring institution, the final report in his view should suggest the establishment of a new institution that will take care of 'advisory and capacity-building function' for the framework as the successor to the mandate of the SRSG.[116] In line with that projection, the SRSG released his final report in March 2011.

5.2 Critical examination of the Ruggie 2011 Guiding Principles for Business

As noted earlier, Pillar 1 of the tripartite framework of the UNGP is the responsibility of states to protect against human rights infraction by third parties.[117] The basis for its adoption in the UNGP rests on the existing responsibility of states 'to respect, protect and fulfils human rights and fundamental freedoms' within their territorial jurisdictions.[118] Therefore, duties to be performed by states in order to fulfil this responsibility with regard to the issue of corporate human rights violations are spelt out in the UNGP.[119] However, a note of warning by the UNGP itself restricts an adventurous interpretation of these duties. The enumeration of state duties by the UNGP should not be perceived as creating new obligations for states; rather it should be viewed as merely restating or elucidating the existing duties of states under the principles of international law.[120] The UNGP demarcates the duty of states to protect into two major differences (actually they are from the same species), which are the ability to take effective preventive and remedial measures against the problem of corporate human rights violations.[121] It provides that states must prevent the occurrence of corporate human rights violations and if infringement occurs despite such preventive measures, they must ensure that the victims get justice and the perpetrators sanctioned.[122] It prescribes that states can

[115] See Ruggie op cit note 91 (2010 report) para 124.
[116] Ibid paras 125–126.
[117] The phrase 'responsibility to protect' was derived from the 'responsibility to protect (R2P) framework' which was initially conceptualised and used as an international law mechanism to prevent commission of certain crimes categorised as crimes against humanity, genocides, war crimes and ethnic cleansings. See, Connie De La Vega, Amol Mehra & Alexandra Wongc 'Holding Businesses Accountable for Human Rights Violations Recent Developments and Next Steps' (July 2011), available at *http://library.fes.de/pdf- files/iez/08264.pdf*, accessed on 20 May 2015; UN General Assembly, 2005 World Summit Outcome, UN doc. A/RES/60/1 (24 October 2005).
[118] See UNGP op cit note 64 paras 1a & 3(1).
[119] For a detailed discussion of state duty to protect through the 'state-business nexus' and regulatory and policy framework as spelt out by the UNGP in order to ensure policy coherence and to also support corporations with respect to their responsibility to respect human rights in conflict affected areas, see Backer op cit note 64 at 108–123.
[120] See UNGP op cit note 64 at paras 2 & 3(1).
[121] Ibid para 3(1).
[122] Ibid. It states 'This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.

discharge these duties by making provision for an effective regulatory, judicial and sound policy framework.[123] These provisions if implemented must be subject to constant review and reform in order to ensure that they are still viable, adequate and potent to achieve their purpose,[124] which is to effectively confront the force of corporate human rights violations at any particular time.

However, as noted by the UNGP, the duty of states to protect is a mere 'standard of conduct'. Consequently, they are not vicariously liable for corporate human rights violations.[125] However, most of them have ratified international and regional treaties. The effect of such ratification is that they are expected to abide by 'international human rights obligations' of the treaties.[126] Consequently, if they fail to take appropriate, protective or remedial measures in protecting their people from human rights violations by third parties, they may be held liable for committing a breach of such human rights obligations. In fact, they can be held liable for complicity in human rights violations committed by third parties.[127]

With regard to the home states of the MNCs, the commentary to Pillar 1 briefly states the imprecise but current position of international law on the issue. States, it notes, are not under compulsion to regulate the conduct of their companies doing businesses abroad but are also not forbidden to do so. It however attempts to move them towards adopting a regulatory extraterritorial framework for corporate accountability[128] by stating that 'there are strong policy reasons' to do so.[129] Perhaps, one of the reasons must also be because most treaties

[123] Ibid.
[124] Ibid, see Operational Principle para 4(3).
[125] Ibid Commentary to Principle 1 of the Framework.
[126] States have three fold obligations with respect to human rights. The first obligation which is to respect human rights has been interpreted by the Interpretative Guide to mean that they must not do anything that can hinder or prevent the people from enjoying human rights. The second which is obligation to protect human rights is interpreted by the Interpretative Guide literarily which means to protect all the people whether as individuals, groups or communities from violation of their rights by the third parties and the third which is obligation to fulfil human rights is interpreted by the Guide as the need for states to take proactive steps in ensuring that the people enjoy basic human rights. See Office of the Commissioner UNHR 'An Interpretative Guide to Corporate Responsibility to respect human rights' (2012) para 2, question 2, available at *http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf*, accessed on 20 June 2015.
[127] See UNGP op cit note 64, Commentary to Pillar 1 of the framework.
[128] See Backer op cit note 64 at 92, noting that the UNGP ignores 'the more aggressive versions of extraterritoriality and suggests, a superior alternative model: the substitution of inter-state consensus standards for projections of state power abroad'.
[129] Ibid. Some of the reasons given are 'where the State itself is involved in or supports those businesses', in order to ensure 'predictability for business enterprises by providing coherent and consistent messages' and preservation of 'the State's own reputation'. Thus the UNGP moved from the ground of social expectations earlier canvassed. See Backer at 106.

which they entered into provided that they regulate the activities of their companies extra-territorially.[130]

However, it must be admitted that the framework does not superimpose extra-territorial regulations for corporations abroad as some scholars would have wanted[131] but nonetheless, it is difficult for one not to notice that it supports it. It states that the home states have a duty to assist in ensuring that MNCs from their origin adhere to human rights obligations and do not violate them.[132] Similarly, it calls for 'cooperation between states' whether from the 'neighboring States' or by the multilateral or regional institutions, to play a crucial role in ensuring CHRR and accountability by providing relevant 'important additional support' in that regard.[133] It is as a result of that call that this research is being conducted in order to interrogate the question: What should be the role of the AU in that regard?

Pillar 2 deals not with the responsibility to protect but the responsibility to respect.[134] The main distinction between the two pillars lies in the fact that the state has a duty to protect but corporation only has a responsibility to respect.[135] While both (protect and respect conundrums) are conterminous, they are also mutually exclusive. Consequently, the failure of the state to perform its duty to protect is not an excuse for the corporation to abandon its own responsibility to respect.[136] The reason why corporations should discharge their own responsibility independent of the state's attitude is because the responsibility to respect human rights goes beyond the territorial boundary of a state, it is a worldwide standard which all corporations are expected to adhere to as they conduct their businesses all over the globe.[137] However, they are more likely to impact negatively on 'the entire spectrum of internationally recognized human rights'[138] as they conduct their businesses[139] unless they

[130] Ibid.
[131] Ibid.
[132] See UNGP op cit note 64 para 10 commentary.
[133] Ibid para 12.
[134] See the discussion of this study in Chapter 1 section 2.
[135] See Surya Deva 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva & David Bilchitz (eds) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (2013) 78 at 93, noting that the UNGP deliberately used responsibility to respect 'to denote non-legal duties'.
[136] See UNGP op cit note 64 para 13(11); see Backer op cit note 64 at125, noting 'the corporate responsibility consists of its own normative system, one that may interact and overlap with the legal system of states (and the international system), but one that remain separate from them'.
[137] Ibid.
[138] Ibid; see Interpretative Guide to the UNGP op cit note 133. Some of the human rights mentioned in the UNGP are the Universal Declaration of Human Rights and its instruments, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work, International humanitarian law, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination

take conscious steps to avert or alleviate the occurrence of 'adverse human rights impacts' that are closely related to their business operations.[140] Beyond that, it must be noted that the UNGP 'suggests a broad scope,'[141] even if corporations are not the perpetrators of such adverse impacts, they still have an obligation to ensure that such adverse impacts do not occur indirectly as a result of their activities. But if it occurs, they have an additional responsibility to address them immediately.[142]

In order to adequately meet the demand of their responsibility to respect, three major fundamental principles touching corporate operations are required for performance by the corporations under the UNGP. The three principles are embedded in the administrative policies and processes dealing with human rights compliance to be adopted by different companies commensurable to their size.[143] First, they must have a human rights mission statement which they must inculcate in to their managerial vision and strictly adhere to in their day-to-day administrative and supply-chain related decision-making processes.[144] It is doubtful if the mission statement alone can enhance human rights in the corporate sector without an effective regulatory regime in the states that instil sanction for corporate human rights violations. As Larry Backer argues 'principles are not instructions in the appropriate way in which to undertake the crafting of policy commitments'.[145] There must be application of principles which requires 'interpretation of the' UNGP and the existence of institutional structures.[146] Similarly, Ruggie notes in its 2008 Report that 'companies need to adopt a human rights policy' but the description of corporate responsibility to respect human rights in 'broad aspirational language' is grossly inadequate to ensure human rights compliance in the corporate sector without an adoption of an explicit functional framework 'necessary to give those commitments meaning'.[147]

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against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities, the United Nations Declaration on the Rights of Indigenous Peoples, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

[139] Ibid Commentary paras 13–14.

[140] Ibid para 15; Taylor distinguishes between 'a bottom–up translation' human rights approach and 'a normative top-down application of human rights' approach. According to him, the position of the UNGP that responsibility to respect human rights 'arises out of activities and relationships' is tilted in favour of 'a bottom–up translation' human rights approach, though he notes that both approaches would lead to the same result. See Mark B Taylor 'The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility' (2011) 5(1) *NJAE* 9 at 16.

[141] See Backer op cit note 64 at 126.

[142] See UNGP op cit note 64 para 15.

[143] Ibid para 15(15).

[144] Ibid para 16 (15a & 16).

[145] Backer op cit note 183 at 494.

[146] Ibid.

[147] See Ruggie op cit note 85 (2008 report) para 60.

Consequently, the second is a due diligence requirement which deals with the means to reduce the risk of companies being implicated in human rights violations. Companies must assess and tackle the 'actual and potential human rights impacts' in their business by the use of 'human rights due diligence'.[148] This can be done by 'remediation' if they are actual risks of adverse impacts and 'through prevention or mitigation', if they are potential risks.[149] But the problem with the requirement according to scholars is that it is merely recommendatory and not comprehensively explanatory enough to serve as guidelines for all companies.[150] Notwithstanding this shortcoming, due diligence mechanisms as prescribed by the UNGP can still help a company not only to comply with its human rights responsibility but also to 'identify ways to make concrete contributions to society beyond its core economic impacts'.[151] However, since, the focus of this study is how to implement the UNGP through a regulatory framework, it is important to consider if due diligence can be used as a regulatory framework for corporate accountability and not as a mere voluntary tool at the hands of companies. This calls for examination of the role of the states in human rights due diligence of companies. According to scholars, their role is that they must use the existing regulatory apparatus in their territories 'to require business due diligence for human rights, and to encourage compliance by creating appropriate incentives'.[152] The UNGP also prescribes this responsibility for states.[153] Therefore, a due diligence mechanism as envisaged by the UNGP is not a mere voluntary tool but a regulatory framework for corporate accountability. As discussed in the previous chapter, failure to comply with a due diligence mechanism requires full sanction of the law.[154] That realisation leads us to the third administrative principle which is a purely legal issue. That companies must obey all existing laws, 'respect internationally recognized human rights' and treat the possibility of directly violating human rights or indirectly complicit in its abuse 'as a legal compliance issue wherever they operate'.[155] The understanding of this principle is the fulcrum upon which the pillar of corporate

[148] Ibid para 18(17); Backer op cit note 82 at 130 & 128–140 for a detailed discussion of due diligence, see 128–140, noting that due diligence is 'the central operational feature of the corporate responsibility to respect'.
[149] Ibid para 18; see also Principles 18–22.
[150] See for example Connie De La Vega op cit note 117 at 8; Backer op cit note 183 at 495.
[151] See, Mark B Taylor, Luc Zandvliet & Mitra Forouhar 'Due Diligence for Human Rights: A Risk-Based Approach' (2009) Corporate Social Responsibility Initiative Working Paper No. 53, 1–23 at 18.
[152] See, Olivier De Schutter, Anita Ramasastry, Mark B Taylor & Robert C Thompson 'Human Rights Due Diligence: The role of States' (2012) 1-64 at 59, available at *http://icar.ngo/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf*, accessed on 3 July 2015.
[153] Ibid; see also UNGP op cit note 64, Pillar 1 of the framework, Principles 2 & 3a.
[154] See Chapter 1 of this study section 1.2, see also Peter Muchlinski 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation' (2012) 22 *BEQ* 145–177.
[155] Ibid, see Principle 23 and its Commentary.

responsibility to respect human rights is based. If the focus of compliance lies in the existing domestic law of states, companies will miss it as the existing law of most states are not adequate.[156] If however the correct interpretation is adopted and their focus goes beyond the inadequate existing domestic law to the relevant global and regional human rights treaties, then companies will be on the right track without liability in complying with their responsibility to respect human rights. This is what Backer means when he argues that the responsibility of corporations to respect human rights goes 'beyond a mere obligation to comply' with domestic law.[157] While they must comply with the domestic laws where they operate which of course serves as the base line, they also have additional responsibility to respect 'a set of transnational norms that are themselves derived from international law and norms'.[158] That broad scope of responsibility to respect the human rights norms, beyond domestic law according to Ruggie is the justification for their license to do business.[159]

Pillar 3 is access to remedy, where the UNGP confers on states the primary duty for provision of remedial action through 'judicial and non-judicial' means of grievance redress mechanism supplemented by subsidiary duty given to the corporations.[160] Principle 25 spells it out without ambiguity that states alone have the responsibility to ensure that victims of corporate human rights violations in their territorial jurisdictions have access to 'appropriate' and 'effective remedy' 'through judicial, administrative, legislative or other appropriate means'.[161] In the mean time, before engaging in adjudication, particularly at the early stage of the grievance between the victims and the corporations, states are enjoined to explore and facilitate non-judicial mechanisms in the form of mediation by state agencies or those that are 'administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group'.[162] Corporations are there only to complement the states in this

[156] See Chapter 1 of this study section 2 and Chapter 3 on the inadequacy of the regulatory frameworks of states in Africa.
[157] See Backer op cit note 183 at 493.
[158] Ibid.
[159] See, John Ruggie 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) 3(2) *MITI* 189–212 at 199 noting that 'whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate'; Kathleen M Wilburn & Ralph Wilburn 'Achieving Social License to Operate Using Stakeholder Theory' (2011) 4 *JIBE* 3-16 at 13, noting that 'many companies are adopting the social license to operate, because it protects their interests, but many others are using it as a way to ensure that there is commitment to norms and values as they move into developing countries'; Larry Catá Backer 'Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.' (2013) 20 *IJGLS* 805-879 at 812 .
[160] Backer op cit note 106 at 140, noting that 'The effect on the ability of corporations, along with other non-state actors, to develop social norm-based remediation structures is thereby marginalized and diminished'.
[161] See UNGP op cit note 64 para 28 and Principles 26−31.
[162] Ibid Principles 27 & 28.

endeavour by directly addressing at an early stage the issue of redress and remediation and 'should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted'.[163]

However, attributing a complimentary role to corporations instead of a shared responsibility perhaps on an equal footing and not on a subsidiary or residual level has been the major reason for critical comments against the UNGP. Indeed, what should be the ideal role of the corporation vis a vis that of the states in protecting human rights has been the main hurdle in resolving the issue of a regulatory framework for CHRR and accountability.[164] Thus, the approach of Ruggie in stressing the role of the state 'as a key principle in order to prevent states from delegating the burden of human rights protection to corporations'[165] makes the UNGP vulnerable to this challenge. Consequently, Pillar 1,[166] Pillar 2,[167] and Pillar

[163] Ibid Principles 29, 30 & 31.

[164] For example the UN norms created joint obligations for states and corporations to respect human rights and were rejected on that ground for creating a non-existing rule of international law.

[165] Pini Pavel Miretski & Sascha-Dominik Bachmann 'The UN "Norms on the Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights": A Requiem' (2012) 17 *DLR* 1–41 at 37.

[166] Jonathan Bonnitcha 'Is the Concept of "Due Diligence" in the Guiding Principles Coherent?', available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588*, accessed on 20 June 2015 noting that the purpose of Pillar 1 'is not to prevent third parties from committing wrongful acts, but to satisfy a certain standard of conduct in attempting to prevent the commission of wrongful acts'; Surya Deva 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9 *ECL* 101 at 103 noting ' … the Framework unfortunately over-relied on this regulatory technique and did not pay adequate attention to exploring other more effective regulatory alternatives that do not suffer from the drawback of state-centred regulation'; Surya Deva *Regulating Corporate human rights violations: Humanizing Business* (2012) 110−111, noting that the UNGP provided a bulwark to the three-fold duty of the states by describing their duty as being protective.

[167] Wesley Cragg 'Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights a Critical Look at the Justificatory Foundations of the UN Framework' (2012) 22 *BEQ* 9−36 at 14, noting that 'it is equally clear that self- interest is not a compelling reason to respect human rights in many of the markets in which Multinational and domestic corporations are active'; Surya Deva & David Bilchitz 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Surya Deva op cit note 141, 1 at 13, noting 'grounding the human rights responsibilities of corporations in social expectations is problematic'; Carlos López 'Ruggie process': from legal obligations to corporate social responsibility?' in Surya Deva op cit note 141, 67 at 72, noting that the approach of the UNGP to social expectation of corporate responsibility to respect as something evolving negates its claims that the framework is comprehensive and authoritative. In addition, he also noted that the framework is weak by relying on the market for enforcement of corporate responsibility to respect human rights; Surya Deva 'Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles' in Surya Deva op cit note 141, 78 at 87, noting that the UNGP did not make provision for sanction for erring companies nor did it offer any solution to the problem of holding parent company liable for the human rights violations of its subsidiary while at the same time avoiding the question of divestment as punishment for corporations; it is incongruence for the UNGP to reject the existence of binding obligations for corporations under international law and then postulate that corporations have responsibility to respect human rights, because it will not be possible to insist that they perform that responsibility; Florian Wettstein 'Making noise about silent complicity: the moral inconsistency of the "Protect, Respect and Remedy" in Surya Deva op cit note 141, 243 at 265, noting that considering the issue of silent complicity of corporations, the categorization of corporate obligation as negative by the UNGP is spurious and untenable.

3[168] have been criticised on that ground. Of course the apprehension of the critics is anchored on the reason that if the role of the corporation to respect human rights is grounded on a mere voluntary milieu, corporations will have unrestrained influence in violating human rights in states without any serious regulatory framework to curtail it.[169] However, while the apprehension from the NGOs and human rights activists are reasonable, one must not deny the possibility of legal obligation arising from state's duty to respect.[170] In addition, if states breached their obligation to protect, regional and international human rights bodies are enjoined by the UNGP to provide remedial support in ensuring that the victims of corporate human rights violations have access to justice.[171] The remedial support to aid the weak states necessitates an inquiry on what the support should be and how it should be channelled to address the issue of CHRR and accountability. This forms the thrust of this research, which is to advocate for the implementation of the UNGP by the AU.

5.3 The WGHR[172]

[168] See, Jonathan Kaufman 'Ruggie's Guiding Principles Fail to Address Major Questions of Obligations and Accountability' *Earth Rights International* (5 April 2011), available at *http://www.earthrights.org/blog/ruggies-guiding-principles-fail-address-major-questions-obligations-and-accountability*, accessed on 30 July 2015, noting 'given the enormous gaps in jurisdiction and enforcement that stymie victims of corporate abuses today, how do we close the net of impunity if companies don't take their "responsibility to respect" seriously?'; Surya Ibid at 102-103, noting that Pillar 1 is 'silent as to what exact remedies victims of corporate human rights abuses can have against the companies' and failed to treat the issue of 'access to a remedy' as human rights; Jean Marie Kamatali 'The New Guiding Principles on Business and Human Rights' Contribution in ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it time for an ICJ Advisory Opinion?' (2011/2012) 20 *CJICL* 437−463 at 441, noting that 'limiting enforcement of the corporate responsibility to respect human rights to general social norms and market expectations … is not sustainable and offers little to the victims of corporate human rights violations'.

[169] See for example Ibid Kamatali at 441; Michael K Addo 'Human Rights and Transnational Corporations – An introduction' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (2000) 11, noting that 'Only a selected few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so'.

[170] Astrid Sanders 'The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' at 9, London School Economics Law, Society and Economy Working Papers 18/2014, available at *http://www.lse.ac.uk/collections/law/wps/WPS2014-18_Sanders.pdf*, accessed on 20 May 2015, noting that 'even if the corporate responsibility to respect was primarily intended to be extra-legal or non-legal, that does not mean that business enterprises do not have any legal obligations to respect human rights'; see Ruggie, op cit note 91 (2010 Report) para 66. Ruggie himself admits that corporate responsibility to respect 'is not a law free zone'; Daniel Augenstein & David Kinley 'When human rights 'responsibilities' become 'duties': the extra-territorial obligations of states that bind corporations' in Surya Deva op cit note 141, 271 at 294, noting that one should not be deceived to think that corporations 'are not subject to legal duties' because the UNGP uses different words to express the duty of states and responsibility of corporations to human rights in Pillars 1 and 2 of the framework.

[171] See UNGP op cit note 64 Principle 28.

[172] See General Assembly 'Human rights and transnational corporations and `other business enterprises' Resolution adopted by the Human Rights Council Seventeenth session, A/HRC/RES/17/4, available at *http://business-humanrights.org/sites/default/files/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf*, accessed on 26 April 2015.

The challenge of leaving an establishment behind to carry on the work of implementing the UNGP was uppermost in the mind of Ruggie. In most of his reports, particularly the 2010 Report[173] as well as the final report,[174] he emphasised the necessity of creating an institution in the UN to continue the task of combating the problem of corporate human rights violations at the global level.[175] His concern was to ensure that the UNGP did not enter a state of oblivion after his exit. Indeed, if principles are enunciated but not followed up, they are likely to be disused. Consequently, his admonition that the UNGP should not be left in a vacuum without 'any follow-up activity'[176] is commendable.

Therefore, it is not a surprise that the UN Human Rights Council (UNHRC) took his advice by establishing a body known as the Working Group on the issue of Human Rights and transnational corporations and other business enterprises (WGHR) to replace his mandate. Five persons 'who are independent experts' were appointed from a 'balanced geographical representation' by the UNHRC to carry on its responsibility for a period of three years as pioneer members.[177] The WGHR mandate is very wide as it covers an extensive gamut of different issues touching the global subject of business and human rights. In the first instance, it has a mandate to implement the UNGP and disseminate information on it.[178] In addition, it has a mandate to engage in capacity-building through identification, exchange and promotion of 'good practices and lessons learned on the implementation of the Guiding Principles' in order to strengthen compliance with human rights by corporations and to develop effective domestic regulatory and policy frameworks for corporate accountability.[179] It is also one of its duties to 'integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children'.[180] Finally, it has the mandate to consult and co-operate with a host of

[173] See Ruggie op cit note 64 (2010 report) para 125.
[174] See presentation of Report to United Nations Human Rights Council by Professor John G Ruggie SRSG for Business and Human Rights on 30 May 2011, available at *http://business-humanrights.org/sites/default/files/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf*, accessed on 23 July 2015.
[175] See General Assembly op cit note 172 para 6.
[176] See presentation of report, op cit note 168.
[177] Ibid; see Business and Human Rights Resource Centre 'About the Working Group', available at *http://business-humanrights.org/working-group/about-the-working-group*, accessed on 20 May 2015.
[178] Ibid; see also General Assembly op cit note 172 para 6a.
[179] Ibid para 6b&c.
[180] Ibid para 6f; to accomplish its tasks, it engages in series of Multi-stakeholder dialogue systems with feedback mechanism such as 'Chairperson-Rapporteur', 'Country missions' 'Field work' 'Multi-stakeholder, consultative and inclusive approach' and reporting technique. For full discussion on the activities of the WGHR, see Michael K Addo 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 *HRLR* 133–147 at 136–140.

institutions, agencies, governments and MNCs[181] in order to make recommendations and encourage relevant actors and institutions that will facilitate compliance to CHRR and accountability.[182]

Pursuant to its mandate, it has the power to create a forum on 'business and human rights' to promote dialogue and co-operation on issues linked to business and human rights, including challenges faced in particular sectors and to deliberate on problems arising from the implementation of the UNGP.[183] In accordance with its mandate to report annually to the UNHRC and the General Assembly, it has submitted three reports as of May 2014.[184]

In the past four years (from 2011 to 2014), the WGHR has made conscious efforts to disseminate information with regard to the implementation of the UNGP to the 'new audiences' and 'large groups', such as business unions, lawyers' associations, states and corporations particularly those 'that have not previously been engaged in the business and human rights agenda, by organising and participating in regional and national events'.[185] The WGHR has interrogated the question of appropriateness of existing remedies available to the victims of gross violations of human rights by corporations.[186] With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), it commissioned an independent inquiry 'to examine the effectiveness of domestic judicial mechanisms in relation to business involvement in gross human rights abuses, including legal and practical barriers to access to justice'.[187] The result of the inquiry was not satisfactorily. The WGHR

[181] Ibid, see paras 6d, e, h, g, 7, 8, 10 & 11. For example it must consult with state governments, regional human rights organizations and sub-regional international organisations, the 'United Nations and other international bodies like the International Labour Organization, the United Nations Development Programme and the International Organization for Migration, Voluntary Code bodies like the Global Compact, financial institutions like 'World Bank and its International Finance Corporation', and MNCs and other business entities, national human rights Institutions, NGOs like civil society organisations and the representatives of indigenous people.
[182] Ibid.
[183] Ibid para 13.
[184] Ibid para 6j; HRC 'Report of the Working Group on the issue of human rights and transnational Corporations and other business Enterprises' 26th Session of HRC (*A/HRC/26/25*) (5 May 2014) para 2.
[185] Ibid Report of WGHRTC para 4.
[186] See, for example, UNWGBHR 'First Regional Forum on Business and Human Rights for Latin America and the Caribbean' Opening statement by Alexandra Guáqueta, member of the UN Working Group on business and human rights (28 August 2013), available at *http://www.ohchr.org/Documents/Issues/Business/submissionsColombia/AlexGuaqueta_LACForumopening_speech_en.pdf* , accessed on 27 May 2015; UNWGBHR 'the closing statement of the Working Group Chairperson at the 2013 annual Forum on Business and Human Rights, available at *http://www.ohchr.org/Documents/Issues/Business/ForumSession2/Statements/*closingChairpersonWGForum2013.pdf, accessed on 27 May 2015; United Nations Human Rights Office of the High Commission 'The UN Working Group on Business and Human Right's work on individual cases of alleged human rights violations and abuses' (March 2014), available at *http://www.ohchr.org/Documents/Issues/Business/WGBrief_Communications_with_States_and_non-State_actors_12.03.2014.pdf*, accessed 26 May 2015.
[187] See Jennifer Zerk 'Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies A report prepared for the Office of the UN High Commissioner for Human

found that the 'existing arrangements for preventing, detecting and remedying cases of business involvement in gross human rights abuses are not working well'.[188] The victims 'in many cases fail to get effective redress and face numerous legal and practical barriers to effective access to the courts'. The recommendations were made which the WGHR 'supports' and promises to contribute to its realisation.[189]

With respect to Africa, which is the subject matter of this thesis, the WGHR has visited Ghana[190] for fact findings on the issue of business and human rights and sensitised them on the implementation of the UNGP. In addition, the WGHR has organised the first African Forum on Business and Human Rights in September 2014 with the support of the AU, 'the United Nations Economic Commission for Africa' and the OHCHR.[191] Members of the WGHR in Africa were adequately represented. The forum deliberated on how the UNGP can be implemented to address the 'negative human rights impacts linked to business activity' in Africa. Both the AU Commission and the WGHR made a commitment to work together 'to advance the business and human rights agenda' in Africa by specifically developing special 'practical tools adapted to the realities in African countries to implement the UN Guiding Principles'.[192] It is hoped that this research will be of immense assistance to them in realising their objective of developing an African approach to CHRR and accountability.

