

**THE STATE, NON-STATE ACTORS AND VIOLATION OF
ECONOMIC, SOCIAL AND CULTURAL RIGHTS: MAKING
THE CASE FOR PARADIGM SHIFT IN HUMAN RIGHTS
ADVOCACY AND PROTECTION IN AFRICA**

by

Nana Kusi Appea Busia, Jr

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DECLARATION

I, Nana Kusi Appea Busia, Jr, declare **The State, Non-State Actors and Violation of Economic, Social and Cultural Rights: Making the Case for Paradigm Shift in Human Rights Advocacy and Protection in Africa** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete reference

June 2009

Signature:

Nana Kusi Appea Busia, Jr.

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In spite of much earlier academic qualifications and many years of experience working and researching on the international human rights law and norms, I still saw the need to pursue this topic in accordance with the requirements for the degree of Masters Law (LLM) at the University of South Africa (UNISA) and in order to deepen my knowledge of human rights to which I am committed both as an academic and an activist.

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LIST OF ACRONYMS AND ABBREVIATIONS

- ACHPR: African Charter on Human and Peoples' Rights
- AIDS: Acquired Immune Deficiency Syndrome
- ACTA: Aliens Tort Claims Act (US)
- AU: African Union
- CSOs: Civil Society Organizations
- CSR: Corporate Social Responsibility
- ECOSOCR: Economic, Social and Cultural Rights
- EITI: Extractive Industry Transparency Initiative
- EU: European Union
- HIV: Human immunodeficiency Virus
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- ICJ: International Court of Justice
- ICJs: International Commission of Jurists
- IFIs: International Financial Institutions
- ILO: International Labour Organisation
- IMF: International Monetary Fund
- KPSC: Kimberly Process Certification Scheme
- MNC'S: Multi-national Corporations
- NGO(s): Non-Governmental Organisation(s)
- NSA(s): Non-State Actor(s)
- OECD: Organization of Economic Cooperation and Development
- SAPs: Structural Adjustment Programmes
- TNC(s): Trans-National Corporation(s) (Companies)
- UDHR; Universal Declaration of Human Rights
- UK: United Kingdom
- UN: United Nations
- UNISA: University of South Africa
- USA: United States of America
- VP: Voluntary Principles
- WTO: World Trade Organisation

SUMMARY AND KEY TERMS

Summary

For many sets of reasons, including the unequal power relationship between them and most underdeveloped states, and probably more in Africa than anywhere else in the world, non-state actors (NSAs) like states are involved in the violation of human rights. With the phenomenon of globalization, their role has become even more pronounced with some of the traditional functions of the state being performed by them, with implications for human rights, especially socioeconomic rights. Unfortunately, state-centred traditional international law has proved to be ill-equipped to hold NSAs directly accountable and liable for their violations of human rights. NSAs are only expected to adhere to non-binding voluntary standards, such as codes of conduct. Yet, if properly interpreted and enforced, the African Charter for Human and People's Rights (ACHPR) can be relied upon to hold them accountable.

Against this backdrop, the study interrogates the existing universal and regional human rights laws and systems with the view to identifying any rules, principles, case law or literature that can help hold NSAs directly accountable for human rights violations. For better advocacy and protection of human rights on the African continent, it makes a case for a paradigm shift away from a state centred to a holistic approach that would include NSAs and ensure that they are also bound to protect human rights and become accountable for their violations.

Key Terms

State, sovereignty, non-state actors, human rights, international human rights law, socio-economic rights, development, globalization, trans-national companies or corporations, United Nations, Africa, African Charter on Human and Peoples' Rights, International Covenant on Economic, Social and Cultural Rights.

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CHAPTER 1 GENERAL INTRODUCTION

1. Background

1.1 General Background

As used in this study, the concept of non-state actors (NSAs) mainly refers to trans-national corporations or companies (TNCs), the International Monetary Fund (IMF) and the World Bank. This is a contested concept that does not lend itself to an easy and universally acceptable definition. Its use heavily depends on the context.¹ The African Commission on Human and Peoples' Rights has defined NSAs as "referring to individuals, organizations, institutions and other bodies acting outside the state and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organizations, corporations or other structures of business and finance."²

This study reflects on the role that NSAs plays in the violation of human rights in Africa, especially of economic, social and cultural rights (ECOSOCR)³ alongside the state.

Discussions about the threats posed by NSAs to the protection of human rights in our contemporary world have gained currency in recent years.⁴

¹ Philip Alston, *The Not a Cat Syndrome: Can International Human Rights Regime Accommodate Non-State Actors?* In: Philip Alston (ed) *Non State Actors and Human Rights*, Oxford University Press, 2006 at 15.

² See African Commission decision on *Communication 155/96-Social, Economic, and Cultural Rights Centre and Centre for Economic, and Social rights v .Nigeria*

³ ECOSOCR are those rights provided for in the International Covenant on Economic, Social and Cultural Rights (ESCR). These are the rights to self determination (article 1); equality between men and women (article 3); Work and favourable conditions of work (articles 6 and 7); form trade unions (article 8); social security (article 9); protection of family, mothers and children (article 10); an adequate standard of living, including adequate food, clothing and housing (article 11); highest attainable of health and health care (article 12); education (article 13); free and primary compulsory education (article 14); the right to take part in cultural life, benefit from scientific progress, protection of scientific, literary or artistic production of which one is the author (article 15). The African Charter on Human and Peoples' Rights (ACHPR) also protects the right to property (article 14), the right to work under satisfactory conditions and the right to equal pay for equal work (article 15), the right to best attainable state of physical and mental health (article 16), the right to education (article 17); and the right to protection of family by the state.