5.4 Having your cake and eating it? Implementing the UNGP while waiting for a binding international regulatory framework

There is no doubt that a binding regulatory framework at the international level should have been an appropriate solution to the problem of corporate human rights violations in the world.

Rights', available at *http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf*, accessed 29 June 2015.

[188] Report op cit note 178 para 46.

[189] Ibid.

[190] See UNHRC 'Statement at the end of visit to Ghana by the UN Working Group on Business and Human Rights Accra, 17 July 2013', available at *http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13547&LangID=E*, accessed 17 April 2015; UNHRC 'report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the Human Rights Council', available at *http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14724&LangID=E#sthash.2RJ3H6mR.dpuf*, accessed 17 April 2015. Noting on Ghana that 'We found that there was a need for further policy coherence through the integration of the Guiding Principles into national policies, and for the establishment of stronger mechanisms to conduct human rights impact assessments, including of investment agreements'.

[191] See, United Nations Human Rights Office of the High Commission (UNHROHC) 'UN and AU commit to advance business and human rights agenda in Africa', available at *http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15053&#sthash.FBFjRFfr.dpuf*, accessed on 19 May 2015.

[192] Ibid, the resolutions emanated from Ecuador and South Africa.

Consequently the endorsement[193] of the two resolutions[194] to commence the process of a 'binding international legal instrument' that will regulate the activities of corporations with regard to human rights is a major breakthrough that was greeted with approval and commendation by NGOs.[195] As earlier noted, the UNGP adopted a polycentric approach to CHRR and accountability instead of a treaty-based regulatory framework[196] that is contemplated by the outcome of the new process.

Unfortunately, the path to the endorsement itself was riddled with contention[197] with the EU, Japan, and the US not only voting against the resolution but with some of them resolving not to take part in the process at all.[198] The position of the US according to its delegation is that to embark on another process without giving 'adequate time and space' to implement the UNGP is a way of circumventing the UNGP itself.[199] Consequently, the question that needs further attention is whether it is true that the resumption of another process that may lead to a binding regime for corporation at the international level is a threat to the implementation of the UNGP? No doubt, the answer is ambivalent. In the first instance, some commentators have doubted the sincerity of the states who opposed the resolution.[200] While this study does not intend to probe the motive behind the opposition, it is

[193] See UNHROHC 'Human Rights Council concludes twenty-sixth session after adopting 34 texts' (27 June 2014) Resolution (A/HRC/26/L.22/Rev.1), available at *http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14798&LangID*=E, accessed 26 May 2015.

[194] Ibid, one of the resolutions emanated from Ecuador and South Africa and the other from Norway supported by 22 other countries; see Ecuador & South Africa 'Elaboration of an internationally binding instrument on Transnational Corporations and other business Enterprises with respect to human rights' (19 June 2014), available at *http://business-humanrights.org/sites/default/files/media/documents/hrc-26_dr_bhr_ecuador.pdf*, accessed on 23 June 2015; Norway 'Human rights and transnational corporations and other business enterprises' a draft resolution tabled for adoption by the UN Human Rights Council (23 Jun 2014), available at *http://business-humanrights.org/sites/default/files/media/documents/norway-resolution-unhrc-17-june-2014.pdf*, accessed on 23 June 2015; for discussion on the two resolutions and the history of the struggle for a binding treaty, see Larry Catá Backer 'Moving forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind them All' (2015) 38 *FILJ* 457–542 at 526–540.

[195] See Richard Girard 'Social movements celebrate historic UN vote against impunity' Transnational Institute (26 June 2014), available at *http://www.tni.org/pressrelease/social-movements-celebrate-historic-un-vote-against-impunity*, accessed 19 May 2015.

[196] See Larry Catá Backer 'The guiding principles of business and human rights at a crossroads: the state, the enterprise, and the spectre of a treaty to bind them all' (2014) Coalition for Peace and Ethics Working Paper 7(1) 1 at 3.

[197] See Carey L Biron 'Contentious Start for UN Process toward Business and Human Rights Treaty' Mint Press News (10 July 2014), available at *http://www.mintpressnews.com/contentious-start-u-n-process-toward-business-human-rights-treaty/193731/*, accessed 16 June 2015.

[198] Kinda Mohamadieh 'Human Rights Council: Historic resolution adopted for a legally binding instrument for TNCs' TWN Third World Network (30 June 2014), available at *http://www.twnside.org.sg/title2/climate/info.service/2014/cc140602.htm*, accessed on 16 June 2015.

[199] See Biron op cit note 197.

[200] See HLD Mahindapala 'US, EU refuse to cooperate with UNHRC on human rights' (3July 2014) Quoting one commentator as saying 'the ganging up of leading market forces is clearly seen in the Western alliance of

important to throw more light on the issue of the implementation of the UNGP being scuttled or circumvented as a result of the commencement of the move to fashion a new treaty.

A new treaty process and implementation of the UNGP are just different sides of the same coin. In fact in the perspective of this research, they serve the same purpose. A proper implementation of the UNGP must adopt a regulatory approach. Justine Nolan argues that 'for soft law (and in particular corporate responsibility to respect as set out in the GPs) to be an effective and sustainable rights protection mechanism, ... there is a need for a more intimate connection to "hard"– that is legally binding –law'.[201] That is the idea behind this study, which seeks to interrogate the question of how the AU can implement the UNGP by fashioning a new regulatory and institutional framework for CHRR and accountability in Africa.

Indeed, the problem at present is that the commencement of the new treaty process should not be used as a means to abandon the implementation of the UNGP. This thesis is of the view that the UNGP is still relevant and should not be circumvented due to the commencement of the new process for a binding treaty. One is not an impediment to the other and processes to attain the objectives of the two can work concurrently. As Backer argues, the process of constructing a binding treaty must begin with consideration of the UNGP.[202] In addition, there is no reasonable basis for abandonment. The time-frame for the new treaty is open-ended. Many challenges will have to be surmounted before a new treaty can come into existence,[203] and it will certainly take a long time before it does so.[204] In the interim, Ruggie argues that the implementation of the UNGP should be given priority and

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US, EU, Norway etc., rejecting the UNHRC resolution on TNCs' and another one saying 'their decision to protect profits at the expense of human rights is unacceptable. US has rushed to protect the transnational corporations at the expense of human rights', available at *http://www.sinhalanet.net/us-eu-refuse-to-cooperate-with-unhrc-on-human-rights*, accessed on 16 June 2015; Thalif Deen 'After Losing Vote, US-EU Threaten to Undermine Treaty' (28 June 2014) Inter Press Service News Agency Quoting Anne van Schaik as saying that 'The division of the votes clearly shows that the countries who are host to a lot of TNCs, such as the EU, as well as Norway and the U.S., are against this proposal', available at *http://fordhamilj.org/files/2015/04/FILJ_Backer_MovingForward.pdf*, accessed on 19 June 2015.

[201] See Justine Nolan 'The corporate responsibility to respect human rights: soft law or not law?' in Surya Deva op cit note 141, 138 at140.

[202] See Backer op cit note 194 at 542 noting that the construction of a new treaty for corporate accountability as an international rule of law must begin with determination of 'the extent of the current landscape of the state duty to protect … and the operationalization' of the UNGP.

[203] See Backer op cit note 196 discussing the challenges and the bottlenecks that the new treaty will pass through to see the light of the day.

[204] During the informal meetings before the vote Ecuador revealed that the time frame of the treaty process might take a decade. See John Ruggie 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors' Institute of Business and Human Rights (9 September 2014), available at *http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html*, accessed on 20 May 2015.

due attention in order to avoid 'a replay of 1970s'.[205] This study rests on that premise. Until the new treaty emerges let the implementation of the UNGP commence.

5.5 Conclusion

An attempt has been made in this chapter to discuss the UNGP, which is presently the most authoritative framework for CHRR and accountability in Africa. This chapter has shown that the first UN framework to be conceived in the area of business and human rights was the UN Norms with its binding regulatory framework but was rejected. Thereafter, the Global Compact was developed to fill the gap and still exists concurrently with the UNGP, which was unanimously endorsed by all members of the UNHRC. However, three years after the endorsement of the UNGP, the UNHRC commenced the process of developing an international treaty that will regulate corporations at the international level. This chapter has shown that the new move should not be seen as a threat to the implementation of the UNGP but rather as its complement. Thus this study supports the implementation of the UNGP as well as the commencement of the new treaty process. In fact while endorsing the resolution for the new treaty, the UNHRC concurrently passes a resolution that the commencement of the implementation of the UNGP should go concurrently and unabated.[206] Consequently, the next chapter interrogates the question of the choice of an appropriate forum for implementation of the UNGP in Africa.

[205] Ibid.
[206] See UNHRC op cit note 190.

CHAPTER 6
THE SEARCH FOR AN APPROPRIATE FORUM TO IMPLEMENT THE UNGP

6.1 Introduction

The previous chapter dealt with the UNGP that is to be implemented by all states in order to ensure observance of human rights in the corporate sector. As a follow up, this chapter examines the availability of an appropriate forum to implement the framework in Africa due to the unwillingness or incapacity of most states in Africa to regulate these companies, particularly the MNCs. It considers various options where companies operating businesses in Africa can be regulated. These options are the home states of the MNCs which are developed countries of the world like UK, US, Netherlands among others and the multilateral institutions like the World Bank, the International Monetary Fund (IMF) and the WTO. Finally, it examines the suitability and availability of the ICC for such corporate accountability frameworks before it concludes that the AU is the most appropriate complementary forum for its implementation.

6.2 The WTO as an option

Agreements on trade issues in a multilateral institution like the WTO[1] between states leading to the opening of national markets and the liberalisation of trade all over the world has contributed in great measure to increasing the status and influence of MNCs over the states[2] and to erode the power and capacity of states, particularly in Africa, to regulate the MNCs

[1] WTO as a multilateral organisation can be explained in different ways. It is an organization where members make commitments to open and liberalise their domestic trade and market; it is a forum where members embark on negotiations of trade agreements and also a forum where they resolve their trade disputes. See WTO 'Understanding the WTO: Who we are', available at *http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm*, accessed on 9 March 2015; for an historical and background information on the WTO, see Mitsuo Matsushita, Thomas J Schoenbaum & Petros C Mavroidis *The World Trade Organization Law, Practice, and Policy* (2006) 6–9; Peter Van den Bossche & Werner Zdouche *The Law and Policy of the World Trade Organization* (2013) 74–104; Beverly M Carl *Trade and the Developing World in the 21st Century* (2001) 89–96; Ricardo Meléndez-Ortiz, Christopher Bellmann & Miguel Rodriguez Mendoza (eds) *The Future and the WTO: Confronting the Challenges a Collection of Short Essays* (2012); Yong-Shik Lee *Reclaiming Development in the World Trading System* (2009) 14–18.

[2] See Corp Watch 'World: Multinationals and WTO' (1 September 1999), available at *http://www.corpwatch.org/article.php?id=329*, accessed on 10 March 2015; Melik Özden 'Transnational Corporations and Human Rights What is at Stake in the United Nations Debate over The Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights' part of a series of the Human Rights Programme of the Europe-Third World Centre (CETIM), noting that 'The unbridled privatizations' which the 'WTO has championed, alone, have substantially added to the power of today's TNCs', available at *http://www.cetim.ch/en/documents/bro2-stn-A4-an.pdf*, accessed on 10 March 2015; Dine Janet *Companies, International Trade and Human Rights* (2005) 97.

and to fulfil their human rights obligations to their citizens in their territories.[3] Unfortunately, the dilemma in which the states find themselves is accentuated by the view of the developing countries that the use of human rights for trade measures is 'a smokescreen for protectionism' by the developed countries to protect their internal market contrary to the WTO obligations.[4] Even the international law is structured along the general belief that trade and human rights are not compatible and that an attempt to use trade to promote human rights is an aberration.

As a result, a gap has been created from the beginning between trade law and human rights either from the 'custom-based'[5] approach or as personified in different treaties that embodied them.[6] Trade law is essentially a treaty law.[7] In fact, WTO is such a 'single treaty' that evolved in isolation of human rights consideration.[8] This is possible because 'most treaties are meant to codify custom or establish some alternative rule'.[9] WTO establishes an alternative rule of multilateral trade liberalization without substantial efforts on its path to inculcate customary international law of human rights.[10]

Consequently, it is assumed that trade measures are not to be used to promote human rights and domestic regulations should not be enacted to impede the free-flow of trade even if the purpose of the legislation is to promote human rights by regulating the conduct of

[3] Jeffery Atik 'Democratizing the WTO' (2000/2001) 3 3*GWIL* 451–473, 452; Lori Wallach & Michelle Sforza *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (1999) 2–9; United Nations Economics and Social Council (UNESCO) 'The Realization of Economics, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights' (15 June 2000) preliminary report submitted by J Oloka-Onyango & Deepika Udagama in accordance with Sub-Commission Resolution 1999/8, available at *http://www1.umn.edu/humanrts/demo/Globalization_Oloka-Onyango, Udagama.pdf*, accessed on 11 March 2015.

[4] The issue of using trade measures to promote labour standards was discussed at the1996 Singapore Ministerial Conference but developing countries opposed it because they alleged that the developed countries might use it as a ploy to protect their internal market. See WTO 'Understanding the WTO' (2003/79), available at *http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf*, accessed on 10 March 2015.

[5] See Statute of the International Court of Justice (ICJ) Article 38(1), 26 June 1945, 59 Stat. 1031, 33 UNTS 993 'international custom' is listed as one of the sources of international law.

[6] Note that treaty is one of the sources of international law as enumerated by the ICJ, see ibid ICJ; Berta E Hernández-Truyol 'Sex and Globalization' (2008) 11 *HLLR* 173 at 178; Robert Howse & Ruti G Teitel 'Beyond the Divide the Covenant on Economic, Social and Cultural Rights and the World Trade Organization' (2007) Dialogue on Globalization working paper, available at *http://library.fes.de/pdf-files/iez/global/04572.pdf*, accessed on 12 March 2015, noting that 'the legal, institutional and policy cultures of international human rights law and of international trade, financial and investment law have developed largely in isolation from one another'.

[7] Robert Howse and Makau Mutua 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization' (2000) Buffalo Legal Studies Research Paper No. 2010-008.

[8] Ibid at 62.

[9] Andrew T. Guzman 'Saving Customary International Law' (2005)27 *MJIL* 116 at 164

[10] But note that customary international law is to be obeyed by states irrespective of their treaty obligations, particularly those that have become *jus cogens*.

business and trade in their territories. The jurisprudence of the WTO supports this view.[11] As a result, protection of human rights not only in the WTO but in the territories of member states becomes a herculean task. In South Africa for example, a group of MNCs in the pharmaceutical sector sued the state government over its domestic law aimed at increasing the accessibility of essential drugs to its citizens on the ground that the law was contrary not only to the Constitution of South Africa but to the state obligations under the Trade-Related Aspects of Intellectual Property Rights (TRIP) agreement.[12] The case had to be withdrawn before it could be decided due to public outcry and critical comments from pressure groups and to the developed countries that supported the case.[13]

Although a similar case instituted by the US against Brazil was also withdrawn[14] before it could be heard, the fact is that WTO commitments are aimed at reducing the ability of states to discharge their obligations in protecting human rights in order to protect corporations operating globally.[15] Indeed, the UN Secretary General in his report argues that the WTO rules have failed to 'produce results that are consistent with human rights imperatives'.[16] This failure is adverse to human rights protection in the corporate sector, particularly, when the scope of agreements covered under the General Agreement on Tariffs and Trade (GATT) has been extended by the WTO to cover a wide array of trade and business issues which include intellectual property,[17] goods,[18] services[19] procurement and Civil Air Craft.[20]

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[11] Although this kind of jurisprudence has created problem of 'legitimacy crises' to the WTO, see Andrew Lang *World Trade Law after Neoliberalism Reimagining the Global Economic Order* (2011) 346, noting that 'WTO law repeats the core problem which led to the WTO's legitimacy crises, rather than resolving it'.

[12] See, the *Pharmaceutical Manufacturers' Association of South Africa and 41 Others v The President of the Republic of South Africa and 9 Others* Case Number: 4183/98 at High Court of South Africa (Transvaal Provincial Division) on 18 February 1998 filed in Pretoria.

[13] On the local and global response which led to the withdrawal of the case, see Lonias Ndlovu 'The WTO Trips Agreement and Access to Medicines in South Africa Twenty Years Into Democracy' (2014) 28 *SJ* 70–100 at 89, noting that 'the pressure later became too much to bear for the pharmaceutical companies which had launched the suit and after the United Nations secretary general's mediation efforts, the pharmaceutical companies withdrew the suit'; Heinz Klug 'Access to Medicines and the Transformation of the South African State: Exploring the Interactions of Legal and Policy Changes in Health, Intellectual Property, Trade, and Competition Law in the Context of South Africa's HIV/AIDS Pandemic' (2012) 37 *LSI* 297–329 at 314-317.

[14] Zita Lazzarini 'Making Access to Pharmaceuticals a Reality: Legal Options Under TRIPS and the Case of Brazil' (2003) 6 *YHRDJ* 103–138 at 132, noting that 'the US dropped its suit after Brazil agreed not to export its generic drugs'; Rebecca Boden & Angathevar Baskaran 'Globalisation and Commodification of Public R&D System' in Mammo Muchie & Li Xing (eds) *Globalisation, Inequalities, and the Commodification of Life and Well-being* (2006) 64–65.

[15] See, Lang op cit note 7 at 344–347.

[16] UN General Assembly 'Globalization and its impact on the full enjoyment of all human rights' (31 August 2000) preliminary report of the Secretary-General' (A/55/342), available at *http://www.un.org/documents/ga/docs/55/a55342.pdf*, accessed on 10 March 2015; UNESCO op cit note 3.

[17] See WTO op cit note 4 para 42, noting that Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was negotiated in the 1986–94 during the Uruguay Round and let to the emergence of 'intellectual property rules into the multilateral trading system for the first time'.

On the other hand, if WTO adopts human rights in its jurisprudence, it will promote human rights protection in the corporate sector globally. Its judicial framework, which resolves trade grievances among state members, can be a great asset to address the problem of access to justice in cases of corporate human rights violations in the world.[21] Consequently, the UN Human Rights High Commissioner and some scholars have argued for the application of human rights in the WTO.[22] Ernst-Ulrich Petersmann argues that the WTO can redefine its public image by giving priority to the 'existing human rights obligations' of the states as essential 'legal context' in interpreting and applying the WTO jurisprudence.[23] He argues that the enforcement of social human rights should take precedence over the WTO rules by insisting that the safeguard mechanisms in the 'GATT/WTO law for national public policy exceptions (such as those in Articles X-VIII-XXI GATT)' should be used to elevate 'the sovereign right of governments to pursue social policies that are considered more important than liberal trade'.[24]

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[18] See generally the text of General Agreements on Tariffs and Trade (GATT), which came into force on 1 January 1948.

[19] The General Agreements on Trade and Services (GATS) came in to force in January 1995.

[20] The two are 'plurilateral' agreements which are not signed by all members.

[21] However it must be noted that the judicial mechanism of the WTO has not been used in the past to promote or enforce human rights, see Susan Ariel Aaronson 'Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO' (2007) 6 *WTR* 1–37 at 21; Gabrielle Marceau 'WTO Dispute Settlement and Human Rights' (2002) 13 *EJIL* 753–814 at 778, noting that the use of judicial framework of the WTO is not envisaged for 'non-WTO norms' which includes human rights.

[22] Ibid, Marceau at 753–814; Salman Bal 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX Of The GATT' (2001) 10 *MJGT* 62–108; Cephas Lumina 'Free Trade or Just Trade? The World Trade Organisation, Human Rights and Development' (2008) 12 *LDD* 20–40; Cephas Lumina 'Free Trade or Just Trade? The World Trade Organisation, Human Rights and Development (Part 2)' (2010) 14 *LDD* 1–26; Ala'i Padideh 'A Human Rights Critique of the WTO: Some Preliminary Observations' (2001) 33 *GWILR* 537–556; Omphemetse Sibanda 'A Human Rights Approach to World Trade Organization Trade Policy: Another Medium for the Promotion of Human Rights in Africa' (2005) 5 *AHRLJ* 387–405; Tarek F Maassarani 'WTO-GATT, Economic Growth, and the Human Rights Trade-Off' (2005) 28 *EELPJ* 269–300; Mcej Bronckers 'Better Rules for a New Millennium: A Warning against Undemocratic Developments in the WTO'(1999) 2 *JIEL* 547–566; UNESCO 'Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Participation and its Application in the Context of Globalization' (23 December 2004) Report of the High Commissioner (E/CN.4/2005/41), available at h*ttp://Daccess-Dds-Ny.Un.Org/Doc/UNDOC/GEN/G04/169/72/PDF/G0416972.Pdf?Openelement*, accessed 10 March 2015; Ernst-Ulrich Petersmann 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *EJIL* 651–659; Ernst-Ulrich Petersmann 'Taking Human Dignity, Poverty and Empowerment of Individuals more Seriously: Rejoinder to Alston' (2005) 13 *EJIL* 845–851; Ernst-Ulrich Petersmann 'Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution' in Frederick M Abbott, Christine Breining-Kaufmann & Thomas Cottier (eds) *International Trade and Human Rights* (2006) 29; Ernst-Ulrich Petersmann 'The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy?' (2004) *JIEL* 605–627; Ernst-Ulrich Petersmann 'Human Rights, International Economic Law and Constitutional Justice' (2008) 19 *EJIEL* 769–798; Ernst-Ulrich Petersmann 'Constitutionalism and International Organizations' (1997) 17 *NJILB* 398–469.

[23] Ibid Petersmann 'The human rights approach' at 607.

[24] See Petersmann 'Constitutionalism' op cit note 22 at 434.

According to him it is necessary to do this in the WTO since by adopting a non-discrimination principle amongst states, WTO regulation paves the way for state members 'to discriminate among their own citizens through tariffs and non-tariff barriers', and consequently redistribute the concomitant 'income for the benefit of protectionist interest groups'.[25] Even though 'his view is that human rights provide a moral underpinning for market economies',[26] yet his analysis is not without its critics.[27]

While this study does not see anything wrong with the approach adopted by Petersmann, it nonetheless contends that a true appraisal of the existing trade law under the WTO will reveal that the issue of merger between trade and human rights is far from being a reality. According to Caroline Dommen, all efforts made to make WTO apply human rights obligations in the WTO have not been heeded[28] including the call made by the High Commissioner.[29] The Doha Agenda that could have corrected this abnormality shunned a discourse relating to trade and human rights.[30] Reasons for this avoidance on the part of the WTO have been briefly explained in this study and fully discussed elsewhere.[31] It is important, however, to know that the WTO could not be of much help with regard to enforcement of human rights and so the search for a suitable forum should continue, in particular for CHRR and accountability. On the other hand, even if it aspires to do so, the suitability of the WTO for the task of human rights enforcement is contestable.[32]

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[25] Ibid at 432.
[26] Sol Picciotto *Regulating Global Corporate Capitalism* (2011) 373.
[27] His view that property rights and social human rights can be used to check the abuse of property law has been criticized by some scholars. For a study of criticism of Petersmann's theory, see Robert Howse 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 *EJIL* 651–659; Philip Alston 'Resisting the Merger and Acquisition of Human Rights by Trade Law a Reply to Petersmann' (2002) 13 *EJIL* 815–844; see also Janet op cit note 2 at 199–204. For his defence, see also Petersmann 'Taking human dignity' op cit note 18; Robert D Anderson & Hannu Wager 'Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy' (2006) 9 *JIEL* 707–747 at 719, noting that in spite of critical remarks against his view 'the central argument' of his message is very valid and important to the advocates of human rights and trade merger.
[28] Caroline Dommen 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2002) 24 *HRQ* 1–50 at 2.
[29] Choudhury, Gehne & Heri et al 'A Call for a Ministerial Decision on Trade and Human Rights' in Thomas Cottier & Panagiotis Delimatsis (eds) *The Prospects of International Trade Regulation from Fragmentation to Coherence* (2011) 323, 324.
[30] Anthony E Cassimattis *Human Rights Related Trade Measures under International Law: The Legality of Trade Measures Imposed in Response to Violations of Human Rights Obligations under General International Law* (2007) 405; Howse op cit note 27, noting that 'WTO negotiations in the Doha Round are occurring without any explicit reference to human rights'.
[31] Nicola Jagers 'Bringing Corporate Social Responsibility to the World Trade Organization' in Doreen Mcbarnet, Aurora Voiculescu & Tom Campbell (eds) *The new Corporate Accountability, Corporate Social Responsibility and the Law* (2007) 177–206, 179–181.
[32] See Alston op cit note 27 at 836 responding to Petersmann's view that WTO 'would protect human rights more effectively' than other international bodies, he noted that this conception '… of human rights-based or more accurately human rights justified constitutionalization of the WTO is highly contentious'.

In spite of the exceptions in GATT Articles XX and XXI and the 'sustainable development' perspective of the WTO, which should give assurance to those states intending to use trade measures to protect human rights, environment and security,[33] the fact that African countries had to be given a waiver[34] to implement the Kimberly Process[35] in order to combat the trade of illicit blood diamonds in their territories is ambivalent. It justifies the notion that human rights protection is alien and not part of the WTO, although at a minimal level it can also be accommodated.[36] Navigating that narrow path, the EU sought and obtained a waiver in order to accord special trade preferences to certain countries through a scheme which enables it to introduce human rights conditionality into trade issues.[37]

That atom of relief notwithstanding,[38] Philip Alston argues that while there is a need for the WTO to use its well entrenched regulatory framework to curb human rights violations by states through sanctions or trade measures, it is 'not designed, structured or suitable to operate in the way the one with major human rights responsibilities would'.[39] Indeed, examples from the US and EU have shown that the use of trade measures to protect human rights is questionable and hardly facilitates fair and equitable market equilibrium in the global

[33] See Ryan Goodman 'Norms and National Security: The WTO as a Catalyst for Enquiry' (2001) 2 *CJIL*101 at 106, arguing that Article XXI can be used to address human rights violations in another states on the ground of security; Aaronson op cit note 21 at 18; Carola Glinski 'Competing Transnational Regimes under WTO Law' (2014) 30 *UJIEL* 44–67 at 52, stating that human rights standards can be implemented through WTO Agreement on Technical Barriers to Trade (TBT); Christian Vidal-León 'Corporate Social Responsibility, Human Rights, and the World Trade Organization' (2013) 16 *JIEL* 2013 893–920 at 917, noting that 'the disciplines of the TBT Agreement do not have the effect of thwarting CSR goals, but only to render them congruent with the obligations in Article 2, notably with the non-discrimination and proportionality provisions'.

[34] But see Joost Pauwelyn 'WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds" (2003) 24 *MJIL* 1177 at 1206–12077, arguing that the waiver is unnecessary because of the exceptions in Articles XX and XXI of GATT.

[35] On Kimberly process see Kimberley Process Certification Scheme Technical Document, available at *http://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf*, accessed 10 March 2015.

[36] But see Pauwelyn op cit note 34, arguing that the waiver gives an impression that Kimberly Process Certification Scheme (KPCS) is foreign to the WTO but that it can be a subject of litigation under the WTO.

[37] On the Enabling Clause in the WTO leading to waiver for the use of Generalized System of Preferences (GSP) see Susan Ariel Aaronson & Jamie M Zimmerman *Trade Imbalance The Struggle to Weigh Human Rights Concerns in Trade and Policymaking* (2008) 44; Mathew G Snyder 'GSP and Development: Increasing the Effectiveness of Nonreciprocal Preferences' (2012) 33 *MJIL* 821–861.

[38] But see David Kinley & Justine Nolan 'Trading and Aiding Human Rights: Corporations in the Global Economy' (2003) 25 *NJHRL* 353–377, 364–369, where the so called little thrives of human rights enforcements were discussed in a magnified manner.

[39] See Alston op cit note 27 at 836; on the same view see Gary P Sampson 'Is there a Need for Restructuring the Collaboration among the WTO and UN Agencies as to Harness their Complementarities? in Ernst-Ulrich Petersmann (ed) *Reforming the World Trading System Legitimacy, Efficiency, and Democratic Governance* (2005) 529, noting that 'a strong argument can be made that a trade policy organization such as the WTO should not be responsible for the non-trade issues that are gravitating towards it'; but see Kinley & Nolan op cit note 38 at 364–369.

world.[40] Often, secret motive lies behind the use of such trade measures and its negative impact on the ordinary people that ought to benefit from them is worrisome.[41]

In addition, the 'dispute settlement system of the WTO provides for dispute settlement exclusively between member states'.[42] Therefore, corporations cannot be sued in the WTO. The implication of that exclusive jurisdiction of states is that unless, the jurisprudence of the WTO is amended, it cannot effectively address the problems of corporate human rights violations.

6.3 Why not at the International Financial Institutions (IFIs)?

The World Bank[43] and the IMF were established in 1944 during the Bretton Woods Conference.[44] Like the WTO, the IMF and the World Bank are all facilitators of international trade. On one hand, IMF supports free trade, by seeking to eliminate 'foreign exchange restrictions which hamper the growth of the World Trade'.[45] On the other hand, the World Bank promotes foreign investment and helps in securing 'investment of capital for productive

[40] The European parliament its self criticized the human rights conditionality in bilateral agreements of the EU as selective, not transparent and fair. See European Parliament Resolution on the Human Rights and Democracy Clause in European Union Agreements (2005/2057(INI)), 14 February 2006 [2006] OJ C290E/107 para 8; even the UN report accuses the United States of violating human rights in America and other countries as well, in fact, the Committee in para 4 expresses regrets on the position of the United States that the 'Covenant does not apply with respect to individuals under its jurisdiction but outside its territory'. See Human Rights Committee 'Concluding observations on the fourth Report of the United States of America' which was adopted by the Committee at its 110th session (10–28 March 2014), available at *http://s3.documentcloud.org/documents/1097784/un-human-rights-final.pdf*, accessed on 6 March 2015.

[41] See United Nations General Assembly 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' (A/HRC/27/L.2), available at *ap.ohchr.org/Documents/E/HRC/d_res_dec/A_HRC_27_L2.doc*, accessed on 7 March 2015.

[42] See, Aaron Catbagan 'Rights of Action for Private Non-State Actors in the WTO Dispute Settlement System' (2009) 37 *DJILP* 278 at 287.

[43] The World Bank consists of five primary global financial institutions which are the International Bank for Reconstruction and Development (IBRD) which was established in 1946, the International Development Association (IDA) in 1960, the International Finance Corporation (IFC) in 1956 and the Multilateral Investment Guarantee Agency (MIGA) in 1988 and the International Centre for Settlement of Investment Disputes (ICSID) which opened it office in 1966.

[44] See C Lumina 'An Assessment of the Human Rights Obligations of the World Bank and the International Monetary Fund with Particular Reference to the World Bank's Inspection Panel' (2006) 31(2) *JJS* 108–129 at 109; for the difference between the two see David D Driscoll 'The IMF and the World Bank, How Do They Differ?' IMF website, available at *https://www.imf.org/external/pubs/ft/exrp/differ/differ.htm*, accessed on 6 March 2015. For a history and understanding of the operation of the banks, see, Daniel D Bradlow 'The Changing Role of the IMF in the Governance of the Global Economy and its Consequences' a paper prepared for the Annual Banking Law Update, University of Johannesburg (3 May 2006), available at *http://www.new-rules.org/storage/documents/global_governance/bradlow.pdf*, accessed on 6 March 2015; Joseph E Stiglitz 'Democratizing the International Monetary Fund and the World Bank: Governance and Accountability' (2003) 16 (1) *GIJPAI* 111–139 at 118–124.

[45] See, Article 1of Articles of Agreement of the International Monetary Fund as amended as of 3 March 2011, available at *https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf*, accessed on 6 March 2015; see also Articles of Agreement of International Bank for Reconstruction and Development (IBRD) (as amended effective 16 February 1989), available at *http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf*, accessed on 6 March 2015.

purposes'.[46] Consequently, the IFIs and the WTO are facilitators of globalisation and their operations have human rights impacts indirectly on the citizens of the countries dealing with them and directly on the ability and capacity of these states to fulfil their human rights obligations to their citizens.[47]

For many years, since their inception, the IFIs had avoided the consideration of human rights in the pursuit of their objectives.[48] Consequently, most of their policies were fashioned without consideration for human rights obligations of states. Thus, they supported states like South Africa under apartheid contrary to the UN resolution because protection of human rights, according to their reasoning, was secondary to flow of capital and free trade.[49] In fact, developing countries that requested their assistance in times of financial crisis had their capacity to fulfil human rights obligations to their citizens curtailed as they struggled to implement prescriptions which were inimical to human rights as conditionality for a bail-out.[50] The result is that gross human rights violations were perpetuated in the process of

[46] Ibid.

[47] See, for example, Mary Dowell-Jones 'Financial Institutions and Human Rights' (2013) 13 *HRL*, 423–468 at 437, noting that 'project finance has been at the forefront of the interpolation of human rights into the financial sector for the simple reason that major infrastructure and mining projects have caused untold and highly visible damage to the human rights and environment of the peoples and communities they affect'; Lumina op cit note 44 at 111, noting that 'the policies and activities of both institutions have been criticised for their negative human rights implications'; Global Exchange 'How the International Monetary Fund and the World Bank Undermine Democracy and Erode Human Rights: Five Case Studies' (September 2001), available at *http://www.globalexchange.org/sites/default/files/wbimfReport.pdf*, accessed on 8 March 2015; Amnesty International 'The World Bank and other International Financial Institutions Must Uphold Human Rights in all Activities they Support' (12 September 2013), available at *http://www.forestpeoples.org/sites/fpp/files/news/2013/10/HRC24%20written%20statement%20IFI6.pdf*, accessed on 8 March 2015, noting that 'the decisions, policies and projects promoted by international financial institutions (IFIs) have significant and often far-reaching impacts on human rights'.

[48] This was due to their spurious defence that the articles of the agreements did not compel them to consider human rights, see for example Ibrahim FI Shihata 'Human Rights, Development, and International Financial Institutions' (1992) 8 *AUILR*, 27–36 at 29, 35, noting that IFIs are not empowered by their articles to be involved in 'the political reform of their borrowing members' and that its lending power cannot be used to ensure 'respect for political human rights'; Ibrahim FI Shihata *The World Bank in a Changing World* (1991) 83, noting that IFIs 'should not allow political factors or events, no matter how appealing they may seem to be, to influence its decisions unless ... it is established that they have direct and obvious economic effects relevant to the World Bank'; but for contrary arguments, see Namita Wahi 'Human Rights Accountability of the IMF and the World Bank: a Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability' (2006) 12 *UCDJILP* 331–407; Tom Farer 'Human Rights and Foreign Policy: What the Kurds Learned (A Drama in One Act)' (1992) 14 *HRQ* 62–77.

[49] They were reluctant to comply with the resolution, see Juan Pablo Bohoslavsky 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights' (22 December 2014) Human Rights Council 28th session (A/HRC/28/59) para 10.

[50] See Lumina op cit note 44 at 117; Anna Grear & Burns H Weston 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15 *HRLR* 21–44 at 27; Wahi op cit note 48 at 343; Stiglitz op cit note 44 at 122.

executing projects they financed with governments incapacitated to protect their citizens from such violations.[51]

In Ethiopia for example, a project recently financed by the World Bank led to the displacement of 1.5 million people and 'Villagization' in Ethiopia's Gambella Region.[52] Considering the purpose behind these developmental projects financed by the IFIs, which is to elevate the standards of living of the people, the occurrence of human rights violations during the execution of the projects should be of grave concern to all. Unfortunately, the IFIs do not bother to see it as serious. In response to the demand by many scholars,[53] that they (IFIs) consider human rights in the performance of their statutory functions, their chief legal counsel argued that the articles of agreement did not entitle them to do so.[54]

In fact, it took many years[55] before they could appreciate the importance of such a call and begin to reform their structural adjustment programmes and other hard-line policies by implementing a human face framework known as the Poverty Reduction Strategy Papers (PRSP).[56] At the same time, the negative effects of the reforms on all stakeholders, particularly the poor and the vulnerable, are analysed through another process known as Poverty and Social Impact Analysis (PSIA)[57] in order to make amends.

However, while still trying to grapple with the issue of how to alleviate or eradicate the human rights impacts of their developmental agenda, another demand was made from the IFIs, especially the World Bank.[58] It was suggested that IFIs provide a framework that will

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[51] See Lang op cit note 11 at 344–346, noting that 'states could not simply regulate freely without having regard to the potential reactions of foreign actors both public and private on which they may rely for investment aid and access to foreign markets'; See Global Exchange op cit note 43, for example of hardships associated with the projects.

[52] Human Rights Watch 'Abuse-Free Development How the World Bank Should Safeguard Against Human Rights Violations' (2013), available at *http://www.hrw.org/sites/default/files/reports/worldbank0713_ForUpload.pdf*, accessed on 20 May 2015; Human Rights Watch '"Waiting Here for Death": Forced Displacement and "Villagization" in Ethiopia's Gambella Region' (2012), available at *http://www.hrw.org/sites/default/files/reports/ethiopia0112webwcover_0.pdf*, accessed on 20 May 2015.

[53] Adam Mcbeth 'A Right by any other Name: the Evasive Engagement of International Financial Institutions with Human Rights' (2009) 40 GWILR 1101–1156 at 1102; Ved P Nanda 'Human Rights Must be at the Core of the Post-2015 International Development Agenda' (2014) 75 *MLR* 1 at 14.

[54] Shihata op cit note 48 at 29, 35; Lumina op cit note 44 at 111.

[55] Mcbeth op cit note 53 at 1102.

[56] On overview of this framework see G-24 Secretariat Briefing Paper 'Poverty Reduction Strategy Paper (PRSP) Approach' (March 2003), available at *http://g24.org/wp-content/uploads/2014/03/G24-Secretariat-4.pdf*, accessed on 8 March 2015; for criticism of the framework see Word Development Movement 'One size for all a study of IMF and World Bank Poverty Reduction Strategies' (September 2005), available at *http://www.globaljustice.org.uk/sites/default/files/files/resources/onesizeforeall01092005.pdf*, accessed on 8 March 2015.

[57] For how the analysis works and its impacts, see Rafael Gomes & Max Lawson 'Pro-Poor Macroeconomic Policies Require Poverty and Social Impact Analysis' (2005) 23(3) *DPR* 369–384.

[58] That the World Bank must be a vehicle to promote and enforce human rights, see Mac Darrow *Between Light and Shadow: The World Bank, the International Monetary Fund and International human rights Law* (2003)

enrich, entrench and facilitate CHRR and corporate accountability.[59] David Kinley and Junko Tadaki argue that the World Bank is adequate for such holistic work. They suggested 'using the World Bank and not the IMF to enforce the human rights obligations of TNCs' because of the persistent avoidance of human rights considerations by 'the IMF orthodoxy'.[60]

While it is true that the World Bank is better disposed than the IMF to consider human rights issues in its operations, the truth is that even in the World Bank, some institutions are more suitable to protect human rights obligations of corporations than others. Without exaggeration, the International Financial Corporation (IFC) among others, is more strategically situated and adequately endowed to deal with this issue of CHRR and accountability.[61] This is because, most often, the execution of developmental projects by the MNCs depends on the credit facility granted by the IFC to the MNCs in conjunction with the host states. If the grant and continuous performance of such an essential credit facility is tied strictly to the upholding of human rights obligations of corporations it would go a long way to entrench the culture of human rights in the corporate sector and reduce the degree or spate of corporate human rights violations in the host states, mostly developing countries that are usually the recipients of such IFC funding.[62]

In essence, it is noteworthy that since 2012, the IFC has begun the implementation of 'the new performance standards' aimed at considering human rights with regard to developmental projects it funded in the developing countries.[63] But its impact in ensuring corporate accountability is so infinitesimal that Chris Albin-Lackey describes it as 'small but important step'.[64] In the same manner, other scholars have condemned the efforts made by other IFIs as inadequate.[65] It follows therefore, that since the issue of corporate human rights violations in Africa is so important, IFC could not be the ideal forum to adequately address it, particularly when the IFC does not even acknowledge that it has personal responsibility and

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124–125, 128; Sigrun Skogly *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001) 94–98; David Kinley & Junko Tadaki 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003/2004) 44(4) *VJIL* 931–1023 at 1000.

[59] Ibid.

[60] Ibid Kinley & Tadaki at 996.

[61] Ibid at 1002.

[62] Chris Albin-Lackey 'Without Rules a Failed Approach to Corporate Accountability' (2013) *HRWTWR* 29–40 at 38.

[63] David Kinley 'Human Rights and the World Bank: Practice, Politics, and Law' (2006) 2 *TWBLRLED* 353–383 at 365; Kinley & Tadaki op cit note 58 at 1002–1005.

[64] Albin-Lackey op cit note 62 at 38; for similar views see Dowell-Jones op cit note 47at 439, 442; Kinley & Tadaki op cit note 58 at 1003–1005; Kinley op cit note 63 at 365.

[65] See Wahi op cit note 48 at 361–362; Lumina op cit note 44 at 112; Kinley op cit note 63 at 360, 363.

accountability to protect human rights.[66] It is just a financial institution with no judicial organ to deal with the issue of remedies to the victims of corporate human rights violations.[67]

However, while the search for an adequate forum continues, it is important to note that the fact that IFIs are said not to be adequate forums for CHRR and accountability does not excuse the institutions from shirking their primary responsibility of considering the adverse effects of their projects on human rights. According to the UNGP, business enterprises must respect human rights by addressing the adverse impact of their operations through an assessment of a 'human rights due diligence' process.[68] However, IFIs have not performed creditably well in discharging this responsibility.[69]

In spite of the commitment made by the World Bank in 1998 to uphold human rights[70] the situation is still worrisome as most of projects funded by the IFIs are still bedevilled with conflicts associated with gross human rights violations committed by states in complicity with the corporations executing the projects.[71] In sum, the absence of a comprehensive human rights protection mechanism on the part of the IFIs[72] calls for consideration of another possible forum at the international level, this time at the ICC.

6.4 A quest for recourse at the ICC

Proposing another alternative to bridge the accountability gap for corporations at the state and international levels, many scholars sought for an extension or amendment of the ICC's jurisdiction to cover corporations with respect to their culpability in human rights violations.[73] Their arguments are hinged on its prominent status as an international tribunal,[74]

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[66] See Mcbeth op cit note 53 at 1141, 1156.
[67] The power of inspection panel is too narrow and cannot be equated to a court.
[68] See the UN Office of the High Commissioner, the Guiding Principles on Business and Human Rights (UNGP) Implementing the United Nations 'Protect, Respect and Remedy' Framework (HR/PUB/11/04) para 15(b), available at *http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf*, accessed on 9 March 2015.
[69] Kinley op cit note 63 at 365; Lumina op cit note 44 at 122.
[70] The International Bank for Reconstruction and Development/The World Bank *Development and Human Rights: The Role of the World Bank* (1998), available at *http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/08DHR.pdf*, accessed on 9 March 2015.
[71] On such conflicts, see OXFAM 'The Suffering of Others The human cost of the International Finance Corporation's lending through financial intermediaries' OXFAM Issue Briefing (April 2015) available at *https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf* accessed 20 July 2015.
[72] McBeth op cit note 53 at 1125.
[73] Mordechai Kremnitzer 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *JICJ* 909–918; Kathryn Haigh 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14(1) *AJHR* 199–219; Joanna Kyriakakis 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19(1) *CLF* 115–151; Joanna Kyriakakis 'Developments in International Criminal Law and the Case of

its existing facilities,[75] and applicability to most states who are signatories to its statute through a 'complementarity principle'[76] and other inherent benefits that are already in place for such a criminal trial.[77]

Specifically, they argue that 'the theoretical obstacle' to the issue of corporate human rights obligations is adequately surmounted in the international criminal law as its criminal system admits that 'non-state actors' are 'capable of being the addressee of human rights obligations'.[78] It should not be a herculean task for the ICC to shift its criminal prosecution from individuals to corporations, particularly from a theoretical and ideological basis.[79]

Indeed, the impact of the ICC in filling the accountability gaps at the international level with regard to human rights law is minimal, even at that level of individual prosecution.[80] However, it has even been suggested that the possibility of prosecuting corporations at the ICC is inevitable as it spills over from its general task of prosecuting individuals.[81] In other words, the issue of extension to corporate accountability should perhaps be a fait accompli. However, it is not so.

Of course, there is no doubt that ICC could have been an appropriate forum to address the issue of corporate human rights violations. The ICC as a permanent institutional global body has in existence an adequate adjudicative mechanism to prosecute corporate crimes.[82] It is adequately positioned to handle the claims of the victims of corporate human rights

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Business Involvement in International Crimes' (2012) 94 *IRTRC* 981–1005; Martin-Joe Ezeudu 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court' (2011) 11(1) *AHRLJ* 23–56; Larissa van den Herik & Jernej Letnar Cernic 'Regulating Corporations under International Law from Human Rights to International Criminal Law and Back Again' (2010) 8 *JICJ* 725–743; Christoph Burchard 'Ancillary and Neutral Business Contributions to "Corporate Political Core Crime": Initial Enquiries Concerning the Rome Statute' (2010) *8 JICJ* 919–946; Desislava Stoitchkova *Towards Corporate Liability in International Criminal Law* (2010) 18.

[74] Ibid Ezeudu at 68; Kyriakakis 'Developments in International Criminal Law' ibid at 983–984.

[75] Kremnitzer op cit note 73 at 916, noting that the 'criminal system has a more equipped mechanism for investigation'; Haigh op cit note 73 at 200; Ezeudu op cit note 73 at 56.

[76] Ezeudu op cit note 73 at 50; Van den Herik & Cernic op cit note 73 at 740.

[77] Haigh op cit note 73 at 200; Van den Herik & Cernic op cit note 73 at 740.

[78] Van den Herik & Cernic op cit note 73 at 726, 740–742.

[79] Ibid.

[80] See, Kyriakakis 'Developments in International Criminal Law' op cit note 73 at 983, noting that ICC is frequently resorted to 'as a means of fulfilling gaps in the enforcement of international human rights law'; Van den Herik & Cernic op cit note 73 at 740 noting that 'international criminal law may even appear to be able to overcome certain obstacles and to fill in the gaps of human rights law'.

[81] Since individuals using corporations to commit crimes are being prosecuted its link to the quilt of corporations is close, particularly when the ICC is embracing the concept of 'indirect penetration through an organization'. See Kyriakakis 'Developments in International Criminal Law' op cit note 73 at 992–997; see also the judgment of ICC issued on 18 May 2012 in *ICC Prosecutor v Taylor*, Case No. SCSL-03-01-T, Trial Chamber II.

[82] See Haigh op cit note 73 at 200, noting further that 'the ICC has in place procedures to receive complaints about alleged crimes; investigate and prosecute crimes; and order the imposition of fines, the confiscation of proceeds of crimes and reparations to victims'; Ezeudu op cit note 73 at 51.

violations because it is a neutral party with no affiliation or allegiance to states (be it host or home) who are affected by the investment and economic issues that are the subject matter of the corporate disputes between the parties.[83]

Neutrality, though indispensable in justice administration, is a rare quality in corporate disputes adjudicated either by the host or the home states' forums.[84] Thus the advantage of the presence of this innate quality in the ICC should be utilised in dealing with the problem of human rights violations and crimes being committed by corporate entities. In addition, recourse can be had to Articles 5, 6, 7 and 8 of the ICC Statute in making corporations culpable for their complicity in the commission of crimes against humanity and possibly violation of human rights.[85]

As argued by Andrew Clapham, 'a series of developments in legal and political fora' are occurring at the international level' in such a way to 'suggest that 'corporations have international obligations particularly in the field of international criminal law'.[86] In the same vein, John Ruggie notes that 'corporations will be subject to increased liability for international crimes in the future'[87] – no doubt, the right prognosis and diagnosis for a future path. However, there is responsibility to be performed in shaping that ideal path. That responsibility can be framed in form of a question; how can corporate liability for international crimes be adequately assessed and addressed through a suitable permanent forum, particularly with respect to Africa? An extension of the ICC's jurisdiction could have resolved the indefinite search for a permanent forum and the lack of precision in international

[83] Ezeudu op cit note 73.
[84] The host and home states are reluctant to enforce corporate human rights responsibilities because of the issue of commercial advantage to their countries. See Kyriakakis 'Corporations and the International Criminal Court' op cit note 73 at 148; Sarah Joseph 'Taming the Leviathans: Multinational Enterprises and Human Rights (1999) 46(2) *NILR* 171–203 at 181.
[85] Ezeudu op cit note 73 at 45.
[86] Andrew Clapham 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *JICJ* 899–926 at 926.
[87] See General Assembly of the UN 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' report of the SRSG on the issue of human rights and transnational corporations and other business enterprises' Human Rights Council (9 February 2007) para 27, available at *http://business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf*, accessed on 20 May 2015; see Kyriakakis 'Developments in International Criminal Law' note 73 at 987, noting that the developments are pointing to two directions, the first 'is the growing international criminal jurisprudence as to forms of responsibility according to which individuals can be held liable for international crimes' and the second 'is the growing number of states with jurisdiction within their national courts to try corporations, as well as individuals, where such persons are involved in international crimes'.

criminal law standards, while at the same time strengthening the 'understanding of international criminal law' principles.[88]

In spite of attracting a critical innuendo of 'victor's justice'[89] the International Military Tribunals (IMT) in Nuremberg and Tokyo are the starting point on the issue of evolution and development of international criminal law.[90] The IMT, particularly, the one at Nuremberg, made a breakthrough in the jurisprudence of international criminal law by extending its jurisdiction to cover groups and collective entities that committed mass crimes against humanity.[91] While business leaders were not spared prosecution[92] corporations were, in spite of the fact that the purported crimes were committed in the process of facilitating their objectives.[93]

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[88] Alice de Jonge *Transnational Corporations and International Law Accountability in the Global Business Environment* 2011 at 161, noting that there are diverse 'standards and rules of corporate criminal liability currently' pervading 'within the diverse jurisprudence of many countries'.

[89] On criticisms of the IMT, see Kirsten Sellars 'Imperfect Justice at Nuremberg and Tokyo' (2011) 21(4*) EJIL* 1085–1102 at 1088–1090; William A Schabas 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 *JMLR* 535–552 at 535. He noted that the charge of 'victor's justice' has two connotations which are 'procedural shortcomings in the trial and in the application of substantive norms, including a rather flexible approach to the rule against non-retroactivity of criminal law, are said to be the consequence of a conviction-oriented framework imposed by the four great powers that established the court'.

[90] See Robert H Jackson 'The Influence of the Nuremberg Trial on International Criminal Law', available at *http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/the-influence-of-the-nuremberg-trial-on-international-criminal-law/*, accessed on 10 March 2015, noting that the IMT at Nuremberg and Tokyo laid 'the groundwork for modern international criminal law'.

[91] Ibid; Articles I and 6 of the Charter of the International Military Tribunal, 8 August 1945, 59 Statute 1544, 82 UNTS 279; Sellars op cit note 84 at 1097, arguing that all the judgments of Nuremberg were followed in the Tokyo trials except 'the Nuremberg ruling that individuals had international duties that transcended obligations to the state, which was dropped at Tokyo on the insistence of the Soviet judge, I.M. Zaryanov'; Edoardo Greppi 'The Evolution of Individual Criminal Responsibility Under International Law' *IRRC* Article no. 835 (30-09-1999), noting that 'The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large number of judgments, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law'.

[92] For the first time in the history of international law, business leaders from Germany were tried before the Nuremberg Tribunal, see *US v Friedrich Flick et al*. opinion and judgment of 22 December 1947; *US v Krauch et al*. judgment of 29 July 1948*; US v Alfried Krupp et al*. judgment of 31 July 1948; similarly on the trial of IG Farben, see Florian Jessberger 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity' (2010) 8 *JICJ* 783–802 at 802, explaining the implications of IG Farben Trial at the Nuremberg, he noted that 'the value of the decision above all lies in having undertaken the attempt to highlight the responsibility of industry and business through the instruments of international criminal law'; for more study on the trials of German industrialists; see Matthew Lippman 'War Crimes Trials of German Industrialists: the "other Schindlers"' (1995) 9 *TICLJ* 173–267; for jurisprudential analysis of the trials, see Jonathan Bush 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 5 *CLR* 1094–1240.

[93] See George P Fletcher *Tort Liability for Human Rights Abuses* (2008) 164, noting that the approach adopted by the Nuremberg was to 'pierce the corporate veil and hold the individual directors liable'. Consequently companies were not prosecuted. Note however that an attempt was made thereafter to prosecute corporations in the ICC through a proposal for the inclusion of Article 23 in the original draft of the ICC but the Statute failed to see the light of the day. The critics of Article 23 argued that if included, it is capable of rendering 'complimentarity principle' of the ICC ineffective since domestic legal systems of some state parties to the treaty of the ICC do not recognise corporate criminal liability. In contrast, some scholars argued that the view is not accurate, see Caspar Plomp 'Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court' (2014) 30(79) *UJIEL* 4–28 at 22; Ezeudu op cit note 73 at 51–52;

However, recognition of 'corporate criminality' at the international level is not novel to the international community as some UN Conventions 'have recognised them' despite the differences that existed in their domestic legal systems.[94] Indeed, it is unfortunate, that in spite of the arguments advanced by some scholars that extension of criminal liability to corporate entities in the ICC will not truncate the complimentarity principle of the ICC, the view still holds sway.[95] Consequently, the same reason behind the rejection of Article 23 in 1998 (when the ICC Statute was adopted) is still being touted as a flimsy excuse to truncate any attempt to extend the jurisdiction of the court to cover corporate criminal liability.[96] However, the real motive for opposing the extension of jurisdiction goes beyond the issue of differences in the legal system, it touches on conflicting interests between State Parties emanating from complex political issues of state sovereignty, protection of investment, the economy of each state, and ideological leanings.[97] Whether it was a mere cover up or not, the support of the majority of the State Parties is essential if the ICC is to be clothed with the jurisdiction to deal with the issue of corporate criminal liability. Without their support, the proposal is doomed to fail. Thus, Alice de Jonge argues that considering 'the political difficulties inherent in gaining acceptance of the ICC in its current form, the politics of extending its jurisdiction is likely to preclude any such expansion for a very long time'.[98] That may be one of the reasons why she supported the view that MNCs 'should not be rendered directly subject to the jurisdiction of the ICC'.[99]

In fact, the complex political issues involved are not easy to resolve. Instead, it has affected the workings of the ICC with respect to the minimal jurisdiction it has in dealing with business-related crimes. The result is that the ICC is not favourably disposed to prosecuting corporations 'for their assistance to perpetrators of international crimes'.[100] Decrying this attitude of avoidance on the part of the ICC, the former ICC Prosecutor argued that if the ICC prosecuted these crimes and prevented the future commission of such crimes,

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Haigh op cit note 73 at 202–211, 205–206; Kyriakakis 'Corporations and the International Criminal Court op cit note 73 at 115, 118.

[94] Ibid.

[95] On this issue many scholars have written many articles; see for example Kyriakakis 'Corporations and the International Criminal Court' op cit note 73; Kyriakakis 'Developments in International Criminal Law' op cit note 73; and Haigh op cit note 73.

[96] Ezeudu op cit note 73 at 51.

[97] Ezeudu op cit note 73 at 55, noting that 'there appears to be a serious element of international politics and/ or protection of economic interests in the whole ICC process'; Plomp op cit note 93 at 21.

[98] Alice de Jonge op cit 88 at 161.

[99] Ibid at 158.

[100] Plomp op cit note 93 at 21.

then the 'investigation of the financial aspects' of crimes could not be ignored.[101] However, due to political reasons the ICC has ignored these crucial financial and economical aspects of crimes.[102] From 1 July 2002 (when the ICC Statute came into force) to February 2015 the ICC is yet to charge any person 'for acts they had committed in their capacity as business leaders'.[103] So, the issue goes beyond extension of jurisdiction of the court. It is obvious that there is reluctance on the part of the ICC to make optimal use of its present minimal jurisdiction. Therefore, with respect to prosecution of corporations in the ICC, the present situation is that of non-committal.