⁴ See for example Philip Alston, *supra* note 1; Andrew Clapham, *Human Rights of Non State Actors*, Oxford University Press, 2006; J. Oloka- Onyango, "Reinforcing Marginalized Rights in an Age of

The debate has given rise to a number of questions. First, does international human rights law⁵ as it stands assign any legal responsibilities to NSAs for human rights violations they may commit in course of their operations? Second, if the answer is in the affirmative, what types of remedies exist at the international level for those whose rights have been violated? Third, should there be no legal obligations placed upon NSAs, would international human rights law be lagging behind global realities since to all intents and purposes, NSAs do commit human rights violations?

This debate is relatively new. However, the United Nations (UN) system, human rights scholars, and activists alike, take it seriously because of its implications for human rights protection in the world in general and in developing countries such as those from Africa in particular.

At the universal level, human rights were given a pride in several international instruments. Key among them is the UN Charter. In terms of the UN Charter, the state is the only entity vested with the responsibility to protect and promote human rights. All state organs, whether they belong to executive, the legislature or the judiciary, are bound to protect and promote human rights. This has been depicted as the vertical application of human rights law. On the other hand, the state must ensure that all persons, whether public or private, natural or juristic persons within its jurisdiction also protect and promote human rights despite the fact that they are also entitled to the protection of their own rights as rights holders. This has been referred to as the horizontal application of human rights law.

Globalization: International Mechanisms, Non State Actors, and Struggle for Peoples' Rights in Africa," *American University International Law Review*, Vol 18, 2003, 851.

⁵International human rights law is based on several instruments, which include the International Bill of Rights, consisting of the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and its additional Protocols, and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Other major UN instruments include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1989 Convention on the Rights of the Child. The regional human rights instruments are: the 1969 American Convention on Human Rights, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the 1981 Africa Charter on Human and Peoples' Rights.

International human rights law has evolved considerably over the years in response to dynamics of the world system and the different aspirations that it creates, but the idea that the state is the principal duty holder has gone largely unchallenged.

In terms of the Statute of the International Court of Justice (ICJ),⁶ treaties or international agreements remain the main sources of international law, including international human rights law.⁷ Treaties can only be concluded between subjects of international law, namely states and international organisations. States are the original subjects of international law. They are entitled to rights and are also subject to duties.

Since the Advisory Opinion of the ICJ in the *Warrant case*,⁸ it is admitted that international organisations such as the UN also qualify as fully-fledged subjects of international law after states. Treaties or international agreements may therefore be concluded between states, between states and international organisations, or between international organisations themselves. However, most treaties, including human rights treaties, are concluded between states. According to the Vienna Convention of the Law of Treaties,⁹ states parties to a treaty are bound by it and must therefore observe its provisions. The principle is known as *pacta sunt servanda*.¹⁰

The state is the sole entity within society that wields ultimate authority with the monopoly over legitimate means of violence and thus able to enforce laws and maintain order thereby protecting persons within its jurisdiction against any violation by third parties.

⁶ Article 39(1) (a) of the Statute of the ICJ.

⁷ Article 39(1)(a) of the Statute of the International Court of Justice.

⁸ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion, 1949, ICJ Reports).

⁹ The Vienna Convention on Law of Treaties was opened for signature at Vienna in 1969 pursuant to the conclusion of a United Nations Conference on the Law of Treaties which met at Vienna between March 1968 and May 1969, see I.M. Sinclair, *The Vienna Convention on Law of Treaties*, Manchester University Press, 1973; see also T.O Elias, *The Modern Law of Treaties*, Sijthoff, Oceana Publications, Dobbs Ferry, New York, 1974.

¹⁰ Article 33 of the Vienna Convention on the Law of Treaties.

Sovereignty, as ultimate political and juridical power, is therefore vested in the state to carry out all transactions for and on behalf of society. In addition, the state has the capacity to realize the exercise of rights because it is the body that lawfully collect taxes and generates other forms of revenue for purposes of responding to its human rights obligations. Accordingly, the state is held accountable and responsible for any infringement of human rights within its jurisdiction even when such infringement is not directly imputable to the state or any of its organs.¹¹

The world order envisaged by the 1945 UN Charter and subsequent international instruments has changed considerably with the emergence of new (trans-national) actors within the international system who are more powerful than some states, especially underdeveloped and African states. These are NSAs that may operate within the jurisdiction of one or several states and even across the borders. Nevertheless, despite change that has occurred, international law, including international human law that is based on the UN Charter and other international agreements, remain state centric. The challenge posed is whether or not such international law and international human rights law can legally accommodate the NSAs so as to bind them and make them accountable for human rights violations.

When most African states acceded to independence in the 1960s, they endorsed the principle that the state was the only person accountable for the violations of human rights within its jurisdiction, whether they were committed by its organs or NSAs.

Human rights treaties espousing this principle were hurriedly ratified or acceded to without a careful scrutiny of the differences between institutional characteristics and the historical experience of the post-colonial African states and that of European states where the concept of human rights as formulated originated. Yet, African post-colonial states were - and still remain- weak as compared to states in the North and even some NSAs.¹²

¹¹ *Velasquez Rodriguez v. Honduras*, Inter-American Court Human Rights, Judgement, July 29th, 1988 , para 172.

¹² For example the British South African Company was to all intents and purposes a trans-national corporation which was the forerunner of colonization of Rhodesia-Zimbabwe in the 19th century.

Globalization has reinforced the functions of NSAs in the world system and brought to the fore new issues including the performance of some of the traditional functions of the state¹³ by these NSAs. They wield enormous power and resources that impact adversely on economic, social and cultural rights globally but yet it would seem there is no legal accountability at the international level for the violation of human rights in course of their operations. This process of globalization has found expression in the privatization of some sectors that traditionally were the preserve of the state.

Under the banner of privatization the state is being asked to roll back from sectors that traditionally belonged to it, and leave it to private NSAs actors who are deemed to be more efficient than the state. Consequently, sectors such as education, health, water provision, prisons, security, are being managed, in part or whole, by private NSAs with human right implications.

Situations of armed conflicts have also brought about fragmentation of the state and proliferation of armed groups as NSAs¹⁴. Also, international human rights law is increasingly being critiqued by feminist scholars for making a sharp and fast distinction between public and private spheres and locating issues of state protection of rights only within the public sphere. Feminist groups also argue that state's intervention in the private sphere dominated by NSAs is required for better protection of women's rights.¹⁵

¹³ See J. Oloka Onyango & Deepika Udagama, *Globalization & Its Impact on Full Enjoyment of Human Rights*, E/CN4/sub.2/2001/10, 2001, at 4.

¹⁴ Through out this study though our focus and usage of NSAS is not intended to mean armed opposition groups or entities as employed in international humanitarian law, that, it is submitted, has much clearer normative standards as provided for in the four Geneva Conventions of 1949 and the Additional Protocols of 1977.

¹⁵ Andrew Clapham, *supra* note 4 at 1-4.

The above trends at the international level may suggest what Clapham rightly referred to as a “paradigm shift away from what has usually been a state centric approach to human rights protection.”¹⁶ This, by implication, challenges the conventional discourse on international human rights law that creates a dichotomy between the public and private spheres as the frontiers between states and NSAs are becoming more and more blurred because of their respective role in the violation of human rights.

Whereas these trends and the threat posed by NSAs to human rights protection are universal, they are even more pronounced in Africa due to the unequal power relations between the major trans-national NSAs and the average African states.

Attempts made to formulate norms or devise a legal regime to regulate the operations and activities of NSAs do not seem to take into account the salient fact of the comparative weakness of the African states in the face of some NSAs.¹⁷ This fact should have warranted a different legal regime for weaker African states and other states in the South with similar characteristics. According to some scholars, the emergence of developing countries into the global market system should have necessitated the formulation of, or, possibly a re-visitation of human rights standards because of the tension it creates between interests of economic development and human rights.¹⁸ A caution though is sounded that the state may also hide behind the veil of TNCs for their own violations.¹⁹

¹⁶ Andrew Clapham *supra* note 4 at 1

¹⁷ see for eg, John Ruggie, Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on Issue of Human Rights and Trans national Corporations and other Business Enterprises, E/CN.4/2006/97, see also the Norms on Responsibility of Trans national Corporations and other Business with regards to human rights, E/CN.4/sub.2/2003/rev2.

¹⁸ Jenness Duke, *Enforcement of Human Rights on Multi-National Corporations: Global Climate, Strategies and Trends for Compliance*, Duke Marcro, 2000, at 341.

¹⁹ S.Gutto, “Violation of Human Rights in the Third World: Responsibilities of States and TNCS “ in: F. Snyder and S. Sathirathai (eds) *Third World Attitudes Toward International Law: An Introduction*, Martinus Nijhof, Boston Mass, 1987, at 275-92.

Thus far, little attempt has been made to reflect on the role played by NSAs in the violation of human rights in the world in general and in Africa in particular. A counter-argument could be that focussing on NSAs may undermine state sovereignty and also allow the state to escape its responsibility. Sovereignty of peripheral African states is sometimes little more than legal fiction.

A major contention of this study is that many African states are unable to hold NSAs accountable for human rights violations and for non-compliance with either national or international human rights law.

1.2 Development Strategies, State, SAPs, NSAs and Protection of ECOSOCR in Post-colonial Africa

On the morrow of political independence, African states had to develop and transcend underdevelopment inherited from colonialism. In such post-colonial societies the state was the only institution adequately equipped to embark upon economic development. This is because, among other things, colonialism did not allow a private and autonomous sector to emerge²⁰.