6.5 Why not at the home states?

The question of states taking responsibility for the conduct of their corporations beyond the confined space of their territories is a controversial issue, but is nonetheless capable of addressing the problems of corporate human rights violations in a significant manner if answered in the affirmative. It has been argued that a state is not under any obligation to impose restrictions on any of its nationals beyond its territorial soil, the duty a state owns is not to interfere in the affairs of other nations[104] and this is said to be in conformity with Article 11 of the ILC which imposes responsibility on states majorly for territorial and not extraterritorial control.[105] Thus, the issue of home state responsibility may not be obligatory.

On the contrary, the narrow path taken by the ILC has been criticised[106] and many scholars have argued that home states' responsibilities exist to ensure that corporations comply with human rights standards abroad.[107] Francesco Francioni expresses the view that

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[101] Moreno Ocampo 'Communications Received by the Office of the Prosecutor of the ICC' International Criminal Court: The Prosecutor (The Hague,16 July 2003), available at *http://www.icc-cpi.int/NR/rdonlyres/9B5B8D79-C9C2-4515-906E- 125113CE6064/277680/16_july__english1.pdf*, accessed on 13 February 2015; Plomp op cit note 93 at 21.

[102] Plomp op cit note 93 at 21.

[103] Plomp op cit note 93 at 6.

[104] See Ibrownlie *Principles of Public International Law* (2003) Chapters 14 & 15; this view is Westphalia in nature see for example, *Bankovic v Belgium* 2001-XII; 44 EHRR SE5 at para 61.

[105] See Silvia Danailov 'The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations' (1998) 1−74 at 22, quoting Luigi Condorelli as stating that 'the drafting of article 11 by the ILC was predominantly aimed at the obligations incumbent on a State with regard to the control of territories under its exclusive jurisdiction', available at *http://www.humanrights.ch/upload/pdf/000303_danailov_studie.pdf*, accessed on 10 March 2015.

[106] RiccardoPisillo Mazzeschs 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility' (2004) 14 *IYBIL* 39−51 at 39.

[107] For example, see Robert McCorquodale & Penelope Simon 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *MLR* 598–625 at 602 & 624, noting that obligations of states 'under international human rights law are not territorially confined' and that home-states have 'a duty to regulate the extraterritorial activities of their corporate nationals in a number of circumstances'; Daniel Augenstein 'The Crisis of International Human Rights Law in the Global Market Economy' (2013) 44 *NYBIL* 41−64 at 62−63, arguing that extraterritorial

in this 'current process of transformation of international law under the forces of globalization', states of origin of MNCs cannot escape responsibility for their failure 'to exercise due diligence' in their territories with regard to the conduct of their business entities 'when that conduct is causing or is likely to cause human rights violations in the foreign state where the MNC is doing business through its subsidiary'.[108] According to him, although the scope of a state's responsibility to protect and respect human rights is 'primarily territorial', the obligation to go beyond one's state to do the same might be imposed by the human rights treaties signed by the states.[109]

Of course, most regional and international treaties impose obligations on states[110] to take appropriate measures that will ensure that everybody under its jurisdiction, including non-state actors, enjoys the rights and privileges guaranteed by those treaties. The fulfilment of that commitment brings with it an inherent jurisdiction of an extraterritorial nature. Similarly, Surya Deva argues that the 'extensive cross-border migration' of nationals of one country to another shows that 'this duty of states cannot be confined to their respective territorial boundaries'.[111] Thus, the issue of territoriality should not be a barrier for states to enforce those obligations on their nationals abroad. As asserted by the US Supreme Court, international law does not debar any state from controlling the conduct of its citizens who are under the jurisdiction of another state.[112]

Extraterritoriality in this respect is a means by which a home state 'extends its laws to overseas subsidiaries of (parent) companies incorporated therein'[113] in fulfilment of its obligation to ensure that its nationals abide by human rights in any territory where they find themselves. Indeed, with regard to human rights that has metamorphosed into *jus cogens*, the responsibility of home states to protect and respect such rights beyond their territorial duty is not in doubt, thus any state (be it the host or home state) may be liable 'for the violation of any of those obligations which can be directly or indirectly traced to the acts or omissions of

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protection of human rights by the home states can legally empower 'third-country victims of human rights violations committed by private and globally operating business entities'.

[108] See Francesco Francioni 'Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations' in Wolfgang Benedek, Koen De Feyter & Fabrizio Marrella (eds) *Economic Globalisation and Human Rights* (2010) 245–265 at 262.

[109] Ibid at 261.

[110] See Article 1 of the European Convention on Human Rights (ECHR), American Convention on Human Rights (ACHR) and Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

[111] Surya Deva 'Corporate Human Rights Violations: A Case for Extraterritorial Regulation' in Christoph Luetge (ed) *Handbook of the Philosophical Foundations of Business Ethics* (2013) 1077–1090 at 1079.

[112] *Skirotes v Florida* 313 U.S. 69, 73–74 (1941).

[113] Deva op cit note 111 at 1078.

the state'.[114] And as if to corroborate the fact that this obligation is all embracing, the ICJ asserted 'all States can be held to have a legal interest in their protection'.[115] The problem, however, is with the controversy around the exact contents of the peremptory norm itself. However, in spite of the confusion caused by the absence of clarity, it is certain that it does not presently extend to accommodate corporate human rights violations.

As a result, home states[116] of the MNCs take their responsibility to protect human rights beyond their borders with reservation, ensuring in diplomatic tone that their state's institutions, agents and organs tread the same path of caution. For example, in the US the Bush administration, through its Justice Department did everything it could do to put an end to extraterritorial use of the Alien Tort Statute (ATS) to 'hold corporations legally accountable for their complicity in human rights abuses' committed abroad.[117]

Of course, the opposition to extraterritorial application of ATS was sustained when the Supreme Court 'dealt a near-fatal blow to the doctrine of corporate liability for overseas human rights violations' through its judgment in *Kiobel v Royal Dutch Petroleum Co*[118] by limiting the ATS' extraterritorial scope and application 'almost to the point of nonexistence'.[119] Admittedly, ATS as a domestic framework for extraterritorial corporate human rights accountability is not perfect [120] and has its own defects.[121] Notwithstanding, for almost 35 years,[122] it was a reference point of commendation by scholars and human rights

[114] See M Sornarajah 'Linking State Responsibility for certain Harms caused by Corporate Nationals Abroad to Civil Recourse in the Legal systems of home states' in Scott Craig (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) Chapter 18 at 502.
[115] *Barcelona Traction* 1970 I.C.J. 3, 33.
[116] These are states where the MNCs are either incorporated or have their headquarters or substantial presence.
[117] Earth Rights International 'In Our Court: ATCA, *Sosa* and the Triumph of Human Rights' a report about the Alien Tort Claims Act (July 2004), available at *http://www.ibiblio.org/obl/docs/In_Our_Court.html*, accessed on 10 March 2015; see also, Brief of United States as Respondent Supporting Petitioner in the case of *Sosa v Alvarez-Machain* 542 US 692 (2004) (No.03-339) at 46–50; but see flexible view by the US government in Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affir-mance, *Kiobel v Royal Dutch Petroleum* (No. 10-1491).
[118] *Kiobel v Royal Dutch Petroleum Co*. 133 S. Ct. 1659 (2013). In brief form, the plaintiffs in the suit filed claims for extra-judicial killing, torture, crimes against humanity, prolonged arbitrary arrest and detention against Shell, SPDC and the Royal Dutch Petroleum Company, claiming that they collaborated with the Nigerian government to commit these violations to suppress their lawful protests against oil exploration.
[119] Andrew B Spalding 'Corruption, Corporations, and the New Human Right, (2014) 91 *WULR* 1365–1428 at 1366.
[120] For most of these blames ranging from unilateralism to imperialism by different scholars, see Mark A Drumbl, Douglas N Letter & Craig Scott 'The Alien Tort Claims Act under Attack' (2004) 98 *ASIL* 49–61; Ronen Shami 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility' (2004) 38 *LSR* 635 at 654.
[121] One of the defects of ATS is the difficulty encountered by the litigants which makes it difficult to penetrate it, see *Marco Basile* 'The Long View on *Kiobel*: A Muted Victory for International Legal Norms in the United States?' (2014) 107 *AJIL* e13– e19 at e18, noting that 'human rights litigation at the ATS has been largely symbolic and has rarely led to liability'.
[122] Though the Act was originally enacted in 1789, it came to limelight in 1980 when judgment was delivered in *Filartiga v Pena-Irala* 630 F.2d 876 2d Cir. 1980.

organisations[123] as a corporate accountability framework from one of the home states of the MNCs to remedy cases of corporate human rights violations committed abroad. Consequently, dissatisfaction over the judgment engulfed human rights activists.[124] Still, some scholars attempted to find a way out of the quagmire, seeking alternative approaches that could replace the loss occasioned by the judgment. Many suggested turning to common law as a cause for action in the state courts[125] instead of bringing a claim under a statutory framework like ATS in a federal court, which may eventually be dismissed in the course of the trial if one is unable to satisfy the requirement of presumption against extraterritoriality.[126]

Andrew Spalding, on the contrary, argues in favour of a statutory provision like the Foreign Corrupt Practices Act (FCPA), which according to him 'can become a more powerful statutory tool for deterring overseas corporate rights violations than the ATS ever was or will be'.[127] There may well be a prescription of corporate human rights accountability role for the FCPA in future. However, while it may be possible for the FCPA to attempt to replace the ATS as a result of the *Kiobel* judgment, it is unlikely that it can adequately do so in a satisfactorily manner. Indeed, the *Kiobel* judgment will have a negative spill over consequence on the 'enforcement of the FCPA',[128] in spite of the flaunted extra-territorial

[123] See Haigh op cit note 73 at 208; Kyriakakis 'Developments in International Criminal Law' op cit note 73 at 989–990; Wolfgang Kaleck & Miriam Saage-Maab 'Corporate Accountability for Human Rights Violations Amounting to International Crimes' (2010) 8 *JICJ* 699–724 at 703; Chilenye Nwapi 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) *UJIEL* 24–42 at 24–25; Shami op cit note 120 at 659; Ingrid Wuerth 'Kiobel v Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort' (2013) 107 *ASIL* 601–621 at 601; Ralph G Steinhardt 'Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink' (2013) 107 *ASIL* 841–845 at 845.

[124] Wuerth, ibid 620, he notes that 'those opposed to the decision lament the corporate and individual human rights abuses that may go entirely unaddressed'.

[125] For example, see Jeffrey A Meyer 'Extraterritorial Common Law: Does the Common Law Apply Abroad?' (2014) 102 *GLJ* 301 at 350, noting that 'a new age of transnational tort cases in US courts may rely on our oldest form of law: the common law'; Paul Hoffman & Beth Stephen 'International Human Rights Cases Under State Law and in State Court' (2013) *3 UCILR* 9–23 at 10 & 23, arguing that the restriction of cases against corporations over human rights violations abroad in federal courts under the ATS will lead to orgies of claims at the state courts for same claims.

[126] Ibid Meyer at 304, noting that 'Not so for the common law because the presumption against extraterritoriality is wholly a creature of statutory interpretation, the presumption – like any other rule of statutory application – has no application to the common law'. In contrast, see Zachary D Clopton & Paul Quintans 'Extraterritoriality and Comparative Institutional Analysis: A Response to Professor Meyer' (2014) 102 *GLR* 28–33 at 33, arguing that Meyer fails to consider the effects of 'the comparative institutional strengths of judges' and conflicts between two equal sovereigns before he reached a conclusion on treatment of extraterritoriality application of common law in the state courts.

[127] Spalding op cit note 119 at 1367.

[128] See FCPA Professor 'Second Circuit Concludes That Presumption Against Extraterritoriality Applies To Criminal Liability Under The Securities Law' a website devoted to exposition of the FCPA law (September 2013), arguing that 'because the presumption against extraterritoriality is not directly applicable to the FCPA, it does not follow that the presumption will not have an impact on FCPA enforcement. To the contrary, the logic and rationale of many justices in *Kiobel* has direct bearing on certain aspects of FCPA enforcement, and indeed

clause. On the other hand, in view of the sensitive nature of the cases adjudicated under the ATS (covering human rights, remedies to foreign litigants and MNCs at the same time), recourse to state courts under the common law jurisdiction is not a fit and adequate replacement.[129]

The question, then is, what is the way out? What does the future portend for corporate human rights accountability at the home states after *Kiobel*? In answering that question, it is important to acknowledge that ATS is difficult to comprehend because of its perceived policy connotation.[130] Thus some scholars still hold the opinion that despite the judgment, ATS can be resorted to, though in minimal form, to address the issue of corporate human rights violations abroad;[131] while others contend that the gate of corporate accountability for human rights violations abroad is closed in the US and that recourse can only be sought to the domestic legal frameworks of other home states.[132]

This thesis is of the view that access to justice through the ATS is not completely ruled out but is greatly curtailed. However, the door of justice must be left wide open without inhibition, if states, whether host or home, can fulfil their responsibility under Pillar 3 of the UNGP to provide access to justice for victims of human rights abuses. Creating curtailed access to justice will definitely not fulfil that requirement. Consequently, another home state should be considered.

Canada is home to many of the mining companies operating in the world, including African countries,[133] and its complicity in human rights violations committed by those

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can be viewed as Supreme Court disapproval of certain aspects of FCPA enforcement', available at *http://www.fcpaprofessor.com/second-circuit-concludes-that-presumption-against-extraterritoriality-applies-to-criminal-liability-under-the-securities-law*, accessed on 10 March 2015.

[129] See Austen L Parrish 'State Court International Human Rights Litigation: A Concerning Trend' (2013) 3 *UCILR* 25–43 at 40 & 43, arguing that 'state law is ill-fitting for human rights claims' and 'is unlikely to prove beneficial'; Patrick J Borchers 'Conflict-of-Laws Considerations in State Court Human Rights Actions' (2013) 3 *UCILR* 45–61at 60, arguing that the state courts alternative 'will not favor plaintiffs'.

[130] Wuerth op cit note 123 at 620.

[131] See Anupam Chander 'Unshackling Foreign Corporations: *Kiobel's* Unexpected Legacy' (2013) 107 *AJIL* 829–834 at 830; Steinhardt op cit note 123 at 843; Julian G Ku '*Kiobel* and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute' (2013) 107 *AJIL* 835–841 at 841.

[132] See Robert McCorquodale 'Waving not Drowning: Kiobel Outside the United States' (2013) 107 *AJIL* 846–851 at 851; Caroline Kaeb & David Scheffer 'The Paradox of Kiobel in Europe' (2013) 107 *AJIL* 852–857 at 857; Andrew Sanger 'Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts' (2013) 107 *AJIL* e23–e30 at e30.

[133] See Foreign Affairs Trade and Development Canada 'Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad' (14 November 2014), available at *http://www.international.gc.ca/trade-agreements-accords commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf*, accessed on 10 March 2015, noting that 'in 2013, Canadian-headquartered mining and exploration companies accounted for nearly 31% of global exploration expenditures. In 2013, over 50% of the world's publically listed exploration and mining companies were headquartered in Canada. These 1 500 companies had an interest in some 8 000 properties in over 100 countries around the world'; Meera Karunananthan 'UN must challenge Canada's complicity in mining's human rights

companies has attracted public opprobrium[134] and the attention of the IACHR.[135] Yet, the state has done nothing commendable in regulating the conduct of these MNCs. The review of the 'Corporate Social Responsibility Strategy for the International Extractive Sector' in November 2014,[136] which will curtail the adverse conduct corporations abroad and ensure effective remedies for victims of human rights violations, will cause difficulties for Canada unless it enacts a binding extraterritorial regulatory framework for those corporations. However, attempts made in line with this proposition have not yielded the desired result.[137] However, the amendment to the Corruption of Foreign Public Officials Act (CFPOA)[138] in 2013[139] and the enactment of Extractive Sector Transparency Measures Act[140] are likely to be effective in the fight against corruption. However, as noted earlier with respect to the FCPA in the US, anti-corruption regulatory frameworks in Canada, even though extraterritorial in reach, may not adequately replace ATCA in ensuring effective remedies to victims of corporate human rights violations committed abroad.

An all embracing multi-regulatory framework to deal with separate but interwoven issues of corruption and corporate accountability for human rights is essential.[141] Unfortunately, in Canada, the judicial framework for extraterritorial application is worrisome. It is difficult, if not impossible for victims of Canadian MNCs abroad to sue in Canada for redress.[142] Cases decided before 2013 by the Canadian courts showed lack of interest by Canada to provide remedies for the victims of human rights violations committed abroad by

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abuses' *The Guardian* (24 April 2013), available at *http://www.theguardian.com/global-development/poverty-matters/2013/apr/24/un-canada-mining-human-rights*, accessed on 10 March 2015.

[134] Ibid; Heidi Vella 'Canadian mining abroad – controversy and calls for legal regulation' (18 March 2013), available at *http://www.mining-technology.com/features/featurecanadian-mining-abroad-controversy-legal-regulation/*, accessed on 10 March 2015.

[135] See, IACHR 'Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations' Thematic Hearing for 153rd Period of Sessions (28 October 2014) at 6, available at *http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/Canada%20Mining%20CIDH%20Oct%2028%202014%20final.pdf*, accessed on 13 March 2015.

[136] Originally the CSR Strategy was unfolded in 2009; see Foreign Affairs Trade and Development Canada op cit note 133.

[137] Bill C-300 was proposed in 2009 with respect to 'Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries' but was 'was narrowly defeated by six votes' in 2010. Presently, another Bill, Bill C-323 which is proposing amendment to Federal Courts Act in order to ensure that litigants abroad are heard on human rights violations is still pending but has not made significant progress 'toward a vote in the House of Commons'. See IACHR op cit note 135 para 15.

[138] Corruption of Foreign Public Officials Act, S.C. 1998, c. 34.

[139] Bill S-14 was passed by the Canadian Parliament and became effective on 19 June 2013. See Act to Amend the Corruption of Foreign Public Officials Act, Bill S-14, §5, 41st Parliament (1st Sess. 2013) (enacted).

[140] Extractive Sector Transparency Measures Act, SC 2014, c 39, s 376, available at *http://canlii.ca/t/52d8v*, accessed on 8 March 2015.

[141] See Sara L Seck 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' (2008) 46 *OHLJ* 565 at 603, arguing for a well-structured 'home state legislation' on 'human rights and environmental law' after a reviewing of Canadian law in the regard.

[142] See IACHR op cit note 135 para 20.

MNCs with direct link to Canada.[143] However in 2013, the Superior Court of Ontario dismissed a consolidated hearing of a preliminary objection, dealing with three motions in *Choc v Hudbay Minerals Inc*[144] and ruled that there is a possibility that a Canadian company with a subsidiary company doing business in Guatemala can be held responsible in Canada for crimes of rape and murder at a mining project formerly owned by its subsidiary in Guatemala. The court opined that 'the plaintiffs have properly pleaded the elements necessary to recognise a novel duty of care'[145] and that their case should proceed to trial. This is nothing but a departure from the past where previous cases had been dismissed on the ground of *forum non conveniens*. That this case scales through the preliminary objection of jurisdiction is a breakthrough, however no cause for celebration just yet, as the final judgment will determine if corporations can be held accountable in Canada for their human rights abuses committed abroad.

Another country worth examining is France, which 'is one of the European countries with the highest number of multinational enterprises'.[146] Unfortunately, like Canada, it does not have any regulatory framework in the form of ATS to hold its corporations liable for gross human rights violations committed abroad.[147] In *Association France-Palestine Solidarite´ (AFPS) v Socie´te´ Alstom Transport SA*,[148] a suit against three French corporations for a breach of international humanitarian law were dismissed by the French Court of Appeal on the ground that corporations are not answerable for breach of treaties to which they were not party and that they have no direct obligations emanating from treaties except those dealing with environmental and labour standards. In addition, under its corporate law 'various companies within a group are legally independent of one another'.[149]

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[143] For example, see cases like *Bil'in (Village Council) and Ahmed Issa Abdallah Yassin v Green Park International Inc., Green Mount International Inc., and Annette Laroche* (2008) Court No. 500-17-044030-081 (Qc. Sup. Ct.); *Association canadienne contre l'impunité c. Anvil Mining Limited*, 2012 CanLII 66221 (SCC).
[144] *Choc v Hudbay Minerals* Inc., 2013 ONSC 1414; for analysis of the case see Susana C Mijares Peña 'Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc' (2014) 5 *WJLS* 1–19.
[145] Ibid at 17.
[146] See Commission Nationale Consultative des Droits de l'Homme (CNCDH) 'Business and human rights: opinion on the issues associated with the application by France of the UN's Guiding Principles' at 8 para 25 (24 October 2013), available at *http://www.etoconsortium.org/nc/en/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=94*, accessed on 10 March 2015.
[147] Anna Triponel 'Business & Human Rights Law: Diverging Trends in the United States and France' (2007) 23 *AUILR* 855 at 909; see CNCDH op cit note 146.
[148] *Association France-Palestine Solidarite´ (AFPS) v Socie´te´ Alstom Transport SA*, judgment of Versailles Court of Appeal, NAC code: 59A delivered 22 March 2013, available at *http://www.intjewishlawyers.org/main/files/Versailles%20Court%20of%20Appeals%20ruling%20doc%20English%20.pdf*, accessed on 10 March 2015.
[149] See Article 1842 of the Civil Code.

The consequence of this strict adherence to the doctrine of corporate personality is that the parent companies of subsidiaries cannot be liable for the torts of the latter. That is a setback in the protection of human rights across the globe. Recently in 2013, the National Human Rights Commission argued that if France is to implement the UNGP in order to hold French companies accountable for abuses committed abroad and provide effective remedies to the victims, it is essential for it to 'extend the extraterritorial jurisdiction of its courts'.[150] To be able to do this, a Bill 'relating to the duty and vigilance of parent and subcontracting companies' is presently before the French national parliament.[151] If the Bill is passed, MNCs in France will not be able to escape justice from corporate human rights violations committed by their subsidiaries abroad.[152]

However, litigants may not need to wait endlessly for a Bill to be enacted in France if the parent companies of the subsidiaries that committed the wrongs are situated in the UK or the Netherlands. In *David Brian Chandler v Cape PLC*,[153] the England and Wales Court of Appeal (Civil Division) confirmed the judgment of the trial court on the liability of a parent company when it dismissed the appeal of the parent company on the ground that law in some circumstances 'may impose on a parent company responsibility for the health and safety of its subsidiaries' employees'.[154] Similarly, in *Akpan v Royal Dutch Shell PLC*,[155] the Dutch court held that SPDC, a Nigerian company, was liable for damages suffered by the Nigerian farmers from oil spillages that occurred due to its failure to sufficiently secure the sabotaged well. However, due to the extraterritorial reach of these cases[156] and the jurisdictional advantage offered by the EU,[157] some scholars have argued that EU countries[158] are well positioned to provide 'effective litigation' mechanisms for corporate abuse abroad even if the US fails to do so.[159] While this statement is difficult to debunk, the problem is that the means

[150] See, CNDH op cit note 146.
[151] Legislative Bill No 1524 registered by the President of the National Assembly on 6 November 2013.
[152] Ibid.
[153] [2012] EWCA Civ 525 Case No: B3/2011/1272.
[154] Ibid at 15 para 80. Note that in this case the subsidiary company is in South Africa, while the parent company is in the UK.
[155] *Akpan v Royal Dutch Shell PLC*, [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA09-1580 (ECLI:NL:RBDHA:2013:BY9854).
[156] See for example, ibid, *Akpan* and *Cape Plc* cases supra note 147.
[157] See Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters Consolidated with Amendments of 2002, 2004, 2006, 2009 and 2010, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0044:20100514:EN:PDF*, accessed on 6 March 2015.
[158] They mentioned UK and Netherlands as examples.
[159] See for example McCorquodale op cit note 132; Sanger op cit note 132 at e30; Kaeb & Scheffer op cit note 132 at 857.

of addressing corporate accountability in the EU may not be sufficient to provide adequate and effective remedies to the victims of corporate human rights violations abroad.

Three instances can be mentioned to justify this view. First, although the barrier to justice occasioned by the doctrine of *forum non conveniens* has been abolished, except on minimal conditions,[160] the major problem is that there is a limit to the type of cases that can be litigated in the EU. For example, cases directly related to human rights violations by corporations have no chance of being litigated except if they can be linked to negligence or breach of the duty of care under the common law torts.[161] Second, class or collective action[162] is rarely available in the EU,[163] in spite of its benefits in extraterritorial human rights litigations.[164] Although there is a move to adopt this class of litigation, it is not certain if the deadline for its commencement is feasible.[165] Third, is the reliance on the domestic law of the host state, where the violation or injury occurred, instead of the law of the home state.[166] This preference for local law, which is often weak and unreliable, provide an escape route for Royal Dutch Shell Plc in the *Akpan* case and should be discountenanced in the interests of justice.

In view of these limitations and some other obstacles in accessing justice by foreign litigants, which are peculiar to the individual member states,[167] the victims of human rights violations by corporations cannot adequately rely on the EU for relief.

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[160] See, *Owusu v Jackson* [2005] ECR I-553, [2005] 2 All ER (Comm) 577, where the European Court of Justice interpreting Article 2 of the Brussels Convention opined that it is unlawful for any court in the EU to refuse to hear cases on the ground that 'a foreign court would be a more appropriate forum for the trial of an action'; Robert op cit note 132 at 847.

[161] McCorquodale op cit note 132 at 849–851; but see Roger P Alford 'The Future of Human Rights Litigation after Kiobel' (2014) 89 *Notre DLR* 1749 at 1761, noting that 'The same facts that give rise to international human rights violations almost always will also constitute a domestic or foreign tort'.

[162] An action brought in representative capacity.

[163] Ludger Giesberts & Andreas Tied 'Is US-style Class Action litigation coming to the EU? European Commission calls for Collective Redress Mechanisms in EU National Laws – 8 Points to Note' (10 December 2013) Product Liability Alert, available at *https://www.dlapiper.com/en/us/insights/publications/2013/12/is-usstyle-class-action-litigation-coming-to-the__/*, accessed 11 March 2015.

[164] See Laura Toma, Ioan Neamț & Andrei Păun 'Class Action: A European Perspective' *Themis* (2012), available at *http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20BUCHAREST%20DOCUMENT/Written_paper_Romania2.pdf*, accessed on 10 March 2015, stating the benefits of class action jurisprudence to the EU.

[165] 26 July 2015 was proposed as the deadline for implementation; see Giesberts & Tied op cit note 157; EUR-Lex 'Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law' *(2013/396/EU)*, available at *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013*, accessed on 9 March 2015.

[166] See Article 4(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), available at *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0864&rid=2*, accessed on 9 March 2015.

[167] There are some unique obstacles in each member states for example the issue of separate entity of parent companies and its subsidiaries in France and the fee problem at the UK.

6.6 Considering the AU

From the appraisal above, one can draw an assumption that a satisfactory forum that will provide effective remedies for the victims of corporate human rights violations and ensure corporate accountability for human rights obligations at the extraterritorial level from the home states has not yet emerged. Similarly, at the state level of the host states in Africa, the entirety of this study so far (particularly Chapter 3) has shown that African states are not willing, and if they are willing, are not actually able to act as a single state to confront the MNCs in the course of protecting their citizenry from corporate human rights violations.[168]

Furthermore, this study has shown that, often, most states in Africa are complicit with MNCs to commit human rights violations, making a mockery of the doctrine of state responsibility to protect.[169] In such an undesirable scenario, some scholars have argued that a regional action plan, perhaps from the EU or others, should be initiated to confront the problem of corporate human rights violations generally.[170] In addition, some scholars have specifically called for the intervention of the AU on this issue.[171] Since, a similar call has been made by the UNGP for collective action;[172] this study discusses in this section the justification for that call and the reasons why the AU should intervene on the issue of corporate human rights violations in Africa.

6.6.1 Foreign investment and its effect on sovereignty

It is a pity that states are confronted with insurmountable odds in their endeavour to regulate corporations at the state level. Once corporations are incorporated, they become corporate entities,[173] a cloak most of them have used to evade sanctions and punishments for breach of

[168] See for example Chapter 3 of this study, sections 3.5 and 3.6 for summary of national regulatory approach and their problems.
[169] Chapter 3 of this study essentially deals with this issue of complicity; see also Chapter 4 section 4.2 on how the AU attempts to curtail it.
[170] For the EU option, see McCorquodale op cit note 132; Sanger op cit note 132 at e30; Kaeb & Scheffer op cit note 132 at 857R.M; for regional options generally, see Alice de Jonge *Transnational Corporations and International Law Accountability in the Global Business Environment* (2011) 149–150; Peter T Muchlinski *Multinational Enterprises & the Law* (2007)118; RM Martin 'Regional Approaches Bridging National and Global Efforts', available at *ftp://ftp.fao.org/docrep/fao/007/y5841e/y5841e03.pdf*, accessed on 9 March 2015.
[171] See for example, the South Africa Institute for Advanced Constitutional Public Human Rights & International law (SAIFAC) 'The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System' a report of SAIFAC (17 February 2010); Daniel Aguirre 'Corporate Social Responsibility and Human Rights Law in Africa' (2005) 5 *AHRLJ* 239–265; Duruigbo Emeka 'Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry' (2001) *7 Annual Survey of International & Comparative Law* 101,126; Wahi op cit note 48 at 407.
[172] See UNGP op cit note 68 para 10 with its commentary.
[173] It is an attribute of corporate personality doctrine and it can be lifted to prevent frauds. On the problem of corporate entity doctrine and how it can be lifted, see discussion of this in Chapter 3 sub-section 3.5.2.

domestic law. The separate entity clause of corporate entity has exacerbated the inability of states to regulate MNCs in many forms. In one way, most states are prevented by this ubiquitous clause to hold their parent companies liable for wrongs committed by their subsidiaries. In another way, states shun the issue of corporate criminal liability for the same reason. Even if states reform their domestic law to block these loopholes, as many of them do, they face another problem that discourages them in their frantic efforts to regulate the corporate sector, which is rooted in the rising profile of the MNCs buoyed by globalisation, the dwindling fortunes of states' sovereignty, and the dangling carrot of foreign investment.[174]

This problem affects both the home and host states. With regard to the host states, Ruggie notes[175] that they are incapacitated to regulate MNCs because they have entered into bilateral investment treaties where they agreed to protect foreign investors to the detriment of their primary responsibility to protect human rights in their territory. The consequence is that corporate human rights violations by the MNCs go un-redressed, since even, the home states that should provide recourse in such a situation fail to regulate the activities of their corporations abroad.

The issue to be addressed is how to surmount the problem. Foreign investment is the reason behind the unwillingness of most African states to regulate corporations working in their territories.[176] The greatest fear is that if they do not relax their regulations, the MNCs will leave their territories for other countries. For example, since Shell Plc began facing problems in Nigeria in the course of exploration oil it made a move to Ghana.[177] This kind of corporate conduct known as 'race-to-the-bottom' is possible because each state regulates corporations at the state level without uniformity of standards and rules at the regional level. If the same corporate accountability framework applies throughout the African continent it will be impossible for MNCs to pick and choose which country has a relaxed regulatory framework to do business with.

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[174] See Lang op cit note 11 at 344, 346.

[175] See, John Ruggie 'Protect, Respect and Remedy: a Framework for Business and Human Rights' 2008 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to Human Rights Council (7 April 2008) para 34, available at *http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf*, accessed on 9 March 2015.

[176] They are incapacitated because of this reason, see Lang op cit note 11 at 344, 346.

[177] See Ben Amuwa 'Shell Wreak Havoc in Nigeria and Head to Ghana' (26 March 2010) *http://remembersarowiwa.com/shell-wreck-nigeria-and-head-to-ghana/*, accessed on 9 March 2015; Michael Eboh & Jonah Nwokpoku 'Shell to Sell off Four More Nigeria Oil Blocks' *Vanguard Nigerian Newspaper* (31 July 2013), available at *http://www.vanguardngr.com/2013/07/shell-to-sell-off-four-more-nigeria-oil-blocks/*, accessed on 20 May 2015, although Shell has denounced this story as fictitious, but even at that it cannot deny the fact it is selling some of its oil wells in Nigeria.

The solution lies in the regional option. In the AU, states acting under the auspices of AU can compel individual states to toe a collective line of action which they may not be disposed to take on their own. This regional power over individual states is more feasible in the AU since the adoption of the Constitutive Act[178] which provides for the right of the Union 'to intervene in a member State …in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. To exercise that power of intervention, (if necessary) in order to resolve conflicts, prevent 'egregious human rights abuses' and unconstitutional changes of government', a 15-member Peace and Security Council (PSC) was established by an additional protocol.[179] In addition, the Assembly of the Heads of State and Government also has power to give directive to any state which that state is bound to obey.[180]

It is important to give four examples of how such regional power was exercised, before or after the Constitutive Act was adopted. First is the issue of change of governments in Africa. In the past, the manner of changing a government in Africa was through military coups,[181] the AU intervened to enforce a culture of democratic change of government in the continent by refusing to recognise the governments that emerged through unconstitutional means.[182] The role of ECOWAS on this issue is also commendable as it has intervened many times to restore democratic governments that were ousted by the military men.[183]

The Second is the case of South Africa. Two illustrations are important for this purpose. One, the role of the AU, then OAU in bringing the apartheid government of South

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[178] The Constitutive Act of the African Union was adopted at the Thirty Sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU, 11 July 2000 at Lome, Togo. Available at *http://www1.uneca.org/Portals/ngm/Documents/Conventions%20and%20Resolutions/constitution.pdf* accessed 20 May 2015). See the discussion of this Act in chapter four (4.2) of this study.

[179] See, the AU 'Protocol Relating to the Establishment of the Peace and Security Council of the African Union' available at *http://www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf* accessed 23 July 2015; International Colloquium Report 'The African Union at Ten: Problems, Progress, and Prospects' (2012) available at *https://www.fes.de/afrika/content/downloads/AU_Report_FINAL.pdf* accessed 23 July 2015.

[180] See Assembly of the African Union 'Rules of Procedure of the Assembly of the Union' (ASS/AU/2(I) – a) (2002) available at *http://www.au2002.gov.za/docs/summit_council/assemrop.pdf* accessed on 20 July 2015.

[181] See Naison Ngoma 'Coups and Coup Attempts in Africa: Is there a missing link?'(2004)13(3) *ASR* 86 at 93 He noted that 'Military coups are prevalent in Africa'; Issaka K. Souaré 'The AU and the challenge of unconstitutional changes of government in Africa' a paper published by Institute for Security Studies (ISS) Paper 197 (August 2009).

[182] Ibid, Issaka K; the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, adopted by the 36th Ordinary Session of the OAU Assembly of Heads of State and Government, held in Lomé, Togo, from 10 to 12 July 2000 (the Lomé Declaration) available at *http://unterm.un.org/DGAACS/unterm.nsf/8fa942046ff7601c85256983007ca4d8/632123d4975be521852572140057d847?OpenDocument* accessed 20 July 2015.

[183] For example, when a democratically elected government of President Ahmed Tijan Kabbah of Sierra Leone was ousted in May and August 1997 through coup d' etat, ECOWAS intervened and reinstated him in to power. On how this was done and the intrigues involved, see John M. Kabia *Humanitarian Intervention and Conflict Resolution in West Africa: From ECOMOG to ECOMIL* (2009)113-116.

Africa to a halt[184] is a good example of how a regional power can bring a formidable government within its continent to toe or refrain from a particular course of action. Although, Lusaka Manifesto[185] of the OAU recognised South Africa as an independent state within the African continent, the OAU engaged in anti-apartheid struggle through peaceful means which compelled South African apartheid government to drop its apartheid regime.[186] Two, it must be noted that the OAU also compelled the same South African apartheid government to withdraw from Namibia in order to usher in a democratic government for the country.[187]

The third deals with humanitarian intervention of the AU and ECOWAS in the continent. In order to maintain peace and security in Africa, the AU and ECOWAS have intervened on many occasions in the internal affairs of member states.[188] The UN Security Council which has primary responsibility to maintain peace and security[189] in the world has commended them for their successful interventions on different occasions.[190] This suggests that when it comes to the issues of gross human rights violations and security, no state is immune from intervention of the AU.

The fourth is on Nigeria. Nigerian government was forced to amend its Decree to make it compatible with the human rights provisions of the African Charter.[191] It was not an easy task to accomplish. The government of Nigeria at the time the Decree was amended was a military government with great reputation for dictatorship and human rights violations. But

[184] See International Colloquium Report op cit note 179, it notes that 'the OAU deserves credit for its firm commitment to the decolonisation of Africa and the anti-apartheid struggle in South Africa'.

[185] On detail of Lusaka Manifesto and its effects on South African struggle for freedom , see N.M. Shamuyarlra 'The Lusaka Manifesto Strategy of OAU States and its Consequences for the Freedom Struggle in Southern Africa' (1977)2(2)*JFASS* 247-266.

[186] The Lusaka Manifesto was actually adopted by the United Nations; see International Colloquium Report op cit note 179, commending OAU for its role.

[187] See Bience Gawanas 'Namibia and the African Union' in Anton Bösl, André du Pisani & Dennis U Zaire (eds) *Namibia's Foreign Relations Historic contexts, current dimensions, and perspectives for the 21st Century* (2014)253-280 at 256 .She notes that 'the OAU passed a resolution that demanded South Africa's immediate withdrawal from Namibia and, thus, the end of its occupation of the territory'; Graham Evans 'A new small State with a powerful neighbour: Namibia/south Africa relations since independence' (1993) 31(1) *JMAS*131-148.He noted that Namibia got independence on 2I March I990 'after IO6 years of colonial rule, first under Germany and then for 76 years under South Africa'.

[188] For a study of such humanitarian interventions, see Jeremy Sarkin 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009)53 *JAL*1-33.

[189] See Article 24(1) of the UN Charter.

[190] It must be stated that most of these interventions occurred without UN authorizations, yet UN commended them. On this, see, Jean Allain 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union' (2013)8 *MYBUNL 237*-289 at 261; Jeremy Sarkin op cit note188 at 7; UN Security Council, 'Resolution' 1545, S/RES/1545, 2004, 21 May 2004; UN Security Council, 'Resolution' 1464, S/RES/1464, 2003, 4 February 2003.

[191] For a discussion of the full story, see Obiora Chinedu Okafor *The African Human Rights System Activist Forces and International Institutions* (2007)128-130.

many factors came in to play to make it possible.[192] While those factors include the resolutions issued by the African Commission,[193] the activities of the civil societies[194] and decision of domestic court,[195] the lessons that could be garnered from the whole scenario is that regional power can override state decisions; idiosyncrasies or policies and can lead concomitantly to amendment of state legislation if well-coordinated. So, there is no reason why regional solution cannot be applied as one of the mechanisms to solve the problems of corporate human rights violations in Africa. Of course, while it might be difficult for a state to confront MNCs,[196] collective action from the AU may solve the problem.

6.6.2 New emerging trends in international law

The exclusion of corporations from liability under international law has caused controversy surrounding the issue of bearers of duty at the international level. However, the 'long-standing doctrinal arguments' that only states are duty bearers and that 'corporations could [not] be "subjects" of international law, … are yielding to new realities'.[197] Realities in the sense that those corporations, particularly MNCs are great actors at the global level,[198] that though they enjoy rights under the same international law[199] they also have the tendency to

192Ibid at 191. He notes that 'It is not plausible, really, to argue that these legislative provisions were changed by the military because of a simple desire on their part to comply… There were a number of other internal political and social forces at work'.

193 See*, Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights* (1999) 38-41; Obiora op cit note 191 at 129; Communications 87/93 Constitutional Rights Project (in respect of *Zamani Lakwot and six others v. Nigeria*.

194 Obiora op cit note 191 at 129-130

195 The same NGOs also filed the same case at the Lagos High Court and the court ruled in their favour against the military government declaring that the same Decree was in conflict with the African Charter which has been domesticated in Nigeria. On this case, see Obiora Chinedu Okafor 'Modest Harvests: On the Significant (But Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria' (2004) 48(1) *JAL* 23-49 at 29-30. For the problem associated with re-litigation of the case in a domestic court, see Rachel Murray & Debra Long *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (2015)96. They note that 'there is the potential that the national courts will open up the decision on substantive issues'.

196 See Ruggie op cit note 175 para 17, notingthat 'governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps. But individual actions, whether by States or firms, may be too constrained by the competitive dynamics just described'.

197 UN General Assembly 'Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises' Human Rights Council para 20 (A/HRC/4/035) (9 February 2007), available at (http://business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf, accessed on 9 March 2015.

198 Ibid, noting that corporations are major 'participants' at the global level and they have 'the capacity to bear some rights and duties under international law'.

199 Ibid, noting that 'They have certain rights under bilateral investment treaties; they are also subject to duties under several civil liability conventions dealing with environmental pollution'.

breach the same law[200] and therefore should be subjects of international law with direct duties and obligations attached as if they are states.[201]

After all, according to Larry Backer, 'the distinction between law and norm, between public and private spheres' has collapsed within the diverse global operations of corporations'.[202] No doubt, that assertion is as true as life itself; nevertheless, a manifest impediment to the idea of corporate duties is a lack of enforcement mechanisms. There is no effective judicial mechanism to enforce corporate duties at the international level and that is deliberate because it supports the state-centric view of international law.

Commenting on this deficiency, Steven Ratner notes that 'the lack of an international court in which businesses can be sued does not alter' the sacred truth that they have duties and rights.[203] He argues that even though states have duties and obligations, no enforcement mechanism is actually set up to enforce them at the international level. However, the attempt to whittle down the effect of this deficiency was rejected by Carlos Manuel Vázquez who argues that states are likely to observe their international obligations in the absence of sanctions, but private actors like corporations are likely to renege unless there is a backed up mechanism to enforce them.[204]

When all is said and done, the impacts of enforcement mechanisms in human rights protection cannot be underestimated. Accordingly, the regional institutions that are likely to be affected more by the failure of the states to regulate corporations in their regions have modestly embarked on a move to enforce these duties against corporations. In the EU, 'corporations that are owned or controlled by the State and/or exercise State functions can be directly subject to the State duty to protect'.[205] That is not possible, in the AU, going by the

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[200] See Carlos Manuel Vázquez 'Direct vs. Indirect Obligations of Corporations under International Law' (2005) 43 *CJTL* 927–959 at 939.

[201] Note that the status of MNCs is rising every day while states are losing the sanctity of their sovereignty, for example, presently US and EU are negotiating a trade agreement which if successful might equate the status of corporations to that of the states. On the erosion of state sovereignty, see Alfred Van Staden & Hans Vollaard 'The Erosion of State Sovereignty: Towards a Post-territorial World?' in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth De Vos & John Dugard (eds) *State, Sovereignty, and International Governance* (2002) 164 at 172; on the new agreement, see Lori Wallach 'Trade Deal Would Elevate Corporations to Equal Status with Nation States' (22 October 2013), available at *http://www.huffingtonpost.com/lori-wallach/trade-deal-would-elevate_b_4143626.htm*, accessed on 9 March 2015.

[202] Larry Catá Backer 'Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets' (2013) 29 *AUILR* 1–122 at 9, citing Norway Sovereign Wealth Funds (NSWF) as an example.

[203] Steven R Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443 at 476.

[204] Vázquez op cit note 200 at 954–955.

[205] Daniel Augenstein 'Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises Operating outside the European Union' Study for the European Commission (2010) ENTR/09/045 at 20 para 51.

African Commission's jurisprudence in *SERAC*[206] where the ACHPR ignored the question of direct liability of corporations. Reviewing the case, Joe Oloka-Onyango argues that 'the African Commission could have gone further' to consider the liability of the MNC involved since 'the conditions for a finding of liability on the part of Shell were all present in the case'.[207] He notes that in any case where a MNC 'is directly involved with the host country in human rights violations, direct liability should be found'.

However, for direct liability of the MNCs to be found, in such a scenario, the question of duties and responsibilities of non-state actors under the African Charter should be an essential issue for determination by the African Commission. As explained in Chapter 4, although, the African Charter provides for individual duties, the demand to obey those duties goes beyond the responsibility of the natural person to cover that of the artificial person. However, the African Commission did not see it that way. Perhaps, John Knox is right to some extent to conclude that the African Commission's manner of interpreting the Charter 'struggles against the text of the Charter rather than flows easily from it'.[208] However, the position of the African Commission at the time of rendering the decision should be considered. The jurisprudence of the AU with respect to protection of human rights lies in its focusing on the doctrine of state's responsibility for corporate human rights violations.[209] If the protocol to confer the African Court with jurisdiction to determine criminal liability of the corporation is ratified, the problem created by that jurisprudence will be a thing of the past. Then it will be glaring to everyone that corporations are not immune from the African Charter and the Court will have no choice but to consider and apply the issue of duties of non-state actors according to the African Charter.

6.7 Conclusion

This chapter has attempted to consider the most suitable forum for the implementation of the human rights accountability framework in Africa. While it is not possible to consider all likely forums, the most notable, WTO, IFI, ICC, the home states of the MNCs, and the AU, are considered. Some of the multilateral institutions like the IFI and WTO could have been the ideal forum, as discussed above, apart from the fact that they were not configured at their inception to handle issues of corporate accountability for human rights except at the

[206] *SERAC & CESR v Government of Nigeria* Communication 155/96.
[207] Joe Oloka-Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa' (2003) 18 *AUILR* 851 at 904.
[208] John H Knox 'Horizontal Human Rights Law' (2007) 102 *AJIL* 1 at 18.
[209] See the discussion of the jurisprudence of the African Commission in Chapter 4 of this study, section 4.2.

peripheral level. The ICC could also be an appropriate forum because of its existing structure and wide acceptance, but presently the Court does not have jurisdiction over corporate entities.[210] Extending the court's jurisdiction, as discussed above, is not an easy venture. It is better to think of a more convenient alternative.

Another forum considered is the home states of the MNCs. The major problem with this forum is the failure of the home states to fully take responsibility for the violation of human rights by their companies abroad. Unfortunately, while the Maastricht Principles adopt a mandatory approach on the issue of extraterritorial obligations of states[211] the UNGP adopts a non-committal approach. The UNGP[212] recognises the existence of the use of extraterritorial power under the international law by the home states of MNCs for the purpose of influencing the attainment of corporate human rights responsibility and accountability in the host states. However, in a dramatic turn-about, it neither imposes it as a laudable example nor condemns it as bad policy. Its first statement, in the form of a command, notes that states 'should set out the expectations that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'.[213] However, this is watered down with a more flexible approach in its second statement:

> 'At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction'.[214]

Furthermore, it is obvious that the *Kiobel* judgment has affected the extent of opportunity available to secure justice for victims of corporate human rights violations through extraterritorial jurisdiction of the home states of the MNCs. Indeed, it is crucial to note that the effect of the judgment goes beyond the US. It affects all other jurisdictions of the home states. The reticent approach taken by the Supreme Court in *Kiobel* is similar to the

[210] In addition, the AU is having problems with the Court.
[211] See EJIL:Talk 'The Maastricht Principles on the issue of extraterritorial obligations of states in the area of Economic, Social and Cultural rights' (2013). It states that states must 'adopt measures to prevent human rights abuses by non-state actors, to hold them to account for any such abuses and to ensure an effective remedy for those affected', available at *http://www.ejiltalk.org/the-maastricht-principles-on-extraterritorial-obligations-of-states-in-the-area-of-economic-social-and-cultural-rights-and-its-commentary-an-overview-of-positive-obligations-to-fulfil/*, accessed on 24 July 2015.
[212] See UNGP op cit note 68.
[213] Ibid para 2.
[214] Ibid Commentary to para 2.

'emerging jurisprudence' from most of the home states of MNCs 'in cases where a corporation is alleged to have aided and abetted human rights abuses by a foreign state abroad'.[215] As Anne Herzberg argues, the reasoning in the *Kiobel* judgment is in conformity with the jurisprudence of the home states on extraterritorial application of human rights to the issue of corporate impunity abroad.[216] In fact, most of the home states that are expected to protect vulnerable people abroad against the MNCs raised contrary views to the extraterritorial application of the ATS through their amicus briefs.[217] So it is self-deceiving to count on the home states as the suitable forum.

The AU, therefore, should be the most appropriate forum to handle the problem. Consider the following questions: Whose continent suffers most from the race-to-the-bottom? Whose citizens rely on the home states for justice as a result of their inability to get justice against MNCs in their territories? Whose responsibility is it to support the states in the continent from their failure to legislate? Whose treaties are being violated by the MNCs? The answer of course is the AU. Indeed, it would be difficult for the AU to fulfil its visions and objectives outlined in the Constitutive Act without 'an institution appropriate for regional action'[218] to handle the problems of corporate impunity. Consequently, many have suggested the idea of exploring regional action as a solution to this problem, an idea supported by the UNGP.

Indeed, the UNGP supports regional intervention and calls for complimentary efforts by regional institutions like the AU to take steps towards ameliorating corporate impunity in their regions. Therefore this thesis contends that states and regional institutions have a responsibility to protect, respect and fulfil human rights in their territories. This calls for efforts of states and regional institutions to make law, enter into treaties, and establish institutions that will ensure that third parties do not infringe these rights. If they do, effective remedial processes must be initiated at the state and regional levels, not only to compensate the victims, but also to serve as deterrence to the violators of human rights, in order for them

[215] Anne Herzberg 'Kiobel and Corporate Complicity – Running with the Pack' (2013) 107 *AJIL* e-41-e-48 at e-48.
[216] Ibid.
[217] See Cedric Ryngaert 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v Shell Litigation in the Netherlands' (2013) 8(2) *MIJSDLP* 245 at 255, arguing that 'there is little European support for a principle of universal tort jurisdiction, either under domestic law or under public international law. This is evidenced by the amicus curiae briefs filed by the United Kingdom, the Netherlands, Germany, and the European Commission in the Kiobel case before the US Supreme Court'.
[218] Pacifique Manirakiza 'The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa' in Vincent Nmehielle (ed) *Africa and the future of International Criminal Justice* (2012) 297–318 at 387.

to take the path of repentance. According to Salmon, 'international cooperation for ensuring human rights constitutes an essential component of the obligations of states'.[219] A regional option for corporate accountability frameworks, no doubt, is one of such co-operation.

[219] Margot E Salomon *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (2007).

CHAPTER 7
IMPLEMENTATION MECHANISM WITHIN THE INSTITUTIONAL STRUCTURE OF THE AU

7.1 Introduction

Although implementation of 'human rights standards' is an indispensable condition 'to the enjoyment of human rights' that are enshrined in international conventions and treaties,[1] it has been argued that in international affairs, human rights have the highest record of 'enforcement deficits',[2] which can be traced to the problem of implementation. Indeed, a major challenge facing 'the regional and international legal bodies charged with protecting' those rights is how to implement them[3] and enforce their obligations under the human rights instruments.[4] This problem arises because of the states' unwillingness to implement these regional or international human rights corpus[5] and the ineffective monitoring system at the regional or international level to compel compliance.[6]

For example, with regard to Africa, the continent is confronted with many challenges that include 'the slow pace of ratification, domestication and implementation of instruments and decisions of human rights bodies'.[7] This chapter seeks to explore how the UNGP[8] can be implemented within the institutional structure of the AU. 'Implementation' in this sense is a broad word interpreted to consider how the principles of the UNGP can be applied at the continental level in such a way that it will strengthen the domestic legal system of each state

[1] Sigrun I Skogly 'Right to Adequate Food: National Implementation and Extraterritorial Obligations' (2007) 11 *MPYBUNL* 339–358 at 339.
[2] Harold Hongju Koh 'Internalization through Socialization' (2005) 54 *DLJ* 975 at 979.
[3] David C Baluarte & Christian M De Vos 'From Judgment to Justice: Implementing International and Regional Human Rights Decisions' Open Society Justice Initiative (November 2010) at 11, available at *http://www.opensocietyfoundations.org/reports/judgment-justice-implementing-international-and-regional-human-rights-decisions*, accessed on 15 March 2015.
[4] Ibid at 13.
[5] Human Rights Council (HRC) 'Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie' (9 April 2010) (A/HRC/14/27) para 44, available at *http://198.170.85.29/Ruggie-report-2010.pdf*, accessed on 11 March 2015.
[6] Baluarte & De Vos op cit note 3 at 12, noting that regional institutions 'are notable in our international order precisely because they have the authority to regulate national sovereigns but, at the same time, they generally lack recourse to an international sovereign power to enforce those orders'.
[7] Department of Political Affairs, African Union Commission 'Human Rights Strategy for Africa' para 22, available at *http://pa.au.int/en/sites/default/files/HRSA-Final-table%20%28EN%29%5B3%5D.pdf*, accessed on 13 March 2015.
[8] See UNGP 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', as endorsed by Human Rights Council (A/HRC/RES/17/4) (6 July 2011), available at *http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf*, accessed on 19 March 2015.

in the continent.[9] It covers execution of judgments and orders of the courts (both domestic and international courts) in line with Pillar 3 of the UNGP, which is access to remedy.

7.2 Develop an action plan to implement the UNGP

At the outset, one thing that must be borne in mind is that the UNGP is not rigid when it comes to implementation. It allows states and regions to give considerable attention to their peculiar needs and local antecedents in implementing its framework. As John Ruggie notes in his report 'when it comes to' implementation of the UNGP, 'one size does not fit all'.[10] To him, to expect all 192 UN member states to implement the UNGP the same way is to expect the impossible.[11] While Ruggie is correct on this issue, if his statement is stretched too far, it is susceptible to misinterpretation. Imagine 192 states implementing the UNGP in different ways. The outcome will lead to absurdity, lack of cohesion and misalignment. A situation Ruggie himself labours to prevent. Throughout his reports, he adequately identifies the problem of policy incoherence in regulating corporations by domestic states[12] and it is expected that he will not subscribe to any move that will compound it.

How then does one interpret the statement of 192 states and different means of implementation without compounding the problem of incoherence or even entering into the region of misalignment? However, while, this is a difficult question to handle, it seems Ruggie himself provides the answer. Summing up his views on what to do to buoy the capacity of states to regulate corporations in their territories, he argues that 'greater policy coherence is also needed at the international level'.[13] Indeed, that is the clue to the proper interpretation of 'one size does not fit all'. States are tempted to take different routes, even if some will not lead to the attainment of their desired goal. For example, one of the routes is the preference for foreign investment at the expense of human rights protection. In contrast, the regions must guide the states to prevent them from going in the wrong direction, which will be detrimental to the overall interests of their people. That can only be done through the

[9] Baluarte & De Vos op cit note 3 at 13, noting that implementation is 'the process of putting international commitments into practice'.
[10] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie' (21 March 2011) (A/HRC/17/31) para 15, available at *http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf*, accessed on 11 March 2015.
[11] Ibid.
[12] For example, see HRC 'Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises' (22 April 2009) (A/HRC/11/13) para 18 and 19, available at *http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf*, accessed on 12 March 2015.
[13] See HRC op cit note 5 para 52.

institutionalisation of a uniform safeguard mechanism for human rights protection in the region. The EU shows an understanding of this with regard to the implementation of the UNGP. It states that ensuring policy coherence in the area of business and human rights is a 'critical challenge'. Consequently, it sets up blueprints and timeframes for states in its region to comply with those resolutions in order to implement the UNGP.[14]

7.2.1 The regional action plan (RAP)

In the same vein, the ideal implementation of the UNGP in Africa should start with the AU. The AU should determine the direction the continent should take. To this end, the first step the AU should take is to develop a regional action plan (RAP) for corporate accountability in the continent in line with the UNGP and the African Charter at the domestic and regional levels and then issue a resolution calling on all other member states to follow suit by developing their own separate national action plans (NAP) in conformity with the regional policy and regulatory blueprints outlined in the AU RAP.