There appears therefore to be perennial tension between human rights and development strategies that countries elect to pursue. According to Asbjorn Eide, human rights practices of developing countries depend upon the typology of development and the path that a given country chooses for its development.²¹ Jack Donnelly is even much more categorical that all development strategies faced a structural task of radical transformation to remove established institutions incompatible with modernisation and development.²²

²⁰ See Hamza Alavi, "The State in Post colonial societies- Pakistan and Bangladesh," *New left Review* number 74, 1972, at 51-84

²¹ Asbjorn Eide, "Choosing the path of Development," *Bulletin of Peace Proposals*, number 4, 1980 see also George Sherperd Jr "Power System and Basic Human Rights from Tribute to Self Reliance" in George Sherperd and Ved Nanda, *Human Rights and Third World Development*, Greenwood Press, 1985, at 13-23

²² Jack Donnelly, "Repression and Development: The Political Contingency of Human Rights Trade offs" in :David Forsythe (ed) *Human rights and Development*, Mcmillan Press 1989, at 305-320

The quest for development made the post-colonial African state an interventionist state when carrying out policies aimed at protecting economic, social and cultural rights (ECOSOCR) such as the rights to education, health care, food, water, and work. The protection of these rights was to contribute to the process for development and the nation- state building project itself. This phase of development resulted in the violation of civil and political rights.²³

Between 1965 and 1974, there was a growth rate of at least 6% coming as a result of the boom in international trade²⁴ that enabled the states to protect some ECOSOCR. The oil crisis and the debt that were incurred by most African states resulted in economic decline in most countries compelling a good number of them to resort to borrowing to service their debt.

This crisis necessitated economic reforms led by the IMF and World Bank, through the giving of loans to the African states with stringent conditionalities attached. In all instances, a common conditionality was that the state should roll back from society and leave the provision of certain basic services to the private sector deemed to be more efficient.²⁵ It is worthy of note that all countries that adopted SAPs became even much poorer²⁶ but more importantly the reforms opened up African economies for much greater role by trans-national corporations (TNCs).

²³ See for example The Report of Presidential Commission that studied establishment of One party state in Tanganyika, 1964. The Commission noted, *inter-alia*, that the insertion of Bill of Rights into the Constitution maybe disruptive for the uphill task of nation- building, Unpublished Government Paper 1965.

²⁴ Thandika Mkandawire and Charles C. Soludo, *Our Continent, our Future: African Perspectives on Structural Adjustment*, Codesria 1999, at 6

²⁵ See Generally Derik MacCuish, Report of Halifax Initiative Coalition, water, Land and Labour: The Impact of Forced Privatization in Vulnerable Communities, 2004.

²⁶ By Mid 1980s almost all the countries in Sub Saharan Africa had been compelled to adopt the SAPs. Mkandawire and Soludo identified three main typologies of SAPs that the countries have carried out. They classified countries like Ghana, Kenya Malawi, Tanzania, and Zambia as intensely adjusted countries. In this category they showed with data that poverty increased from 56% in 1965 to 62.4 % in 1988. In the other category referred to as adjusting countries made up of Gabon, The Gambia and Mali, in this group poverty decreased from 65.8% in 1965 to 43.3% in 1988. Source: T. Mkandawire and . C. Soludo, *supra* note 24 at 71.

The role of TNCs in African political economy is as old as the post-colonial African states themselves. In fact in some instances, they preceded the creation of the very states themselves. In more recent years, they have become very active in the extractive industry with implications for ECOSOCR. The IMF and World Bank policies of liberalization in the last 15 years or so made extractive industries very central in the development strategies of many African countries. The implementation of SAPs became contingent upon export of primary resources from extractive industry.

In this context, many African countries have amended their mining codes and regulations so as to facilitate investment²⁷ in the resource extraction industry, with mining and oil sectors dominating. Around 50 % of their exports are still made up of primary products.²⁸ Several TNCs involved in the extractive industry are bigger (in terms of turn over, capital and resources) and more powerful than most African states which are therefore less autonomous in charting their own paths of economic development. This also impacts negatively on the human rights practices of African states.

There have been wars related to resource extraction in both mining and oil sectors leading to internal displacements and violations that accompany it, such as right to education. During times of displacement, the right to education is difficult to exercise because of absence of schools in the relocated areas. A 2008 report on the mining extractive sector in Ghana chronicled serious violations of human rights generally and ECOSOCR in particular.²⁹ The report recounted cases of torture, unlawful detention, assault and battery carried out by private security companies and state security forces against people who were viewed as interfering with the mining of the companies. Public protest against the mining companies was and still is met with violent suppression.

²⁷ Africa's Blessing –*Africa's Curse*, The legacy of Resource Extraction in Africa, Report by KAIROS Canada and Third World Network, TWN, Ghana., undated, at 5.

²⁸ *Ibid* at 8.

²⁹ The State of Human Rights in the Mining Communities in Ghana, Report of Ghanaian Commission on Human Rights & Administrative Justice, CHRAJ, March 2008.

Community and individual rights are violated in course of the operations of the mining companies. The study identified several violations of human rights, including the destruction of properties and sources of livelihood. The communities in the mining areas complain about the fact that their land is appropriated without compensation and this affects their livelihood such as farms, pollution of waters, which in turn affect river fishing. There are several diseases associated with mining, including skin diseases such as tuberculosis, air pollution dizziness, malaria from mosquito-infested stagnant water.³⁰ The destruction of land in farming communities where these intensive mining takes place results in unemployment since the youth in the absence of land for cultivation are rendered jobless.³¹

The situation in Sierra Leone is even more telling of the negative effects of mining on the rights of individuals and the collective rights of the communities. There is a national consensus that the mining industry fuelled the eleven year protracted hostilities that the country experienced.³² Residents in mining towns were often evicted from their land and properties to make way for the mining of newfound minerals. When new mineral discoveries are made, areas of deposits that are near schools are dynamited, during which period schools are closed down for the duration of the exercise.³³ With intensive mining, more agricultural lands are taken over for mining or are destroyed thereby rendering the residents, especially the youth, unemployed which in turn creates its own social dynamics including prostitution, drug abuse, and crime. It was a good number of such unemployed youth who were readily recruited by the armed insurgents during the years of hostilities.³⁴

³⁰ *Ibid* p 19-23.