An action plan is 'a common policy tool used by Governments in all regions to set out priorities and programme actions in specific policy areas'.[15] It has been recommended as an essential mechanism for the implementation of the UNGP[16] because it can be used to 'accelerate and scale up the implementation of the UNGP to strengthen legal and policy frameworks to prevent and protect against human rights abuses by business enterprises' through 'an inclusive process of indentifying needs and gaps' in the existing domestic governance regime.[17] For the AU RAP to be effective, it must address at the regional level why the doctrine of state responsibility cannot adequately address the problem of corporate impunity in Africa and suggest how the AU can balance the doctrine with direct liability of

[14] Note that the EU did not provide guidelines in the 2012 Communication, though it affirmed its intention to do so. Unfortunately, the timeframes have not been met. European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility' Brussels, (25 October 2011) (COM (2011) 681 final, available at *http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf*, accessed on 13 March 2015.

[15] See, Human Rights Council 'Report of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises' (5 May 2014) (A/HRC/26/25) para 10; on the advantages of action plan see, European Commission 'Action Plan for Resilience in Crisis Prone Countries 2013-2020' (SWD (2013) 227 final) (19 June 2013), available at *http://ec.europa.eu/echo/files/policies/resilience/com_2013_227_ap_crisis_prone_countries_en.pdf*, accessed on 13 March 2015.

[16] UN General Assembly 'Human Rights and Transnational Corporations and other Business Enterprises Note by the Secretary General' A/69/263 (5 August 2014) para 2, available at *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/495/68/PDF/N1449568.pdf?OpenElement*, accessed on 13 March 2015.

[17] Ibid.

non-state actors, including corporations. It must resolve the controversy of the duty of corporations under the African Charter.

As Ruggie notes in his report, the African Charter unlike other regional instruments provides for duties of individuals, 'opinions' however 'vary on their effect', particularly on the issue of their application to 'groups, including corporations'.[18] Controversy must be addressed in favour of corporate duties not only to respect human rights but to protect them. Furthermore, the issue of duties of non-state actors is one area in which the implementation of the UNGP in Africa may be different from that of the other regions. The AU has taken positive steps in this regard with a proposal to vest the ACJHR with the jurisdiction to determine the issue of CCL. This should be sufficient to trigger the African Commission to make a positive shift of jurisprudence from state responsibility to corporate and individual responsibility, if the proposal is accepted. This issue will further be discussed in sub-section 7.6.1 of this chapter.

Furthermore, RAP must determine how the governance gap in the existing human rights protection mechanism can be filled in order to effectively protect the vulnerable people of Africa like women, old people, children, indigenous peoples and environments that are susceptible to corporate human rights violations. States must determine how they can transplant these protection policies into domestic regulation. It must give them guidelines to work with and timeframes for effective monitoring. The principle of complementarity must be employed to the extent that if a member state fails to comply, the regional protection mechanism will come to the rescue of the victims.[19] This is supported by the Constitutive Act of the AU.[20] It has also been argued that implementation of the UNGP should be all embracing,[21] that if possible no governmental organ should be left out. If all organs of government are involved, none will claim ignorance when it comes to implementation and the problem of 'horizontal' incoherence, identified by Ruggie in his 2009 report,[22] will be resolved.

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[18] HRC 'Report of the Special Representative of the Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and other Business Enterprises' (9 February 2007) (A/HRC/4/035) para 43, available at *http://business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf*, accessed on 11 March 2015.

[19] See Article 46H (2), (3) and (4) of Draft Statute of the ACJHPR, available at *https://www.iccnow.org/documents/African_Court_Protocol_-_July_2014.pdf*, accessed on 13 March 2015.

[20] See Articles 4(h) and (o) of the Constitutive Act of the African Union; on the impacts of Article 4(h), see Sabelo Gumedze 'The African Union and the Responsibility to Protect' (2010) 10 *AHRLJ* 135 at 147–154.

[21] See UN General Assembly op cit note 16 para 8.

[22] See HRC 2009 report op cit note 12 para 18.

Consequently, this thesis proposes that all organs of the AU should be involved in the making of RAPs.[23] In addition, the NGOs, National Human Rights Institutions (NHRI), and academics should be involved. The AHSG, an organ mandated to determine the 'common policies of the Union' should kick-start the RAP process. The AHSG can adopt the following process: one, it can commission a private research body to co-ordinate and draft the RAP; two, it can mandate any of its organs to co-ordinate the process of drafting the RAP; three, it can set up a think-tank committee to develop a blueprint on how the UNGP could be implemented in the region. At least two members of the existing organs with related corporate human rights responsibility and accountability oversight should be included in the committee. The members of the committee should also include some African NGOs; representatives of the academia with expertise in international law, business and human rights; and some members of the NHRI. The committee can be dissolved once it submits the blueprint to the AHSG for approval.

7.3 Adopting a regulatory approach

The approach adopted to implement the UNGP will determine its success or failure. If it is approached by states as a means of discharging their responsibility to protect, a regulatory approach will be adopted to ensure that their corporations comply with human rights within and outside their territories,[24] if not, it will be approached cautiously and a voluntary approach[25] will be adopted to cover up their unwillingness to strictly implement the UNGP. Ironically, each approach can find support in the UNGP, particularly the voluntary approach,[26] which is not the subject of this enquiry.

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[23] See UN General Assembly op cit note 16 para 8.

[24] See Daniel Augenstein & David Kinley 'When Human Rights "Responsibilities" Become "Duties": the Extra-Territorial Obligations Of States that Bind Corporations' in S Deva & D Bilchitz (eds) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (2013) 271–294 at 275, noting that although Pillar 2 is voluntary 'in practice', Pillar 1 of the UNGP can make it legally binding through state regulation; Stéphanie Lagoutte 'Unpacking Pillar 1 and 3 of the Un Guiding Principles on Human Rights and Business' the Danish Institute for Human Rights' research papers Series No. 2014/1 at 44, available at *http://www.humanrights.dk/files/media/dokumenter/udgivelser/research/matters_of_concern_series/matters_of_concern_state_duties.pdf*, accessed on 15 March 2015, noting 'the strength of the UNGPs is to stay at a general level of regulation and operation and envisage business activities (and collateral relevant state actions) through the prism of human rights protection'.

[25] See infra note 28.

[26] Pillars 1 and 3 are essentially regulatory in nature while Pillar 2 is voluntary hence the UNGP has been described as a mixture of the two see John G Ruggie 'Closing Plenary Remarks of Third United Nations Forum on Business & Human Rights', noting that 'implementing and building on the Guiding Principles would require "a smart mix of measures," voluntary as well as mandatory, which are capable of generating cumulative change and achieving transformational scale', available at *http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf*, accessed on 15 March 2015.

It is too early to assess the implementation of the UNGP, as states are still making efforts to implement them.[27] Nonetheless, some commentators have reviewed the approach so far taken in implementing the UNGP[28] and the results are not satisfactory.[29] This is due to nothing but the outcome of the approach adopted in its implementation. For example, the UK, Dutch and Denmark governments adopt a voluntary approach in their action plans for its implementation.[30] They fail to express 'a firm commitment to implement the UN documents as part of their state duty to protect human rights against abuses by business actors'.[31] The UK adoptet it's NAP not 'as the consequence of legal human rights obligations', but as a mere policy tool to satisfy the yearnings of business actors for 'consistent policy messaging'.[32] Two other countries adopted it for similar objectives.[33] On the contrary, the UNGP is not all about voluntarism, it is about regulations and those countries who want to use it to reform their law will 'find guidance' to do so.[34]

As a consequence this thesis proposes that Africa should not follow the voluntary approach, while implementing the UNGP. Even, some European countries adopting CSR are being encouraged to also enact some regulations in order to limit the problems of corporate impunity abroad[35] and some are already making efforts in that direction.[36] Africa which is greatly affected by the problems cannot afford to play a voluntary game. Its legal system and

[27] The UNGP was adopted in 16 June 2011; most states are yet to implement it. In fact, AU has not taken any steps to implement it.
[28] See for example, CORE 'Good Business: Analysis of the UK Government Action Plan on Business & Human Rights' (December 2011), available at *http://corporate-responsibility.org/wp-content/uploads/2013/12/GoodBusiness_COREcommentonUKNAP_final_Dec2013.pdf*, accessed on 15 March 2015; Damiano De Felice & Andreas Graf 'The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights' (2015) 7 *JHRP* 40–71; Humberto Cantú Rivera 'Regional Approaches in the Business & Human Rights Field' (2013) *35 LDU* 54–84; Maddalena Neglia 'The Implementation of UN Guiding Principles on Business and Human Rights: Some Reflections on European and US Experiences' (4 September 2014), available at *http://www.msm.nl/resources/uploads/2014/09/MSM-WP2014-35.pdf*, accessed on 15 March 2015.
[29] Ibid CORE at 5; De Felice & Graf at 62, 65; Rivera at 68, 73 &77; Neglia at 11.
[30] Ibid De Felice & Graf 58–60.
[31] Ibid at 58.
[32] Ibid.
[33] Ibid at 59.
[34] See Lagoutte op cit note 24 at 44 noting that 'States which actually seriously mean to take action to implement the UNGPs can easily find guidance to start doing so'.
[35] See for example Olivier De Schutter, Anita Ramasastry, Mark B Taylor & Robert C Thompson 'Human Rights Due Diligence: The Role of States' (December 2012) at 23, available at *http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf*, accessed on 20 March 2015.
[36] For example, see a draft Bill No. 1524 proposed and presented in November 2013 to the French parliament 'calling for the establishment of a duty of vigilance of parent and subcontracting companies with respect to their subsidiary companies, subcontractors, and suppliers', available at *http://www.accessjustice.eu/map/proposition-loi-n-1524-devoir-de-vigilance-eng.pdf*, accessed on 16 April 2015.

human rights protection mechanisms at both domestic and regional level need to be strengthened in order to ensure corporate accountability.

7.3.1 Methods for regulatory regime

What should Africa do to accomplish this difficult task? With regard to the regulatory approach, this thesis proposes four options.

In terms of the first proposal, African states must reform their domestic laws to ensure corporate accountability in the states. In order to do this, property or land law must be reformed to abolish forcible eviction, and before private land is taken prompt and adequate compensation must be paid to the victims.[37] Regulations must be enacted to protect the rights of the vulnerable and the environment must be shielded by the purview of law from corporate onslaught. Furthermore, labour law and access to information are important in protecting human rights in the business sector, therefore, all human rights in the workplace must be protected and access to information guaranteed.

The second proposal is for the AU to encourage all states to ratify the existing regional and international human rights treaties. Some African countries with a civil law background are monist, while those with a common law legal upbringing are dualist.[38] Irrespective of the differences on the reception and application of international law,[39] African countries generally have a poor record of ratification of human rights treaties.[40]

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[37] See The African Commission on Human and Peoples' Rights '231: Resolution on the right to adequate housing and protection from forced evictions' adopted at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights held in Yamoussoukro, Côte d'Ivoire, from 9 to 22 October 2012 noting that member States must put 'an end to all forms of forced evictions, in particular evictions carried out for development purposes', available at *http://www.achpr.org/sessions/52nd/resolutions/231/*, accessed on 15 April 2015.

[38] Magnus Killander & Horace Adjolohoun 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in Magnus Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 4.

[39] In monist countries, treaties are directly applicable without incorporation in to domestic law whereas under the dualist, treaties must be domesticated in to national law before they can be enforced. On the distinction between the two, see G Ferreira & A Ferreira-Snyman 'The Incorporation of Public International Law Into Municipal Law and Regional Law Against The Background of The Dichotomy Between Monism and Dualism' (2014) 17 *PELJ* 1471–1496 at 1471.

[40] See, AU Directorate of Information and Communication, 'Workshop for Western and Northern Regions of Africa on the Importance of Ratification, Accession and Domestication of OAU/AU Treaties of Direct Relevance to Shared Values' (Press release Nº 136 /2013), noting that 'AU Member States are slow to ratify' and it has become a problem which was discussed at the meeting of Experts on the Review of the OAU/AU Treaties held from 18 to 20 May, 2004 in Addis Ababa, Ethiopia. available at *http://legal.au.int/en/sites/default/files/Treaties%20adopted%20by%20the%20African%20Union%20offer%20the%20basis%20for%20collective%20actions%20and%20solutions%20in%20addressing%20the%20political.pdf* , accessed on 16 March 2015; Continental Advisory Research Team, 'Deliver the Dream: Time to Close the Gap between Continental Promises and the Reality of African People State of the Union Continental Report 2010' 1–35 at 1–2, available at *http://www.oxfamblogs.org/eastafrica/wp-content/uploads/2010/09/State_of_the_Union_Continental_Report_20101.pdf*, accessed on 15 March 2015.

Consequently, even courts of countries with a monist legal system create a culture of 'dualism in practice'.[41] The implication of this statist syndrome is that 'unless there is a change in the behaviour of both the AU organs and member states, the many important decisions being taken at continental level risk the danger of not being implemented'.[42] Consequently, the AU resorted to the use of some methods to promote ratification of its treaties,[43] but the methods are not effective because of its exhortative approach.[44] This definitely will affect the protection of human rights in the business sector at the domestic level unless solutions are proffered to this problem. What then is the way out of the problem?

7.3.2 Treaty Implementation and Ratification Body (TIRB)

This thesis proposes the establishment of a TIRB. Unlike a treaty body with compliance mechanisms that has no power to monitor ratification of treaties,[45] the TIRB mandate will be to liaise with the national legislatures in order to facilitate ratification of outstanding treaties. This body will work with the NGOs in each country to explain the benefits of the pending treaties to the citizens and lobby the state legislature and executive for their ratification. TIRB will also be ready to provide technical expertise to any state that requires it for its ratification process.[46] Periodic assessment of the ratification process will be done and TIRB will indulge in sensitisation in states to put governments that refuse to ratify treaties under intense pressure from their people.

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[41] See Killander & Adjolohoun op cit note 38 at 10.

[42] See Continental Advisory Research Team op cit note 40 at 2; see AU 'Concept note for the Regional Workshop on the Importance of Ratification and Domestication of OAU/AU Treaties of Direct Relevance to African Union Shared Values', available at *http://legal.au.int/en/sites/default/files/LC10305%20_E%20Original.pdf*, accessed on 16 March 2015. Noting that 'since its inception in 1963, the policy organs of the Organization of African Unity and the African Union have adopted forty-two (42) treaties to date [but only] twenty-five (28) of these treaties have entered into force'.

[43] One is the compilation of a 'biennial report' on the position of status on ratification of treaties to the Executive Council for assessment, second is the posting of the same status on the AU websites and the third is the devotion of a week in a year to 'OAU/AU Treaty Signing Week'. For a brief discussion on this, see Tiyanjana Maluwa 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 *MJIL* 1–49 at 36–37.

[44] Ibid at 37.

[45] Ibid Maluwa at 39, noting that the AU established treaty bodies to monitor compliance in three specific treaties in the past but the bodies have no such power to 'monitor ratification of treaties'.

[46] It has been argued that technical problem is the reason behind the failure of some countries to implement or domesticate international law, see Abram Chayesa & Antonia Handler Chayes 'On Compliance' (1993) 47 *IO* 175–205 at 194.

7.3.3 Clarifying the exact duties of the non-state actors

The third proposal may not be feasible at present. If possible, the AU should draft a regional instrument clarifying the exact duties of the non-state actors under the African Charter. As noted earlier, this is important to clarify the controversy surrounding the interpretation of the African Charter relating to duties of individuals and also to help to determine the liability of corporate entities under Article 46C of the Protocol on Amendments to the Protocol on the Statute of the ACJHR.[47] The problem with this proposal is that the road to drafting and adopting a new treaty or an instrument is long.[48] Furthermore, since the UNHRC has approved a resolution for the establishment of an open-ended intergovernmental working group (OEIWG) to consider the making of a binding treaty to regulate the activities of corporations since June 2014.[49] It is expedient to be cautious in taking such a path at the regional level until the outcome of the UN efforts is seen. However in the interim, as noted earlier, the duties of non-state actors, particularly the corporations can be spelt out in the regional action plan. The effects will be the same once the regional action plans are implemented both in the regions and in the states.

7.3.4 Harmonisation of laws in Africa

The fourth proposal is that the AU should encourage the harmonisation of laws in Africa, particularly with regard to corporate law. This is in consonance with the objective of the AU Constitutive Act.[50] The benefits of such an endeavour cannot be over-emphasised. As Chareles Fombad argues, 'If business laws in Africa were harmonized', it will 'provide an opportunity' to reform the laws and 'it would be easier for the continent to deal with the rest of the world as a unit', to the extent that 'foreign partners would no longer be able to play one

[47] See Protocol on the Statute of the African Court of Justice and Human Rights which have been ratified by 5 member countries, out of 54 and is not yet in force until it is ratified by 15 members, available at *http://www.au.int/en/treaties*, accessed on 10 April 2015.
[48] See David Bilchitz 'The Moral and Legal Necessity for a Business and Human Rights Treaty' (21 April 2015), available at *http://businesshumanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf*, accessed on 7 July 2015, noting that 'indeed, the development of all international law norms takes time'; John G Ruggie 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty', available at *http://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf*, accessed on 7 July 2015.
[49] See UN Human Rights Council 'Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' A/HRC/26/L.22/Rev.1 (25 June 2014).
[50] Ferreira & Ferreira-Snyman op cit note 39 at 1490.

country against another and exploit differences in legal regulations'.[51] Certainly such a situation will solve the problems of 'race to the bottom' by MNCs in Africa.

Of course, Africa does not need to start from scratch in doing this; the starting point should be from the existing mechanism, which is the Organization for the Harmonization of African Business Law (OHADA).[52] In addition, corporate accountability for human rights has to be incorporated into its framework. If this is not done, the scale will be tilted towards the protection of MNCs to the neglect of the environment and human rights.[53]

7.4 Responsible human rights contractual regime

The major reason behind state incapacity to regulate corporations is the issue of foreign investment. According to Ruggie, the promise by host states to treat investors with 'treatment no less favourable'[54] in order to attract foreign investment 'through bilateral investment treaties and host government agreements' contributed in enhancing the legal protections of the investors with little regard to the duties of states to protect.[55] The result is that it is difficult for the host states 'to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration'.[56] To avoid this problem, states are encouraged by the UNGP to 'maintain adequate domestic policy space to meet their human

[51] Charles Manga Fombad 'Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond' (2013) 59(3) *AT* 51–80 at 55–56.

[52] In fact, other African states can be encouraged to join OHADA in line with Article 53 instead of establishing a new organisation, however approach to be adopted for reception of the treaty should be watched in order to avoid the problem associated with Cameroonian accession to OHADA. For example, Article 42 of OHADA has to be amended to embrace English speaking countries of Africa. See Ibid Fombad at 70 noting that 'The harmonization process in Africa may well be a journey of a thousand miles in which OHADA has taken the important first step'; see Article 53 of the OHADA Treaty 1993 which provides that the organization is open to any Member State of the African Union (AU) and to states that are not members of the AU but are African states; on the problems that arise as a result of Cameroonian accession to OHADA, see Nelson Enonchong 'The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' (2007) 51 *JAL* 95–115 at 99–105; Article 42 recognises French as the official language of the treaty.

[53] Some commentators have proposed for adoption of Corporate Social Responsibility (CSR) in OHADA but it is the view of this writer that adoption of human rights is the appropriate view. On those who proposed for CSR, see Karounga Diawara1 & Sophie Lavallée 'Corporate Social Responsibility (CSR) in the Ohada Law' (2014) 2 *JBLE* 39–62 at 56–59.

[54] For the meaning of 'treatment no less favourable' and its consequences, see Todd J Weiler 'Treatment No Less Favorable Provisions within the Context of International Investment Law: "Kindly Please Check Your International Trade Law Conceptions at the Door"' (2014) 12 *SCJIL* 77–109 at 90–109.

[55] John Ruggie 'Protect, Respect and Remedy: a Framework for Business and Human Rights' Report of the SSRG on the issue of human rights and transnational corporations and other business enterprises (7 April 2008) para 34, available at *http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf*, accessed on 20 May 2015.

[56] Ibid.

rights obligations' when negotiating contractual agreements or investment treaties 'with other States' or corporations.[57]

In fact the commentary to Principle 9 explains it clearly when it provides that states must ensure their ability to protect human rights is not affected by such agreements.[58] It means they must negotiate with their eyes wide open and must not be like Esau in the Bible who sold his birth right for porridge.[59] What can states do to attain this level of negotiation with MNCs or their home states? Two things are important for this purpose. One, they should shun any BIT that do not impose human rights obligations on the corporations;[60] and two, they should ensure that reference is not only made to human rights in the preamble of the treaty[61] but that a clause referring to some applicable human rights treaties are included in the body of the treaty.[62] If this is done, adequate regulatory space for states could be secured.

However, on the issue of human rights treaties or obligations that can be included in the BIT, it seems the UNGP adopts a narrower approach when it limits the scope to only 'human rights and labour rights instruments'.[63] While, it is arguable, that the reason behind the narrower approach is to avoid the fall-out that greeted wider extension of direct human rights obligations to corporations by the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Respect to Human Rights (UN Norms).[64] It is contended that there should be no problem with specific rights addressed by the UNGP since it covers almost all the human rights in the international bill of rights. On this issue, Patrick and Gabrielle argue convincingly that with in the ambit of customary international

[57] UNGP op cit note 8 para 9.
[58] Ibid, see Commentary to principle 9.
[59] See the story in Genesis 25:29–34.
[60] Patrick Dumberry & Gabrielle Dumas-Aubin 'How to Impose Human Rights Obligations on Corporations under Investment Treaties?' (2011/2012) 4 *YIILP* 569–600 at 598; Patrick Dumberry & Gabrielle Dumas Aubin 'How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?' (2013) 3(3) *ITN* 9–10 at 9, noting that most BITs do not refer to the issues of human rights and 'when they do, they clearly do not impose any binding obligations on foreign corporations and yet international do not eschew BITs that impose human rights obligations on corporations.
[61] On the importance of preamble to interpretation of treaties see, Article 31(1) of the Vienna Convention on the Law of Treaties; see also Daniel Aguirre *The Human Right to Development in a Globalized World* (2008) 158.
[62] See Dumberry & Dumas-Aubin 'How to Impose Human Rights' op cit note 60 at 579.
[63] UNGP op cit note 8 para 12; Dumberry & Dumas-Aubin 'How to Impose Human Rights' op cit note 60 at 583.
[64] See John Ruggie 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (E/CN.4/2006/97) para 59 and 60, noting that the UN norms failed because it because of its inherent flaw which was an attempt to allocate wide human rights responsibilities to corporations through the 'existing state-based human rights instruments without grounding the allocation on the true foundation of international law. On the contrary, it should be noted that the UN Norms were criticised for imposing the same level of obligations on the corporations, irrespective of their scope.

law, the UNGP scope can be extended from two instruments to accommodate another three.[65] According to them, the extension is possible under customary international law because some rights are sacrosanct to human life to the extent that they cannot be taken away by the states, even during the times of emergency. Consequently, they are non- derogable rights that can be included in the UNGP.[66]

In sum, this thesis proposes reference in BIT should be made to at least 12 treaties. This includes human rights and labour rights treaties proposed by the UNGP,[67] three additional treaties proposed by Dumberry and Dumas-Aubin,[68] six other AU treaties on the ground that have been unanimously ratified by almost all African countries[69] and a treaty on social economic and cultural rights on the premise that in Africa 'civil and political rights cannot be dissociated from economic, social and cultural right'.[70]

7.5 Engage in Multi-monitoring and Reporting Mechanism (MRM)

Implementation of the UNGP will entail investigation into corporate abuse, monitoring of the conduct of corporations and reporting of human rights compliance by states and corporations at the state and regional levels. The UNGP sets the tone for MRM when it notes that corporations must not only satisfy their consciences respecting human rights but must also show the world that they are doing so.[71] Furthermore, it provides that states have a duty to ensure corporations' compliance to that responsibility by requiring them to do so or alternatively by merely encouraging them, which is a more exhortative path.[72]

However, in a clear and unmistakable tone, the UNGP insists that states are to enforce law to compel corporations to do so.[73] If states perform this duty well, through the instrumentality of law as envisaged by the UNGP, there should be no problem of a corporate accountability deficit in the states. However, as Ruggie himself acknowledges, states have

[65] For reasons advanced for their view see, Dumberry & Dumas-Aubin 'How to Impose Human Rights' op cit note 60 at 584–589.
[66] Ibid at 584-589.
[67] See UNGP op cit note 8 para 12.
[68] See Dumberry & Dumas-Aubin 'How to Impose Human Rights' op cit note 60 at 582.
[69] The treaties are: (1) African Charter on Human and Peoples' Rights, which is ratified by 53 countries out of 54; (2) African Charter on the Rights and Welfare of the Child, which is ratified by 47 out of 54; (3) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, ratified by 36 out of 54; and (4) African Union Convention on Preventing and Combating Corruption, ratified by 35 out of 54. Current status of ratification, available at *http://au.int/en/treaties*, accessed on 19 March 2015.
[70] See para 8 preamble to the African Charter.
[71] UNGP op cit note 8, commentary to para 15.
[72] Ibid Principle 2 para 3(d).
[73] Ibid Principle 2 para 3(a).

been found wanting in this area.[74] Consequently this section deals with how the AU can help states to implement the UNGP through MRM.

[74] HRC 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (A/HRC/8/5) (7 April 2008) paras 14 and15, available at *http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf*, accessed on 18 April 2015.

7.5.1 The existing mechanisms in the AU

The first thing the AU can do is to strengthen and improve its existing mechanisms for reporting and monitoring of human rights compliance by states. Two such mechanisms are important for this purpose. They are the African Commission and the NEPAD. Another important mechanism for monitoring of human rights compliance in the AU that could have been useful is the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA).[75] It has similar objectives with NEPAD and seeks to attain them in the same way;[76] yet, CSSDCA has been relegated to the background, unable to perform its oversight function and NEPAD established to over shadow it.[77] Apart from minimal efforts made by NEPAD to involve it in its monitoring exercise,[78] CSSDCA as a separate entity or unit in the AU has not been used[79] to spearhead the performance of its primary function, which it shares with NEPAD. Hence it is appropriate to consider the NEPAD mechanism of APRM, which has attracted substantial support locally, continentally and internationally.[80]

Every state which is a party to the African Charter has a duty to report to the African Commission every two years on how it has taken legislative and other measures to enforce the rights and freedoms protected by the Charter in its territory.[81] These reports will open the states to public scrutiny on how they are performing their duty to protect human rights in

[75] For history of CSSDCA, see African Union Summit 'Background on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)', available at *http://www.au2002.gov.za/docs/background/cssdca.htm,* accessed on 26 March 2015.
[76] Ibid; Garth Abraham '"Africa, the Tragedy; Africa, the Challenge" NEPAD and the new Humanitarian Agenda' (2003) 85 *IRRC* 717–736 at 727.
[77] For a detailed study of its objectives see Memorandum of understanding on Security, Stability, Development and Cooperation in Africa, available at *http://biblioteca.clacso.edu.ar/ar/libros/iss/pdfs/oau/CivilSoc160702.pdf*, accessed on 26 March 2015.
[78] CSSDCA is one of the relevant organs or units of the AU shortlisted by the APR Forum to assist it in 'conducting technical assessments on corporate governance and socio-economic development'. See APRM 'Objectives, Standards, Criteria and Indicators for the APRM' para 6(3) (9 March 2003), available at *http://aprm-au.org/sites/default/files/aprm_osci_0.pdf*, accessed on 25 March 2015.
[79] See Dan Kuwali 'Just Peace: Achieving Peace, Justice, and Development in Post-Conflict Africa' (August 2014) African Peacebuilding Network (APN) working paper 2 at 25, noting that 'CSSDCA is still docile', available at *http://webarchive.ssrc.org/working-papers/APN_WorkingPapers02_Kuwali.pdf*, accessed on 25 March 2015.
[80] See APRM '12th Anniversary of the African Peer Review Mechanism' (6 March 2015), noting that 35 countries are now members of the APRM and that seventeen of them who have undergone peer-review mechanism of the APRM have commenced implementation of 'their respective National Programmes of Action (NPOAs), available at *http://www.aprm-au.org/news/12th-anniversary-african-peer-review-mechanism*, accessed on 25 March 2015; Kempe Ronald Hope 'Toward Good Governance and Sustainable Development: The African Peer Review Mechanism' (2005) 18(2) *GIJPAI* 283–311 at 288–289, noting that international communities like G8 countries, the UN and international financial institutions like the World Bank, the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD), the United States Agency for International Development (USAID) and the Department for International Development (DFID) of the UK, and others have embraced NEPAD; Adejoké Babington-Ashaye 'The African Peer-Review Mechanism at Ten: from lofty Goals to practical Implementation' (2014)19 *AYIL* 21–44 at 43, noting that 'APRM is making a positive impact on development in Africa'.
[81] See Article 62 of the African Charter op cit note 69.

their territories and thereby enhance the regulatory and enforcement framework within the corporate sector.[82] Thus, the African Commission notes, 'Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties'.[83] The reports are examined and reviewed by the African Commission and[84] cover inquiry on the steps taken by the states to protect those rights, the benefits so far gained by those steps, and the challenges faced.[85]

Furthermore, NHRI with affiliated status or NGOs with observer status can initiate a discussion relating to any issue of human rights by making a request to the African Commission to include such item on its agenda for the ordinary sessions on condition that such request is made 60 days before the commencement date of the discussion.[86] There is no doubt that such an opportunity creates an incentive for NHRI and NGO to play a pivotal and strategic role that has been earmarked for them in the implementation of the UNGP.[87] Three specific roles are assigned to NHRI and NGO in the UNGP. One, with regard to Pillar 1, the UNGP expects them to review the state laws and assess the extent of their compliance with the human rights obligations of the state and then advise the states and all non-state actors, including corporations, on how they can comply with their human rights obligations and responsibilities in that context.[88] Two, with regard to Pillar 2, they are expected to give

[82] On the benefits of state reports generally, see Navanethem Pillay 'Strengthening the United Nations human rights treaty body system, a report by the United Nations High Commissioner for Human Rights' (June 2012) at 8, available at *http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf*, accessed on 21 March 2015. She noted that 'States parties report periodically to the treaty bodies, which review legislation and policies and advise States on ways to achieve better compliance with human rights obligations'; Rachel Murray 'Report on the 1997 Sessions of the African Commission on Human and People's Rights' (1998) 19 *Human Rights Law Journal* 169–185 at 181. She quotes Chairperson of the the African Commission saying the report is 'a non-contentious and non-judgmental proceeding allowing states to present a comprehensive picture of the human rights situation in a country and engage in constructive dialogue with the Commission with a view to assist states to enhance their human rights standards'.

[83] See Annex 5, Decisions on Communications Brought Before the African Commission 155/96 the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria para 57, 15th Annual Activity Report of The African Commission 2001–2002.

[84] See George William Mugwanya 'Examination of State Reports by the African Commission: A Critical Appraisal' (2001) 2 *AHRLJ* 268–284 at 272, noting that 'In response to the African Commission's request, the OAU Assembly entrusted the Commission with the task of considering state reports'; The Second Annual Activity Report of the Commission (1998–1989) 20.

[85] See Rule 73 (1) of Rules of Procedure (RP) of the African Commission, (2010) approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul (The Gambia) from 12 to 26 May 2010, available at *http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf*, accessed on 21 March 2015.

[86] Ibid rule 63(1).

[87] Veronika Haász 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013)14 *HRR* 169 at 176, noting that the UNGP 'assign duties to NHRIs in relation to the implementation of all three pillars of the framework'; for the roles assigned, see UNGP.

[88] See UNGP op cit note 8 Pillar 1, commentary to para 3.

technical and expert advice to corporations doing businesses in 'operating environments, such as conflict-affected areas' on how to avoid 'the risks of … being complicit in gross human rights abuses committed by other actors'.[89]

Lastly, the UNGP notes that NHRIs in particular, have a laudable role to play in the process of providing 'non-judicial mechanisms' to the victims of corporate human rights violations.[90] Thus, their involvement in state reports is capable of ensuring the fulfilment of their oversight function, which is the purpose of the tripartite duties assigned to them in the UNGP. Thus, if a state or corporation fails to comply with human rights provisions, in spite of their advice,[91] they can request that such human rights issues be listed for discussion in the African Commission ordinary sessions.

No doubt, it is a great opportunity for ensuring compliance to human rights? But, in spite of this brilliant design, states are unwilling to submit their reports promptly to the African Commission for scrutiny, thus scuttling a viable opportunity to enhance 'the protection and promotion of human rights through the examination of state reports'.[92] Unfortunately, the African Charter itself fails to provide penalties for such disobedience.[93] Similarly, observations or recommendations emanating from the reports are of no 'significant impact on those who finally submitted the report'[94] and the possibility of exerting pressure on them to comply through publicity is hindered by the confidential provision of the Charter which reserves the right to authorise publication of such recommendations and observations to the AHSG.[95] The implication of that provision, according to Nsongurua Udombana is that 'the decision on whether to publicize a human rights violation on the part of an African State is reserved to the discretion of her sister States'.[96]

It is unreasonable to expect that the AHSG will authorise the publicity of atrocities committed by members. One should note that an atmosphere of camaraderie, fraternity and conviviality exists between AU heads of state and government. On many occasions, that cord of conviviality or loyalty has metamorphosed into an expression of support to acts of impunity committed by their members. Perhaps, two examples of such solidarity can be cited.

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[89] Ibid Pillar 2, commentary to para 23.
[90] Ibid Pillar 3, commentary to para 27.
[91] Note that the purpose of the duties assigned to them by the UNGP is to advise the states and the corporations, even after they might have reviewed the state law.
[92] See Mugwanya op cit note 84 at 278; Joseph M Isanga 'The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?' (2013) 11 *SCJIL* 267 at 280.
[93] Ibid Isanga.
[94] Ibid.
[95] Ibid; see also Article 59(1) of the African Charter.
[96] See Nsongurua J Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than Never' (2000) 3 *YHRDLJ* 45 at 69.

In the first example, most heads of states in the AU did not raise an eyebrow against human rights violations committed by the administration of President Robert Mugabe of Zimbabwe.[97] Rather than criticising him, they supported him. In fact, it was reported that when President Mugabe refused to attend an EU-Africa summit in April 2014 in Brussels because his wife was not invited, President Jacob Zuma in solidarity with him also refused to attend.[98] Again, the support of the SADC heads of state and government for Mugabe contributes in great measure to crippling the SADC Tribunal.[99] The second example is the unflinching support of the AHSG of the AU to President Omar Bashir in spite of the allegations of crimes against humanity, genocide, and war crimes by the ICC.[100]

In sum, for the African Commission monitoring mechanism to yield its maximum benefits to the continent, it must be strengthened in order to compel prompt and mandatory participation from all members. This can be done if the provisions of the African Charter are amended to compel states not only to submit reports promptly but to implement the recommendations in the report and to allow the recommendations and observations to be published without seeking the approval of the AHSG.

[97] While the heads of states of the AU romance with Mugabe, the EU states sanctioned him, see Alastair Macdonald 'EU Renews Sanctions on Zimbabwe, Mugabe' (Reuters) (20 February 2015), available at *http://www.reuters.com/article/2015/02/20/us-zimbabwe-eu-sanctions-idUSKBN0LO14L20150220*, accessed on 26 March 2015.

[98] See Alastair Macdonald & Adrian Croft 'Zimbabwe's Mugabe may be allowed in to EU in new role' *Reuters* (3 February 2015), available at *http://www.reuters.com/article/2015/02/03/us-africa-mugabe-eu-idUSKBN0L72DM20150203*, accessed on 26 March 2015.

[99] See Richard Lee 'African Commission to hear SADC Tribunal case' (22 November 2012), noting that as a result of some rulings of SADC Tribunal against the Zimbabwe government, SADC leaders instead of urging President Robert Mugabe to comply voted 'instead to support' him, available at *http://www.osisa.org/law/regional/african-commission-hear-sadc-tribunal-case*, accessed on 26 March 2015; on the genesis of the problem between Mugabe and the Tribunal, see Daniel Hemel & Andrew Schalkwy 'Tyranny on Trial: Regional Courts Crack Down on Mugabe's Land "Reform"' (2010) 35 *YJIL* 517–523.

[100] Nsongurua J Udombana '"Can These Dry Bones Live?" In Search of a Lasting Therapy for AU and ICC Toxic Relationship' (2014) *AJICJ* 57–76 at 62, noting that 'the tipping point in the current frosty relationship' between the ICC and the AU 'appears to be the indictment of President al-Bashir'; Dire Tladi 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34 *SAYIL* 58 at 64, noting that the assumption that the 'AU objection against the ICC indictment of Bashir' is possibly an attempt by the African leaders to simply protect 'one of their own' is a 'basis that would not warrant an analytical discussion'.

7.5.2 The APRM

One regional institution in the AU by which compliance of states to human rights enforcement in the corporate sector can be monitored and assessed is through the APRM which was set up to assess how the member states are faring in their execution of the standards and objectives enunciated in NEPAD in their territories.[101] One of these standards is corporate governance.[102] Its objectives can be simplified in to three. One, it seeks to facilitate the enactment of a regulatory framework that will create a conducive environment for business activities.[103] Two, it aims to make corporations and directors' accountable in order that they might 'act as good corporate citizens with regard to human rights, social responsibility and environmental sustainability'.[104] Three, it also seeks to promote the codes of 'good business ethics' particularly the stakeholder model of corporate governance.[105] To attain these objectives, states are assessed on a number of yardsticks one of which is to determine if the states have put in place a regulatory and legal framework that could effectively 'govern corporate and government activities effectively' in their territories.[106]

A country has access to four types of reviews under the APRM depending on its status and peculiar needs and each review entails five stages.[107] If it is a new member, it is subject to 'a base review' which must be done 'within 18 months' of being a member.[108] Thereafter, at every two to four years, a member must undergo 'a periodic review'.[109] Two remaining reviews are extemporary for specific purposes and can be carried out in two instances, either at the request of a member country or at the request of the participating

[101] André Mbata B Mangu 'Assessing the Effectiveness of the African Peer Review Mechanism and its Impact on the Promotion of Democracy and Good Political Governance' (2007) *7 AHRLJ* 354–388 at 354–355; Jakkie Cilliers 'NEPAD's Peer Review Mechanism' Institute for Security Studies (ISS) Paper 64 (November 2002), available at *http://www.issafrica.org/Pubs/Papers/64/Paper64.html*, accessed on 25 March 2015; Christopher Mbazira 'A Path to Realising Economic, Social and Cultural Rights in Africa? A Critique of the New Partnership for Africa's Development' (2004) 4 *AHRLJ* 34–52 at 42; Evarist Baimu 'Human Rights in NEPAD and its Implications for the African Human Rights System' (2002) 2 *AHRLJ* 301–319 at 307.
[102] See APRM op cit note 80 paras 4 & 21.
[103] Ibid 21.
[104] Ibid.
[105] Ibid.
[106] Ibid 22.
[107] In the first stage, the country to be reviewed will provide relevant information for the review including 'the draft country Programme of Action' and the APR will analyse the information and prepare a 'background document' on the country. In the second stage, the APR Team will visit the country for review and hold wide consultations and briefing meetings with the stakeholders. Stage three deals with of the report of the APR Team. At the fourth stage, the APR Panel will review the report and if approved, the Chairperson of the APR Forum will communicate their decisions on the report to the 'Head of State or Government of the country being reviewed'. Publicity of the report is done at the fifth stage. For detail of these stages, see APRM 'African peer review mechanism organizations and processes' (9 March 2003) (NEPAD/HGSIC-3-2003/APRM/Guideline/O&P), available at http://aprm-au.org/sites/default/files/aprm_onp_0.pdf, accessed on 25 March 2015.
[108] See APRM 'About APRM', available at *http://aprm-au.org/about-aprm*, accessed on 25 March 2015.
[109] Ibid.

AHSG where there are ominous signs that economic and political upheavals are looming in the territory.[110]

Though the APRM was conceived in 2002 and established in 2003,[111] it is undisputed that it has recorded some enviable success.[112] Notwithstanding impressive accolades, there some concerning issues which if not adequately addressed can greatly inhibit the APRM's capacity to deliver optimally to the generality of the whole continent. The first of these issues is that its membership among the AU states is voluntary. The negative implication of this has attracted constructive criticisms from many scholars. To mention a few, Dan Kuwali notes that it makes the APRM 'porous with respect to non-member states'.[113] Likewise Deon Geldenhuys argues that tyrannical governments or non-conformist states find opportunity in the voluntary nature of the APRM to escape public scrutiny by shunning accession.[114] Similarly, John Akokpari asks rhetorically 'how can a country persisting in human rights violations be made to reform if it withdraws or simply refuses to sign up?'[115] He observes that the negative implication of its voluntary nature is that states can refuse to join and those who join can withdraw their membership 'without any severe consequences'.[116]

Another weakness that negatively affects the capacity of this mechanism to deliver is the APRM's inability to enforce its observations and recommendations.[117] Though the APRM Base Document provides for mechanisms to be adopted if states fail to follow its recommendations, there are no concrete sanctions suggested.[118] Instead, states are just left to the discretion of the participating states through 'a process of constructive dialogue'.[119] However, this could prove a weak link given the atmosphere of camaraderie, fraternity and

[110] Ibid; Mangu op cit note 101 at 364.
[111] See APRM op cit note 108.
[112] On the success of APRM, see Steven Gruzd 'The African Peer Review Mechanism: Assessing Origins, Institutional Relations and Achievements' (2009) South African Institute of International Affairs (SAIIA) occasional paper 2 9 at 12, detailing the reforms in domestic laws of Ghana, Rwanda, Kenya AND South Africa as a result of APRM; Babington-Ashaye op cit note 80 at 33–38; Edward R McMahon, Kojo Busia & Marta Ascherio 'Comparing Peer Reviews: The Universal Periodic Review of the UN Human Rights Council and the African Peer Review Mechanism' (2013) 12 *AAS* 266–289 at 276 .
[113] Kuwali op cit note 79 at 25.
[114] Deon Geldenhuys 'Brothers as Keepers: Africa's new Sovereignty Regime' (2006) *28 SRSA* 13 at 21–22.
[115] John Akokpari 'Policing and Preventing Human Right Abuses in Africa: The OAU, the AU & the NEPAD Peer Review' (2004) 32 *IJLI* 460 at 468.
[116] Ibid.
[117] Ibid at 468–469, noting that APRM is very loose in its approach without 'serious strings' and 'internal coercive mechanisms'. It has 'no clearly defined ways of compelling deviant states to reform. In other words, [it] does not indicate any process of subjecting states to diplomatic, economic or any form of punitive sanctions in the event of poor or non-compliance with the established principles'; Babington-Ashaye op cit note 79 at 31, noting that 'the APRM lacks teeth'.
[118] See APRM 'APRM Base Document' para 24, available at *http://aprmau.org/sites/default/files/aprm_base_0.pdf*, accessed on 28 March 2015.
[119] Ibid; Babington-Ashaye op cit note 80 at 31, noting that the approach adopted 'will leads to vague consequences'.

conviviality that exists between the AHSG of the AU.[120] This thesis holds the view that by leaving the participating states to take decisive action on the erring states, creates a great vacuum in the APRM that paves the way for human rights violation to go unchecked in Africa.[121] That loophole if estimated in value is capable of truncating the success rate of the APRM. As such Adejoké Babington-Ashaye advises that to assess the APRM through 'a purely rights based approach' is to be disappointed.[122]

However, this does not mean that the APRM is incapable of yielding human rights benefits to Africa. It can, but according to Evarist Baimu, the issue of protection of human rights in the APRM is ancillary to the major objective of attracting foreign investment and aid.[123] Consequently, its disposition to human rights is not impactful, because it is secondary. Even if the APRM takes protection of human rights as its main objective, another problem is that it does not regulate non-state actors, particularly corporations.[124] The same thing is applicable to the AU reporting framework.[125] Thus they have only a minimal contribution to make to corporate human rights accountability. However, the APRM must be strengthened if it is to attain its objectives. First, the pace of reviews is too slow. As of April 2015, half of the member states had not been peer-reviewed.[126] In addition, none of the states has undergone the second review process.[127] Consequently, the review-process must be fast-tracked, if the purpose of the APRM is not to be defeated. Second, governmental influence during the peer-review process must be curtailed to ensure credibility.[128] Third, the voluntary nature of the APRM should be re-examined. If the voluntary model of accession cannot be reversed[129] to create a mandatory accession for all AU members, internal mechanisms for the

[120] See the criticism of the African Commission reporting process. I discuss that the effect of such atmosphere is that they cannot be trusted to perform the role of watch dog among themselves.
[121] Malachia Mathoho 'An African Peer Review Mechanism: a Panacea for Africa's Governance Challenges?'(2003) *Policy Brief* 29 at 3, noting that 'There is scepticism about how far African leaders are prepared to go to put pressure on their peers', available at *http://www.cps.org.za/cps%20pdf/polbrief29.pdf*, accessed on 4 April 2015.
[122] Adejoké Babington-Ashaye op cit note 80 at 31; on those who had taken that path and were disappointed, see Akokpari op cit note 114 at 467–470; Magnus Killander 'The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward' (2008) 30 *HRQ* 41–75; Baimu op cit note 101 at 311.
[123] Baimu op cit note 101 at 309.
[124] Kuwali op cit note 79 at 26, noting that NEPAD does not cover non-state actors.
[125] AU does not regulate non state actors too.
[126] See APRM '12th Anniversary of the African Peer Review Mechanism' (6 March 2015), available at *http://www.aprm-au.org/news/12th-anniversary-african-peer-review-mechanism*, accessed on 6 April 2015.
[127] See Terence Corrigan 'Why the African Peer Review Mechanism Must Remain Voluntary' SAIIA Policy Briefing Paper 130 (March 2015).
[128] On governmental influence in the process, see, Harald Heubaum 'Making the African Peer Review Mechanism (APRM) work: A rough road ahead for NEPAD's key component' (2005) GIISA Working Paper FG 6, 1–6 at 4.
[129] On why mandatory accession should not be adopted in APRM, see Corrigan op cit note 127 at 3, arguing that 'moving the APRM to a mandatory accession regime would be unwise at present'.

implementation of the recommendations should be developed by the APRM itself and should not be left to governments. Last, priority must be given to human rights protection in the accountability agenda of the APRM.[130] If all these are done, the APRM will be strategically positioned to attain its objectives and to attract other states to accede to its review mechanism as a result of positive influences emanating from its achievements.

7.6 Strengthening access of victims to remedy in Africa

Access to remedy for victims of corporate human rights violations is the main thrust of the UNGP's Pillar 3.[131] It provides that states must ensure that the victims of corporate human rights violations have access to effective remedy in their territories.[132] As discussed previously in this study,[133] due to lack of effective access to courts in Africa, many victims of corporate human rights violations have resorted to litigation abroad.[134] The cases are seldom concluded.[135] However, some victims are lucky to have their cases settled by the MNCs and huge monetary compensation awarded in their favour.[136] Others (those in this category are many) have their cases dismissed after many years of prolonged litigation.[137] As concluded in the previous chapter,[138] extraterritorial jurisdiction of judicial remedy for corporate accountability at the home states of the MNCs is not reliable and recourse for an adequate and effective remedy should be found at the AU. Therefore, this section deals with how the victims of corporate human rights violations can have unfettered access to justice in Africa through the instrumentality of the AU judicial mechanism.

[130] See Baimu op cit note 101 at 310.
[131] See UNGP op cit note 8 Principle 25.
[132] Ibid.
[133] See discussions on extraterritorial jurisdiction in chapter one and on the home states in Chapter 6.
[134] Ibid, for discussion of the cases.
[135] Most of the cases are dismissed prematurely, see Meetali Jain & Bonita Meyersfeld 'Lessons from Kiobel v Royal Dutch Petroleum Company: Developing Home grown Lawyering Strategies around Corporate Accountability' (2014) 30 *SAJHR* 430 at 449 highlighting some cases that were dismissed prematurely.
[136] Latham & Watkins 'International Companies Beware: The Steady Rise of Alien Tort Claims Act Law' (13 September 2010) noting that 'companies that have paid significant settlements in ATCA cases, and judgments have been entered against non-US, non-corporate citizens as high as almost US $2 billion', available at *www.lw.com/thoughtLeadership/rise-of-atca-suits*, accessed on 17 April 2015; on Shell settlement agreements in the sum of $15.5, see Xiuli Han 'The Wiwa Cases' (2010) 9 *CJIL* 433–449; on another compensation by Shell, see John Vidal 'Shell announces £55m pay out for Nigeria oil spills' *The Guardian* (7 January 2015), available at *http://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills*, accessed on 17 April 2015.
[137] See Meetali & Meyersfeld op cit note 135.
[138] See Chapter 6 discussions on the home states.

7.6.1 The ACJHR

The AU has extended the jurisdiction of the ACJHR to cover not only international crimes but corporate criminal liability.[139] It is the first time in the world that such a legal accountability mechanism will be devised.[140] Of course, Africa is used to pioneering such boundaries and frontiers in international law,[141] but the problem is how to optimise and maximise the opportunity it avails for human rights protection, particularly in the corporate sector.

The first concern is the limited access of the ACJHR to the victims of human rights violations in Africa. The Court entrusts the issue of its access by African citizens and NGOs to the decision of their states. It provides in Articles 9(3)[142] and 30(F)[143] of the ACJHR Protocol that individuals and accredited NGOs can only file cases at the court, if their states have made declarations at any particular time accepting the jurisdiction of the Court to hear them. This optional clause which is *ipsissima verba* with Articles 5(3) and 34(6) of the Protocol[144] to the African Court on Human and Peoples' Rights has been the subject of critical comments by many scholars due to its implication of shutting the door of access to justice on many victims of human rights violations generally.[145]

Currently, only seven countries out of 27 who have ratified and acceded to the Court's Protocol[146] have given the envisaged *imprimatur* in form of declaration that the Court can accept cases from the individuals and NGOs in their territories. The implication of this skeletal rate of seven out of 54 countries in the continent, according to the Court and it's

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[139] See Article 46C of the ' Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' adopted by the Heads of State and Government on 27 June 2014, (15 May 2014) EX.CL/846(XXV), available at *https://www.iccnow.org/documents/African_Court_Protocol_-_July_2014.pdf*, accessed on 26 July 2015.

[140] See Vincent O Nmehielle '"Saddling" The New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?' (2014) 7 *AJLS* 7–42 at 23, 29.

[141] Ibid; Jeremy Levitt 'Introduction – Africa: A Maker of International Law' in Jeremy Levitt (ed) *Mapping New Boundaries in International Law* (2008) 1–9.

[142] See the 'Protocol on the Amendments to the Protocol' op cit note 139.

[143] See African Court 'Protocol on the Statute of the African Court of Justice and Human Rights', available at *http://www.africancourt.org/en/images/documents/Court/Statute%20ACJHR/ACJHR_Protocol.pdf*, accessed on 7 April 2015.

[144] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, available at *http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf*, accessed on 7 April 2015.

[145] See, Manisuli Ssenyonjo 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008–2012' (2013) 2 *IHRLR* 17–56 at 51–56; Isanga op cit note 92 at 285–295; Andreas O'Shea 'A Critical Reflection on the Proposed African Court on Human and Peoples' Rights' (2001) 2 *AHRLJ* 285 at 298; Robert Wundeh Eno 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *AHRLJ* 223 at 231.

[146] The countries are Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Republic of Cote d'Ivoire.

judges is that the Court 'finds itself in a paradoxical situation whereby' it is difficult for it to ensure justice to 'the real victims of human rights violations' in Africa because 'the scope of the Court's judicial protection of human rights is grossly limited'.[147]

Unfortunately the Court could not remedy this defect, lamenting the lack of jurisdiction in such cases where people sought its intervention. In *Femi Falana v AU*[148] the Court declined jurisdiction to entertain action against the AU for the failure of Nigeria to make a declaration to accept the competence of the Court in line with Article 46(6) of the Protocol. Similarly, an attempt to seek the Court to declare the said Article 34(6) of the Protocol null and void on the ground that it is incompatible with the spirit of the African Union Constitutive Act was rejected in *Atabong Denis Atemnkeng v AU*.[149] As usual, the Court ruled it has no jurisdiction. Indeed, many applications brought by victims of human rights violations by African states were struck out on this ground.[150] The consequence of the retention of this optional clause, in spite of the CLL jurisdiction, is that cases from about 47 countries will not be entertained by the ACJHR.

In such a scenario, calling the Court an African Court is a misnomer. As Manisuli Ssenyonjo argues the Court has been made to become 'largely a court primarily for those States which have accepted to allow individuals and NGOs direct access to the Court'.[151] Consequently, it is important to note that for the purpose of implementing the UNGP, the bottlenecks placed at entry to the Court must be removed in order to provide unfettered access for the victims of corporate human rights violations to be heard at the continental level. Since this can't be done without the consent of the states concerned. What the AU can do is to adopt a sensitization approach to call the attention of the states and their citizens to

[147] Honorable Justice Augustino SL Ramadhani 'Opportunities and Challenges for the African Court on Human and Peoples' Rights' a speech delivered during the third meeting of Legal Advisors of the African Union and the Regional Economic Communities 11–13 July 2011 in Arusha, Tanzani, available at *http://www.african court.org/en/images/documents/Speeches/Speech%20on%20Challenges%20for%20the%20African%20%20Court%20by%20Judge%20Ramadhani.pdf*, accessed on 8 April 2015; Report of the African Court on Human and Peoples' Rights, EX.CL/718(XX) 2012 para 89, noting that 'the judicial mandate of the Court is seriously compromised in contentious matters by the low rate of ratification of the Protocol and even lower number of countries that have made the declaration under Article 34(6)'.

[148] See *Femi Falana v African Union*, Application No. 001/2011.

[149] See *Atabong Denis Atemnkeng v African Union Application* No. 014/2011.

[150] See for example, cases of *Michelot Yogogombaye v The Republic of Senegal Application* No. 001/2008; *Delta International Investments and Others v The Republic of South Africa Application* No. 002/2012; *Emmanuel Joseph Uko and Others v The Republic of South Africa* Application No. 004/2012; *Amir Adam Timan v The Republic of the Sudan* Application No. 005/2012; for discussion of many of these cases that were struck out or transferred to the African Commission, see Ssenyonjo op cit note 145 at 32–39.

[151] Ibid Ssenyonjo at 28.

the benefits of removing the 'optional clauses'.[152] In order to do this effectively, the NGOs and Civil societies in the same states should be involved.[153] The problem with the AU is that most of their activities do not go beyond the knowledge of those who are in the governments at the national level. The majority of the citizens are not aware of their activities. In this case, the benefits of removing the 'optional clauses' should be spread to the common men, in those countries. If that can be done effectively, the issue of removing 'optional causes' (so that the citizens can enjoy the benefits afforded by the AU) can become a political issue in electing leaders at the national level.[154] Once, it comes to that level, the issue of securing consent will be easier. In addition, another thing the AU can do is to give incentives to states that have removed the 'optional clauses'.

Once the issue of access to the Court is settled with the removal of the so-called optional clause, the second issue to deal with is the most important aspect of Pillar 3, which is provision of effective remedies. However, for that to become a reality, the Court must have 'the weapon of injunctive relief'[155] either mandatory or prohibitory[156] as well as the power to award damages. With the provisions of Articles 35[157] and 45[158] it is obvious that the ACJHR is vested with adequate power to provide adequate remedies to the victims of corporate human rights violations. The plaintiffs approaching the Court can ask it to grant interim measures pending the determination of the case.[159] After the cases are determined, they are also entitled to list of damages such as reparations, restitution, compensation and rehabilitation.[160] In addition, as curious as it might be,[161] the Court is also vested with civil

[152]See Rachel Murray & Debra Long *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (2015)195. They note that 'constructive dialogue with states and the informality of the procedures' are successful means of securing compliance.