³¹ *Ibid*

³² See Abu Braimah, *The Mining Sector and Human Rights Violations in Sierra Leone: A National Struggle*, An unpublished paper of Network for Movement for Justice and Development (NMJD), 2004.

³³ *Ibid at* 8

³⁴ *Ibid at* 11

Resistance to this state of affairs is often met with police brutalities and that of personnel of private security companies. In the case of Sierra Leone high profile private security companies like Sandline and Executive Outcomes were implicated in a number of human rights cases³⁵.

The extractive oil industry in the rest of Africa presents a similar pattern of human rights violations by trans-national corporations on their own or in collaboration with the host governments. The case of Niger Delta in Nigeria typifies this state of affairs. Shell's extraction of oil, in collaboration with the Nigerian Government, dates back to 1956. The region accounts for 50% of all the oil in the country. Oil has been so central to the political economy of Nigeria. Oil is such a strategic national commodity that the civil war that took place between 1967 and 1970 is seen by scholars as mainly an attempt to regain the oil fields from the Biafra secessionist.³⁶ Ecological damage and pollution of environment are some of the common features of the operations of Shell in the Niger Delta Region. This has given birth to the destruction of livelihoods such as access to water, fish and land for farming. Shell has exhibited so much power in the region which has been aptly captured in this sentence: "nothing is allowed to stand in Shell's way, not trees, not swamps, not beasts not man."³⁷ There are about 890 production wells in the Niger Delta of which there are about 15 spills each year polluting both land and sea.³⁸ In a town like Okoroba, families numbering about 6000 lost their food and cash crops after Shell dredging passed through the communities.³⁹

Shell's activities gained notoriety after the execution of Ken Sero Wiwa, an environmental activist from the Ogoni community of the Niger Delta region. Since then, the violations have been exposed to world attention. Violations of rights such as people's rights to food and land through forcible eviction with little or no compensation, and diseases caused by gas flares and emissions have all become a commonplace practice. These acts lead to resistance from the communities, often met by Shell, in connivance with the government security forces, with brutalities.

³⁵ Abu Braimah *supra* note 32 at 15

³⁶ Okonta I, Douglas Oronto, *Where Vultures Feast. Shell Human Rights and Oil*, Verso, 2003

³⁷ *Ibid* at XI

³⁸ *Ibid* at 66

³⁹ *Ibid* at 82

Between 1993 and 1996 Shell used its own police to detain and beat up protesters. There were some credible allegations that Shell was paying allowances of Nigerian soldiers.⁴⁰

In all recounted instances of violations resulting from the extractive sectors and World Bank and IMF policies, women bore much more of the brunt of the violations.

It would appear that SAPs were the first phase that prepared the way for globalization in peripheral countries such as Africa. Real globalization though it needs to be stated had started in 1900s when all peripheral economies were integrated into the world global trading system, noting pointedly that the main feature of globalisation is the diminution of the ability of peripheral countries to construct economic development for their countries.⁴¹

The IMF, the World Bank, and TNCs, have shown themselves to be main agents of globalisation exercising enormous *de facto* powers over states in Africa as elsewhere, dictating policies to be pursued. J. Stiglitz, a former Vice-President of the World Bank, illustrates with specific examples from African countries, such as Ethiopia, to show how any African or developing country that attempted to adopt any alternative strategy without the approval of IMF met the wrath of the Bretton Wood institutions. The states are therefore dictated to on what to do.⁴² There are instances that in the agreements with the countries, provisions are inserted directing the parliament, of an otherwise sovereign country, as to what laws need to be passed and by the same token those to be repealed.⁴³

⁴⁰ Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, Jan 1999, <http://www.hrw.org/reports/199/Nigeria/index/htm> last visited October 16, 2006.

⁴¹ For such insights see for eg Walden Bello, *Deglobalization: Ideas for A New World Economy*, Zed Books Ltd, 2004.

⁴² J. Stiglitz, *Globalization and Its Discontent*, Penguin Books, 2002, at 30-32

⁴³ *Ibid* at 44

Non compliance has several consequences including denial of assistance by certain donor countries and even access to private capital market. Thus, in this era of globalization the choices of African states, in terms of development models, are limited, if any at all, and the space for autonomous decision-making as regards economy, politics, and even culture, are constrained. The issue that comes up often is whether or not giving the implications of SAPs policies and the conduct of some TNCs, why the State do not pursue other development options that could be protective of ECOSOCR. In the so-called globalized world the options states have are increasingly being constrained in terms of choices they have as regards economic policies, political systems, and we may dare add, in terms of security.⁴⁴

Generally the home governments of these TNCs give considerable support to the companies in their dealings with the host countries. The strategies used include, enlisting support of their own governments, embassies, trade delegations, professional lobbying voices including the media.⁴⁵ A telling example in recent times is when pharmaceutical corporations in Europe and the US waged a campaign and openly threatened countries that made drugs cheaper and affordable. South Africa is one such case in point. It passed medical laws in 1997 to make medicine cheap and also allow companies to compete in terms of procurement of drugs. Because of its human rights sensitive policy, South Africa was subjected to threats.⁴⁶

⁴⁴ There is a general belief that some TNCs have the support of their home governments, who are often in the North or the West, and do have preponderant power in terms of economic resources and military power, and that power could be brought to bear in certain instances when a corporation viewed as serving a particular national interest is under some form of threat from peripheral countries in Africa or elsewhere. Former Defence Secretary, William Cohen, is on record to have remarked to reporters prior to a speech he gave at Microsoft Corporation in Seattle that “ the prosperity that companies like Microsoft now enjoy could not occur without having the strong Military that we have “. Countries in Africa or the South are all too often aware of this reality and as such do not resist these policies and some of the operations of TNCs. See Karentalbot, “Backing up Globalisation with Military Might”, Cover Action Quarterly, Fall- Winter 1999.

⁴⁵ Robert J. Delehunty, “Federalism Beyond the Waters Edge: State Procurement, Sanctions and Foreign Affairs”, *37Stanford Journal International law* Vol 1,35,2001

⁴⁶ Peter Montaque, “Corporate Right vs Human Right”, *New Renaissance Magazine* visited on 27/05/05 at <http://www.ru.org/93montaque.ht.wl>.

In extreme cases companies have been involved in the politics of some African countries trying to determine who the rulers should be or ousting a government they feel is not favourable to them.⁴⁷ From what has been presented, the average African state is clearly challenged in terms of the exercise of its authority within its jurisdiction and therefore laying claims to sovereignty may even be anachronistic.⁴⁸ The issue of state sovereignty has been interrogated by scholars in light of the emerging role of NSAs within the respective countries. After analysing these situations, Walker and Mendlovitz noted:

no longer can states pretend to be autonomous...the most important forces that affect peoples lives are global in scale and consequence. Even the most powerful states recognise serious global constraints on their capacity to affirm their own national interests above all else...the organisation of political life within fragmented states appears to be increasingly inconsistent with emerging realities”⁴⁹

2 Problem Statement and Research Questions

Concerned about violations of human rights by NSAs, scholars, activists and the UN, as the foremost inter-governmental body, have in recent years attempted to identify norms that could be relied upon to hold NSAs accountable for violations of human rights, including ECOSOCR.⁵⁰ Whereas the identified norms have contributed to making NSAs aware of their social responsibilities, a careful examination of the norms shows that they are generally voluntary in nature and therefore not legally binding. Nor have they brought about the desired regulation on the conduct of NSAs⁵¹ of adhering to standards of international human rights law.

⁴⁷ [Http://www.global.orgpress release/display2id-234](http://www.global.orgpress release/display2id-234) visited on 19/10/06

⁴⁸ Chris Jochnick, *Confronting The Impunity of Non-State Actors: New Field for Promotion of Human Rights*, 21 *Human Rights Quarterly* 56, 1999, at 63

⁴⁹ R.B.J Walker and Sole.H Mendlovitz, *Interrogating States Sovereignty in Contending Sovereignities: Redefining Political Community* in: R.B.J Walker and Sole H Mendlovitz in (eds). 1990 cited in H. Steiner and Phillip Alston: *International Human Rights Law in Context*, Oxford University Press, 1996 at 151.

⁵⁰ See for example Report of International Council on Human Rights Policy titled: *Beyond Voluntarism, Human Rights and Developing International Legal Obligations of Companies*, 2002.

⁵¹ See UN Sub- Commission on Promotion and Protection of Human Rights, Sessional Working Group on Methods and Activities of Trans national Corporations and other Enterprises, stated in its report of 2002 that: “ the use of an entirely voluntary system of adoption and implementation of human *rights* Code of Conduct , however is not enough. Voluntary principles have no mechanism for enforcement

Other norms identified are only restatement of existing state based human right instruments, which are not binding on NSAs directly.⁵² What international human rights law provides for as established principle⁵³ is rather states' obligations to prevent private and/or third parties such as NSAs from violating human rights. The state is under the obligation to protect or due diligence.⁵⁴ This legal principle assumes that once there is willingness on its part, the state as a sovereign entity will be able to regulate the activities of third parties such as NSAs to ensure that they conform to international human rights law.

However, NSAs are not bound to protect human rights under international law. Nor can they be held directly responsible for human rights violations. Given the fact that the state is the entity that is bound to protect human rights within its jurisdiction, this study argues that in the case of peripheral African states even when there is a political willingness the state may be unable in most instances to rely on domestic or international law to hold powerful NSAs accountable for human rights violations.⁵⁵ In this era of triumphing globalization, there is urgent need to devise an international legal human rights regime that addresses the challenges posed by NSAs to the protection of human rights. A paradigm shift⁵⁶ is therefore required to make them accountable for the violation of human and peoples' rights, especially ECOSOCR.

mechanisms, they may be adopted by Trans national corporations and other business enterprises for public relations purpose and have no real impact on business behaviour, and they may reinforce corporate self governance and hinder efforts to create outside checks and balances"; See also Sigrun Skogly, *The Human Rights Obligations of the World Bank and IMF*, Cavendish Publishing Ltd, at193.