[153] See Chapter 6.6.1 of this study on how the NGOs worked persistently to ensure that the Nigerian government amended its law to conform to the African Charter.

[154] See Rachel Murray op cit note152 at 98, they note that 'political implications' are essential factors that determine the implementation of regional policies or treaties by the national governments.

[155] Sandy Ghandhi 'The Human Rights Committee and Interim Measures of Relief' (2007) 13 *CLR* 203 at 205.

[156] On distinction between the two see, Kenneth M Chackes 'Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor' (1987) 31 *WUJUCL* 155 at 159, noting that 'mandatory injunction compels the performance of an action or duty, while a prohibitory injunction requires that one refrain from performing a particular action or duty'.

[157] Article 35 of the Statute of the Court African Court op cit note 143.

[158] Article 45 of the 'Protocol' op cit note 139.

[159] Article 35 op cit note 143.

[160] Article 45 op cit note 139.

[161] The combination of civil and criminal jurisdiction in a single court has been criticised as complicated and curious. See Ademola Abass 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *EJIL* 933 at 944; but it is worth noting that the appellate division of the Caribbean Court of Justice (CCJ) is also vested with power to hear civil and criminal matters, see Article XXV of Agreement Establishing the Caribbean Court of Justice, available at *http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf*, accessed on 10 April 2015; Christoph JM Safferling 'Can Criminal Prosecution be the Answer to Massive Human Rights Violations?'

and criminal jurisdictions,[162] which is capable of yielding two-pronged benefits to the victims of corporate human rights violations.[163]

Indeed, the possibility of exploring CCL for human rights violations in Africa is commendable because of the many advantages embedded in its use.[164] Thus, Mordechai Kremnitzer argues that 'only criminal responsibility fits the requirement to take the core of international crimes seriously'.[165] Of course, corporate criminal liability too is not without defect.[166] Harmen van der Wilt comments on what seems to be its major defect when he argues 'focusing entirely on the collective or corporation, while ignoring individual liability' is not only a misnomer, but puts 'the blame exclusively on the corporation [and] entails the risk that at the end of the day no one is guilty but the abstract entity'.[167]

Fortunately, the approach adopted by the ACJHR is different in the sense that it codifies both CCL and individual criminal liability.[168] Thus, there is possibility of corporations, businessmen and individuals being held liable. In addition, a critical look at the entire provision of Article 46C[169] shows that the Court will adopt a corporate fault theory as the basis of criminal liability of corporations.[170] This is commendable in the sense that corporate fault was developed as a response to correct weaknesses identified in other theories

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(2004) 5 *GLJ* 1469 at 1485, noting that civil litigation can 'operate alongside a criminal trial against an individual culprit as the criminal'; James G Stewart 'A pragmatic critique of Corporate Criminal Theory: Lessons from the extremity' (2012) NY University Public Law and Legal Theory Working Papers 369 at 25, noting that 'the advocates for corporate criminal liability argue for the coexistence of corporate and civil remedies'.

[162] See Article 16 of the 'Protocol' op cit note 139.

[163] For advantages of both, see Safferling op cit note 161 at 1479–1486.

[164] Mordechai Kremnitzer 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *JICJ* 909 at 915–916; Safferling op cit note 157 at 1479–1484; Stewart op cit note 161 at 23, noting that 'The essential point, though, is that criminal liability might occasionally fill accountability gaps like this where civil liability falls short'.

[165] Mordechai Kremnitzer 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *JICJ* 909 at 915.

[166] For analysis of its shortcomings, see Gerhard OW Mueller 'Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Liability (1957) 19 *UPLR* 21–51 at 21, describing corporate criminal liability as weed; Andrew Weissmann & David Newman 'Rethinking Criminal Corporate Liability' (2007) 82 *ILJ* 411 at 451, noting that 'Corporate criminal liability has been stretched past the breaking point where it no longer serves the purposes of the criminal laws'; Jennifer Arlen 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 *JLS* 833 at 867.

[167] Harmen van der Wilt 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *CJIL* 43 at 74.

[168] See Article 46C (6) of the 'Protocol' op cit note 139.

[169] Ibid Article 46C.

[170] This is also known as non-derivative theory. However, corporate fault theory was developed by Gobert, see James Gobert 'Corporate Criminality: New Crimes for the Times' (1994) *CLR* 722−734; see James Gobert 'Corporate Criminality: Four Models of Fault' (1994) 14 *LS* 393 at 407−410

of corporate attribution of guilt.[171] It treats corporations as a separate entity 'whose "mind" is embodied in the policies it has adopted'.[172] The advantage of this, according to James Gobert is that it will solve the perennial problem that the courts experience in extracting guilt from corporations through recourse to individual faults.[173] It is also noteworthy that the choice of corporate fault will facilitate the implementation of the UNGP because failure to show due diligence as emphasised by the UNGP and corporate fault theory is a requirement for criminal liability.[174]

Without doubt, it would seem that a solid regulatory framework has been laid for the ACJHR to provide effective remedies for victims of corporate human rights violations using the twin advantages of civil and criminal adjudicative processes. All the more so as the fear that judgments of the Court might suffer the same fate (of lack of enforcement) as that of the African Commission decisions[175] has now been laid to rest with enforcement mechanism put in place for execution of its judgments.[176] For example, the parties must execute the court's judgment which is final and binding on them.[177] If however, they fail to do so, the Court shall refer the failure to the AHSG which shall deliberate on measures (like sanctions) that can be taken to execute the Court's judgment.[178]

The reliance on the AHSG for executory purposes is not reliable as it is subject to political vagaries, and indeed, has been condemned by many scholars.[179] Albeit, it is arguable that it is compatible with international practice.[180] But even at that, it is preferable, for the purpose of efficiency, if additional provision is made for national enforcement of the judgment in any of the member states of Africa in line with the practice in most of the

[171] For a discussion of these theories of corporate attributions which are identification doctrine theory and the aggregation theory, see Richard Mays 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1998) *MJLS* 31 at 39–59.
[172] Gobert 'Corporate Criminality' op cit note 170 at 724.
[173] Ibid.
[174] See James Gobert & Maurice Punch *Rethinking Corporate Crime* (2003) 100, noting that observance of due diligence can be a defence to corporations; UNGP op cit note 8, Principle 17 provides that corporations 'should carry out human rights due diligence'; Gobert 'Corporate Criminality' op cit note 170 at 732.
[175] See African Commission does not have enforcement power, see Carolyn Scanlon Martorana 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights?' (2008) *40 GWILR* 583 at 593, noting that 'the most crippling aspect of the Commission is its lack of enforcement power'.
[176] See Article 46 of the protocol, African Court op cit note 139.
[177] Ibid Article 46(1, 2 & 3).
[178] Ibid (4 & 5); Article 57 of the 'Protocol' op cit note 139.
[179] For example, see Martorana op cit note 175 at 607; Isanga op cit note 92 at 297–298.
[180] See Article 94(2) of the United Nations Charter which lays reliance on the Security Council to enforce the judgments of International Courts of Justice (ICJ); Clarence Wilfred Jenks *The Prospects of International Adjudication* (1964) 706, proposing that international judgments should be enforced in national courts.

regional courts.[181] This proposed provision if adopted can act as a check on the AHSG's power. An African adage from Nigeria says it is not possible for all of us to sleep and face the same direction. In this context, it means a multitude of people cannot agree on a view without dissent. Consequently, if the AHSG finds it difficult to impose sanctions because the majority of the states are silent on the matter,[182] it is not unlikely that some states will dissent, even though they might be in the minority. Therefore, those dissenting states will allow the execution of the judgments in their countries, instead of waiting endlessly for the AHSG to take action.

There is no problem with this proposal under international law, once the Court's Protocol has been amended to include domestic enforcement of the Court's judgments; any state that has ratified the Court's Protocol has a right to take steps to execute the Court's judgment. The beauty of this proposal is that if the execution of judgments is left with the national courts, the domestic courts may attempt to execute the judgment even if the government is against it.[183]

7.6.2 National and regional courts

Principle 25 of the UNGP states without equivocation that it is the primary duty of states 'to protect against business-related human rights abuse' and to provide 'access to effective remedy' to the victims of corporate human rights violations within their territories.[184] It follows therefore, that the role of the AU is complementary and can only support the national and regional courts in Africa. Mindful of that fact, Article 46H (1) provides that the jurisdiction of the Court shall be complementary to that of the national and regional courts.[185] Consequently, the protocol provides that a case is not admissible at the court if the case has been tried or is being investigated for trial or the trial is ongoing in the state which has jurisdiction over it.[186]

[181] For example, see Article 22(3) of the 1991 ECOWAS Court Protocol which provides for execution of the Court's judgment in the member states; Article 32(1, 2 & 3) of the Protocol to the Southern African Development Community Tribunal and Rules of Procedure thereof; Article 44 of East African Community Treaty.
[182] AU members are prone to be silent as a result of support for one another, see my criticism above on the African Commission reporting mechanisms.
[183] See the judgment of Constitutional Court of South Africa in *Government of the Republic of Zimbabwe v Louis Karel Fick* (CCT 101/12) [2013] ZACC 22.
[184] UNGP op cit note 8.
[185] Article 46H (1) of the 'Protocol' op cit note 139.
[186] Ibid Article 46(2abc).

It provides further that if the state is 'unwilling or unable to carry out the investigation or prosecution' the court will be seized of the matter.[187] Thus, it is obvious that states are accorded primary priority in the administration of justice to the victims of human rights violations in their territories. In this regard, this thesis proposes that the primary role assigned to states can be discharged to complement the AU judicial accountability mechanism in two ways. One, by dispensing justice to all African citizens in their territories in line with the amended Statute of the Court; and two, by creating an efficient administrative and judicial mechanism to execute the Court's judgments in their territories.

This two-pronged approach can be performed without stress on two conditions. One, if the Court's Protocol or statute is ratified by the member states; and two, if after ratification they are domesticated in their national legal system. If this is done, the states shall feel the impacts of the complementary efforts of the AU. In *Government of the Republic of Zimbabwe v Louis Karel Fick*[188] the South African Constitutional Court confirmed the judgment of the South African Supreme Court of Appeal[189] when it held that the SADC Tribunal judgment against Zimbabwe was enforceable in South Africa because Zimbabwe had waived its rights to immunity in the foreign courts by signing Article 32(3) of the Protocol which provides that all the Tribunal decisions are enforceable in the territories of all the member states.[190]

In contrast, it must be noted that not all national courts will be disposed to execute an international court's judgment on the premise of such clause alone. Indeed, the possibility to refuse is high if such judgment is categorised as a foreign judgment as the South African Constitutional Court did.[191] Foreign judgments are likely to pass through a public policy test before they can be enforced in another jurisdiction.[192] In fact, the judgment could not be enforced in Zimbabwe also due to public policy, as the High Court held that it would be contrary to public policy to enforce the judgment in Zimbabwe, in spite of the clause mandating execution of the judgment of the SADC Tribunal in the territories of the member states.[193] The absence of this clause is fatal to such judgments. In *Republic v High Court*

[187] Ibid Article 46 (2ab).
[188] *Karel Fick* supra note 179.
[189] *Government of the Republic of Zimbabwe v Fick* 2012 ZASCA 122 para 44.
[190] It is obvious that the statute of ACJHR does not have such a clause. Thus I propose that such important provision be provided so that court's judgments can be enforced in any of the states where its protocol has been ratified.
[191] *Karel Fick* supra note 188 para 70.
[192] Ibid para 39. The South African Constitutional Court did not consider the issue of public policy extensively but concluded that 'The enforcement of the costs order is also not against public policy, of which our Constitution is an embodiment'.
[193] See *Gramara (Private) Limited v The Republic of Zimbabwe* unreported case number 5483/09 of 26 January 2010 17–18.

(Commercial Division) Accra, Ex parte Attorney General, NML Capital and the Republic of Argentina,[194] the Supreme Court of Ghana was asked to determine whether the court in Ghana was bound to enforce the orders of the International Tribunal of the Law of the Sea. It held that Ghanaian courts were not bound to enforce them. According to the court, since Ghana is a dualist country, treaties even when ratified do not have the force of law until they are domesticated in the municipal law.[195]

It must be noted that the High Court of Zimbabwe also identified the failure of Zimbabwe to domesticate the SADC Treaty or its Protocol as the major barrier for its execution.[196] On its own, the South African Constitutional Court was able to manoeuvre itself out of this quagmire because of a unique constitutional provision which gives it the power to develop the common law in order to ensure the rights protected by the Bill of Rights are not rendered ineffectual.[197] Generally, the situation is that 'a national court is unlikely to find a legitimate basis' to enforce the judgment of an international court 'if the treaty establishing the international court does not have the force of law in the national legal system'.[198]

As proposed earlier, it is important to avoid this cul-de-sac. The Protocol of the ACJHR needs to be amended to include a clause mandating the execution of its judgments in the territories of the member states. In addition, the member states must ratify the Statute of the Court and incorporate it into their national legal system. This will accelerate a reform of criminal and corporate law in their states, as they will have to bring their law into line with the corporate regulatory framework of the AU. Surely, that will necessitate national legislation.

At the same time, the courts of regional economic communities cannot be excluded from this revolutionary trend. The statutes establishing them must be amended, if they are to fit properly into the complementarity structure of the ACJHR,[199] and they must be amended to embrace the individual and CCL of the Court. This should not be difficult to do once the majority of the member states have ratified the Court's Protocol and domesticated it in their national legal systems. However, if the AU is unable to finance the cost of the proposed

[194] Civil Motion No J5/10/2013.
[195] Ibid.
[196] See *Gramara* supra note 193; Richard Frimpong Oppong & Lisa C Niro 'Enforcing Judgments of International Courts in National Courts' (2014) *JIDS* 1–28 at 8.
[197] *Karel Fick* supra note 188 para 53.
[198] Frimpong Oppong & Niro op cit note 196 at 7.
[199] On this ground, Ademola Abass queries the competency of regional courts in Africa to perform their own responsibility within the complementarity structure of the court when he asks 'How then can a court not accessible to individuals, or which cannot determine the criminal responsibility of individuals, be asked to make an initial determination of such a nature before their member state's national court has recourse to the African Court?' See Abass op cit note 161 at 945.

amendment in order to save cost and to avoid duplicity, the Protocol can still be amended to exclude crimes over which the ICC has jurisdiction to prosecute and to strictly limit the extension to those crimes, which are important to Africa but not prosecuted by the ICC.[200] Apart from the fact that this will show the sincerity of the AU in proposing the extension, it is also reasonable since many of the African states have already acceded to the Statute of the ICC.

7.7 Conclusion

While suggesting a regulatory approach for the implementation of the UNGP, this chapter has shown how the existing accountability framework in the AU can be rejuvenated and overhauled to provide a robust functioning corporate accountability framework for Africa. Although it recommends that all organs of the AU and governmental institutions be involved in the implementation of the UNGP, it does not rule out the possibility of one agency in the state and in the continent being specifically assigned to co-ordinate the implementation task. Thus for the continent, it is proposed that the WGEIEHR be specifically assigned to this task. Each state can use its discretion in the choice of an agency that it considers suitable for its implementation. Among other things, this chapter considered the reporting mechanisms of the African Commission and NEPAD and recommendations were made to ensure that they perform optimally and maximally in order to attain the goal of human rights protection in the continent. Finally, it also considered the corporate criminal accountability framework of the proposed ACJHR and recommendations to ensure that it functions well with complimentary effects at the national and sub-regional court levels.

Having said all, it must be noted that the recommendations proposed in this thesis may not see the light of the day if the states fail to muster the political will to implement them. Rejuvenating and overhauling the AU to take a regulatory approach on the issue of corporate accountability are likely to be opposed by MNCs and some states. However, this resistance can be subdued with the support of the civil societies and NGOs in Africa. The civil societies and the NGOs can help the AU and the states to muster the political will by

[200] See Ibid at 939, noting that 'the AU incurs obligations to prosecute crimes which are peculiar to Africa'; Nmehielle op cit note 139 at 39, noting that the decision of the AU should be subjected to the necessity test in view of the 'existence of other mechanisms such as ICC' and cost; Elise Keppler 'Managing Setbacks for the International Criminal Court in Africa' (2012) 56 *JAL* 1–14 at 7, noting that in spite of the problem of the ICC with the AU, 'the court nevertheless continues to enjoy strong support across the continent'; Max du Plessis *The International Criminal Court that Africa Wants* (2010) 5–6, noting that Africa is the 'largest regional group' in the ICC and 31 have ratified the statute.

supporting them through a vigorous advocacy and sensitization that will encourage them to implement an effective corporate accountability framework in Africa.

CHAPTER 8
THESIS CONCLUSION

8.1 Introduction

The aim of this thesis was to consider how the AU can develop a regulatory framework for corporate human rights responsibility and accountability in line with the UNGP. In order to do this, the understanding of the nature, effects and impacts of corporate human rights violations in Africa is imperative. Therefore the thesis traced the origin of the contact of Africa with corporate entities and its implications regarding different phases of corporate human rights violations that occurred as a result of that contact.

After that, the thesis examined the adequacy of the current level of regulatory, normative and corporate accountability framework for corporations doing business in Africa. It considered how the AU can be rejuvenated, overhauled and re-positioned in order to perform effective corporate accountability oversight, to support the domestic and sub-regional systems in Africa. Finally, it proffered wide and extensive recommendations which if implemented by the AU can ensure an effective corporate human rights accountability regime in Africa.

8.2 Thesis summary

Chapter 1 is the introduction to the thesis. It sets the scene for discussion of the topic. It has two sections. Section one provided a research background to the study by interrogating the issue of global commerce and human rights. It explained the link between corporation and global commerce in Africa and the ensuing governance gap resulting in corporate human rights violations. The importance of corporation in a globalised world is examined as well as their interest in exploring mineral resources in Africa. The study found that instead of the contact of Africa with the MNCs to facilitate development in Africa, the reverse is the case. The reason behind the resource curse can be traced to corporate complicity in human rights violations with the states that supposed to regulate them. Consequently, the thesis briefly examined the negative effects of corporate human rights violations in Africa and its untold hardships. In section two, the thesis examined the theoretical background on which the discussion of the remaining chapters was based.

In Chapter 2 the thesis attempted to identify the uniqueness of the African experience in relation to corporate human rights violations by discussing the issue of corporate human rights violations in Africa in three dimensions: its history, nature, and extent. It began with

the origin of the corporation itself and how Africa came into contact with corporations at different stages of its growth.

The discourse on history revealed frequent complicity of states in corporate human rights violations; the nature of corporate human rights violations itself showed complexity and difficulty in determining criminal liability of the perpetrators, while its extent showed that nearly all human rights treaties have been violated by the states in Africa with the complicity of corporations. Indeed, the whole discourse in Chapter 2 revealed that states in Africa are victims of international legal structures which make corporations untouchable for states in Africa. In addition, the thesis found that at every stage of contact with corporations, Africa witnessed one form of corporate human rights violation or another. The chapter is partially historical as it discussed the subject matter of the thesis in retrospective perspective. However, the thesis did not end in the analysis of the past alone but traced the issue of corporate human rights violations from the past to its current status.

Chapter 3 presented a general overview of the current level of regulatory, normative and corporate accountability framework for corporations doing business in Africa at the national level. The chapter majorly adopted a comparative approach. Having found that all states in Africa rely on their constitutions as the fundamental law of the land to protect human rights even in the corporate sector, it began its enquiry from that premise. Two types of constitutional approaches to corporate human rights accountability were examined. The first was countries with special constitutional regulatory frameworks for corporations, and the second were those countries with general regulatory frameworks. The extent to which these constitutional regulatory frameworks can adequately protect human rights in the corporate sector were considered. Thereafter the discourse turned to the examination of the existence of regulatory framework for CCL in the states. For that purpose, states in Africa were divided into three and some states were assessed within this classification. This was followed by an examination of other regulatory frameworks that were relevant for corporate accountability in some states apart from the constitutional provisions in order to determine the adequacy of national regulatory frameworks for corporate accountability in Africa.

Chapter 4 discussed the complimentary role of the AU and RECs in ensuring corporate accountability in Africa. It began by tracing the origin of the OAU, the metamorphosis to the AU and explained its significance. Thereafter, it examined how the AU protects human rights and the impacts of that protection on corporate human rights responsibilities and accountability at the states and at the continental level. Consequently, it discussed the legal and institutional framework for protection of human rights in the AU for

the African states and at the continental level. It found that while the AU has a regulatory and accountability framework for the protection of human rights and has designated some organs for the protection of human rights, yet the mechanisms are deficit in operation and its result has minimal impact on protection of human rights generally. Lastly, it examined how the REC (SADC, ECOWAS and AEC) complement the role of the AU in protecting human rights accountability of corporations at the sub-regional level.

Chapter 5 discussed the unrelenting attempts made by the UN at the international level to deal with the hydra-headed problem of corporate human rights violations in countries with relaxed domestic regulatory regime. It traced the attempts from the Draft Codes, to the Global Compacts and then to the UN Draft Norms until the attempt yielded the desired result in May 2011 when the UNHRC unanimously endorsed the UNGP. Thereafter, the UNGP was subjected to rigorous and critical analysis to assess if it could fill the governance gap in the business and human rights sector at the international level and be a panacea to the problems of corporate accountability in Africa. The thesis noted that UNGP is short of what scholars clamoured for and a new move is on to have a regulatory accountability framework at the international level. Yet, it concluded that a new treaty process and implementation of the UNGP are just different sides of the same coin and that they serve the same purpose. However, it proposed that this can only be true if the implementation of the UNGP adopts a regulatory approach. Finally, it highlighted the usefulness and implications of the UNGP for the AU.

In Chapter 6, the thesis considered the question of an appropriate forum for effective corporate accountability framework for Africa, where the UNGP can be implemented. Multilateral institutions like the World Bank, the IMF or the WTO, the ICC and the home states of the MNCs were considered but found not suitable. Thereafter, it examined the reasons and justifications for recommending AU as the forum for dealing with corporate accountability in Africa. It addressed three issues that culminated in the choice of the AU. The first is the dilemma of the status of MNCs in the theoretical analysis of international law. The second is the inadequacy of the regulatory, institutional and remedial frameworks put up by the home states of the MNCs in addressing the state of CHRR and accountability in Africa. The third issue is the effects of global commerce on developing states in Africa. It argued that the overall effect of those reasons is that the present situation demands that the AU take a viable role on corporate accountability in the continent.

Furthermore, it supported the choice of the AU by examining the new emerging trends in international law, for corporate and individual criminal liability and submitted that

the present embers of corporate accountability in the AU can be triggered or fanned to ensure an effective regional corporate accountability regime for human rights in the continent. In addition, it also discussed the emergence of corporations as new duty bearers, the role that law and institutions can play in addressing the issue of CHRR and accountability in Africa and reasons behind the quest for legal and institutional frameworks for CHRR and accountability in Africa. It reviewed the African approach to corporate responsibility for human rights violations and accountability and justified the basis for the quest for a new legal framework that addresses CHRR and accountability from an Africa and theoretical perspective.

Chapter 7 dealt extensively with the issue of an African approach for a corporate accountability framework in Africa. Consequently, the chapter developed a framework for the AU that addresses corporate human rights violations and accountability from an African perspective in response to the call of SSRG for further study on the UNGP. The proposed framework examined how the widely acclaimed 'internationally recognized principles of corporate accountability' recognised by the UNGP can be used by the AU to help African states not only to effectively perform their international obligations but also to solve the hydra-headed problems of corporate human rights violations.

Therefore, it discussed how some legal and policy-making institutions in the AU can be rejuvenated, overhauled and re-positioned in order to perform effective corporate accountability oversight, to support the domestic and sub-regional systems and gives adequate remedies to victims of corporate human rights violations in Africa. For this purpose, it considered NEPAD and its APRM, African Commission and its monitoring mechanism, the ACJHR and WGEIEHR as places for the development of corporate accountability and implementation of such obligations in Africa. Furthermore, the role of RECs in the new corporate accountability framework was examined. Likewise, the role of the member states of the AU with respect to their original jurisdiction and continental obligations in respect of corporate human rights violations in Africa was also considered. Finally, it considered a corporate criminal accountability framework of the proposed ACJHR and made recommendations to ensure that it functions well with spiral and complimentary effects at the national and sub-regional courts.

8.3 Thesis conclusion

This thesis has addressed the question of how the AU can come up with a regulatory approach to corporate human rights accountability in the continent in the process of implementing the UNGP. Indeed, the study has shown that there is a modicum of hope that the AU can fill the so-called corporate governance gap at the continental level for two reasons. First, there is a plethora of existing institutional facilities that can be used to attain that feat in the continent. Second, irrespective of the circumstances surrounding the proposed extension of the jurisdiction of the ACJHR, what can be gleaned from that extension is the preparedness of the AU to fill the corporate governance gap by proposing to vest the ACJHR with the power to prosecute corporations for international crimes and human rights violations.

However, this study has shown that there are challenges that may frustrate this dream in the AU institutional and proposed regulatory framework itself. This thesis attempted to address those challenges and recommendations to avert the likely negative consequences. It is argued that if those recommendations are implemented, Africa would be strategically positioned to handle the problems of corporate human rights violations at the national, sub-regional and continental level. Further, this thesis considered the problem of non-ratification of treaties and attempted to make recommendations that could improve the capacity of states to ratify treaties.

In sum, although, the UNHRC is still making efforts to address the issue of governance gap (this time through a binding treaty), nonetheless the approach AU is adopting particularly with regard to CCL can fill the gap at the continental level, if carried through to the end. It is hopeful that the AU will not retreat from the step it has taken and that all the recommendations that this thesis has proffered will be attended to so that the hydra-headed problems of corporate human rights violations can be addressed and the vision of the AU itself can be fulfilled.

8.4 Thesis Recommendations

This thesis has made a number of recommendations for the implementation of the UNGP for both the AU and the States. In summary, some of the recommendations for the AU are: First, to develop a regional action plan (RAP) for corporate accountability in the continent in line with the UNGP and the African Charter at the regional level. Second, the AU must involve all organs of the AU in the implementation of the UNGP. Third, the Assembly of the Heads of states and the government, an organ with mandate to determine the 'common policies of the Union' should kick-start the process of the RAP and implementation

of the UNGP. Fourth, the AU should adopt a regulatory approach to ensure that corporations doing businesses in Africa comply with human rights. In order to do this, the AU must encourage all the states to reform their current statutory and corporate accountability frameworks in their territories and ratify the existing regional and international human rights treaties. It is also suggested that a Treaty Implementation and Ratification Body (TIRB) be established. Fifth, the AU must clarify the exact duties of the non- state actors under the African Charter. Sixth, the AU should encourage harmonization of laws in Africa, particularly with regard to corporate law and it is recommended that the starting point should be from the existing mechanism which is the Organization for the Harmonization of African Business Law (OHADA). Seventh, the AU must help the states to implement UNGP through Multi- Monitoring and Reporting mechanism (MRM). In order to do this, it must strengthen and improve its existing mechanisms for reporting and monitoring of human rights compliance by states. Eighth, on access to the African Court of Justice and human rights (ACJHR), a sensitization approach adopted in partnership with civil societies and NGOs is recommended in order to remove the 'optional clauses'.

For the states, some of the recommendations are: One, states must develop their own separate national action plans (NAP) in conformity with the regional policy and regulatory blueprints outlined in the AU RAP. Two, states must adopt a regulatory approach to the implementation of the UNGP. Consequently, they must reform their existing statutory and corporate accountability frameworks and ratify all regional and international human rights treaties. Three, states should harmonize their laws according to the regional guidelines. Four, they should 'maintain adequate domestic policy space to meet their human rights obligations' when negotiating contractual agreements or investment treaties with corporations.

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