⁵² See for example Secretary –General Kofi Annan's address at the World Economic Forum in Davos, Switzerland, 1991, UN DoC, SG/SM/6448 1999.

⁵³ Asbjorn Eide, Special Rapporteur, *Right to Adequate Food as a Human Right*, UN Publications Sales, no: E 89 X1V2.

⁵⁴ *Velasquez Rodriguez. v. Honduras*, Judgement of the Inter – American Court supra note 11 at para 182.

⁵⁵ For very good analysis of the complexities of this relationship and the nuances see J. Oloka – Onyango and Deepika Uagama, *Supra* note 13.

⁵⁶ Paradigm shift is here used in the sense as developed by Thomas Kuhn, which means, *inter alia*, as a change from one thinking to another which is revolutionary, transformative, a sort of metamorphosis. As such a major change in thought patterns radical in character whereby former ways of thinking or organizing is radically different replacing the former. In sum almost a fundamental change of world view. For in depth discussion see Thomas Kuhn, *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago, 2nd Ed, 1970,

The study calls for an investigation in a number of research questions:

- Does contemporary international human rights law address the challenges posed by NSAs to protection of ECOSOCR in Africa?
- Are there existing or evolving norms that are legally binding which could be used to hold NSAs such as the IMF, the World Bank, and TNCs accountable for violations of ECOSOCR? If not, what are the emerging discourses, trends, scholarly thoughts, expert opinion, and recommendations on how to address this lacuna in international human rights law?
- Do the European and Inter-American regional systems and national human rights legal regimes offer any insights or legal principles of holding NSAs liable for violations of ECOSOCR?
- Does the changing role of the state because some of its functions are being taken over by NSAs mean a corresponding change in legal obligations under international human rights law?
- What is the status of ECOSOCR under the African Charter on Human and Peoples' Rights (ACHPR)?
- Does the ACHPR and the jurisprudence thereof provide for norms and principles that could be used to hold NSAs legally responsible for their violation of human rights? Can the national law and jurisprudence of some African countries held?

3 Assumptions and Hypotheses

This study makes certain assumptions. It is assumed that the international system is divided into two broad categories of dominant centres and peripheries. This relationship between the centres and periphery is asymmetrical, and it is historically determined with its own dynamics. The centre has power, technology, and resources that make it possible for it to effect changes in the periphery such as Africa. Africa states makes certain decisions that they would otherwise not have made but for the powers of NSAs from Northern countries.

The Centre is also the generator of norms, such as international human rights law, of which the periphery is more often than not recipients of the norms so generated by the north, including some of those that purport to be universal or international. The centre deals with the periphery through foreign policy formulation, with national interests of the centre being the determining factor in this relationship. There is a hierarchy of national interests. The latter are topped by issues of national security. Then follow economic interests. “Moral” issues such as human rights are often marginalised. Security or economic interests tend to prevail whenever they conflict with human rights and international law principles.

The fact that the international system is increasingly becoming less state centric has not necessarily altered the essence and nature of this relationship between the centre and periphery, this is because the main NSAs have the powerful dominant countries as their parent countries that back them when dealing with states generally but more so with peripheral weak states like those in Africa.

It needs also to be borne in mind that the supranational bodies such as the IMF, World Bank, UN, are created by dominant centre states that have weighty votes when it comes to decision-making through multilateralism. International law, in terms of its formulation or interpretation, has to conform with some level of national interest of the dominant hegemonic states lest their cooperation and financial support may not be secured. In fact NSAs do enjoy the support of the parent countries, the same dominant centre countries. Common to all these entities is the ideology of market mechanism, private sector and free trade.⁵⁷

The conceptualisation of contemporary international human rights law was generally informed by European experiences of state formation, nation-building and sovereignty. These are not necessarily the experience of African societies⁵⁸.

Another key assumption of this study is that it is not likely that within the foreseeable future states in Africa as elsewhere will negotiate and adopt a new multilateral human rights treaty that will clearly make NSAs liable for violations of ECOSOCR. So, the inquiry for a legal basis to be employed against NSAs is carried out by scrutinising the existing international and regional human rights legal systems.

⁵⁷ See generally Johan Galtung, *A Structural Theory of Imperialism*, Journal of Peace Research, Vol 8, no. 2, 1971.

⁵⁸ Abdulahi A. An-Naim, *The Possibilities and Constraints of legal Protection of Human Rights under constitutions of African Countries*, in: Abdulahi A. An-Naim, *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa*, Interights, Afronet, and GTZ, 1999.

The concept of state in Africa and its historical development is markedly different from that of the European experience of state formation and the typology itself.⁵⁹ The evolution of the European state has been governed by the ideology of liberalism. This ideology makes a sharp and fast distinction between state and society; the public and the private realms; the formal and informal spheres; and between the state and non-state actors. The African philosophy of law and the jurisprudence, on the other hand, do not make these sharp and fast distinctions. Nor are rights and duties exercised by separate entities within the society. In African societies what could be referred to NSAs, for example, are right bearers just as they are duty holders at the same time.

Accordingly, the ACHPR as the regional human rights instrument that embodies the continental framework and conception of human rights if properly interpreted could be employed to hold NSAs responsible for the violation of ECOSOCR. This is because of Africa's conception and philosophy of human rights does not make the same distinctions as the European experience recounted. So, NSAs could be held liable for violation of ECOSOCR if the letter and spirit of the African Charter are properly interpreted.

⁵⁹ Makau wa Mutua, "The Banjul Charter and The African Cultural Finger print: An Evaluation of The Language of Duties", *Virginia Journal of International Law*, Winter , 1995; see also Rachel Murray, *The African Commission on Human and Peoples' Rights and International law*, Hart Publishing Oxford, 2000, pp78, 119-121, and Andre Mbata B. Mangu "Democracy, African Intellectuals and African Renaissance" *International Journal of African Renaissance Studies*, Vol 1, Number 1,2006, at 147-163.

4 Research Objectives and Scope of the Study

4.1 Research Objectives

This following are the main objectives of this study:

- To rigorously examine international human rights law, especially under the UN system, to find out whether there is any authority that may be relied upon to hold NSAs accountable for violation of ECOSOCR.
- To study trends in the scholarly discourse and legal expert opinion in relation to NSAs' legal accountability for human rights violations.
- To attempt to demonstrate, with reference to relevant sources, that the operations of the IMF, World Bank and some TNCs do impact adversely upon the enjoyment of ECOSOCR in Africa.
- To explore how globalisation has made NSAs key players in Africa involved in work that impact on individual and peoples' ECOSOCR.
- To carefully scrutinize the provisions of the ACHPR and the decisions of the African Commission with a view to ascertaining any legal or jurisprudential basis for holding NSAs legally responsible for violation of ECOSOCR.
- In view of the impact of NSAs on human rights in Africa, to make the case for a paradigm shift whereby NSAs would be held liable for human rights violations either individually or jointly with host governments.
- To analyse the national legal systems of some African states where human rights law applies horizontally and can thus be used to hold NSAs liable for human rights violations under domestic law or under the African regional human rights system.

4.2 Scope of the Study

Cognisant of the fact that there are several typologies and meanings of NSAs, this study only deals with the two Bretton Woods institutions, namely the IMF and the World Bank, and with the TNCs, especially with those that operate in the extractive mining and oil industry.

The IMF and the World Bank as multilateral financial institutions and TNCs operate throughout the world where their activities impact on individual and collective ECOSOCR. This study is mainly concerned with the violation of ECOSOCR by NSAs in Africa based on the lessons drawn from some African countries where NSAs operate. The cases mainly referred to and the data used are those that relate to the major objective of the study which is to ascertain whether international human rights law can be relied upon to hold NSAs liable for violations of ECOSOCR.

5 Literature Review

With the ushering in of the New World Order, after the fall of the Berlin Wall, in the 1990s, the world witnessed a new form of trans-national actors at the global stage. Their new impact prompted scholars to pay more attention to their role in contributing to violation of human rights generally, and ECOSOCR in particular.

NSAs are not new to the global system but they have assumed a new important and visible role within the global political economic system under the banner of the neo liberal ideology that has become dominant since after the fall of Berlin Wall. Neo-liberalism requires the state to retreat or roll back from society and allow the market and its forces which are deemed much more efficient in running and managing the deregulated economies and related state functions.

This re-assertion of neo-liberalism has brought about a renewed role of NSAs on the global political landscape thereby attracting the attention of scholars in terms of its implications for the protection of human rights. Until recently, the issue of protection of ECOSOCR was the subject of much ideological and sometimes dogmatic debate and practice rather than merely one of availability or lack of resources.⁶⁰ Earlier literature focussed on SAPs and the impact of their conditionalities on their negative impact on ECOSOCR.⁶¹

Andrew Clapham⁶² has been one of the foremost scholars to articulate the role of NSAs and human rights violations. He takes as his point of departure that it is the state that has legal responsibility for human rights violations, but nevertheless argues forcefully that both NSAs and the state to contribute to human rights violations. In his view, NSAs violations take place within the private sphere whilst violations by the state take place in public realm. He strongly critiques the held view and concept that it is the state that individuals need to be protected from, in terms of their rights. In his view, some NSAs have in certain instances much more greater responsibility for violations than the states, depending upon their power and the role they play, and therefore there is need to protect people from the negative impact of NSAs. He shows, using the example of TNCs, that NSAs are complicit in certain human rights violations.⁶³

⁶⁰ See Nana K. A Busia and Bibiane Mbaye, "Filing Communications on Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights (Banjul Charter)" *East African Journal Peace and Human Rights* 188, 192-193 (1997)

⁶¹ See T. Mkandawire and C. Soludo *supra* note 24 see also Asad Ismi, *Improving a Continent: The World Bank and IMF in Africa*, commissioned by Halifax Initiative coalition, 2004; Danilo Turk, Special Rapporteur, *The Realization of Economic, Social and Cultural Rights*, E/UN4/Sub 2/1991/17, at 57-58; Fantu Cheru, *Effects of Structural Adjustment Policies on Full enjoyment of Human Rights*, E/CN 4/1999/50.

⁶² See generally Andrew Clapham *supra* note 4

⁶³ *Ibid*

In Africa, as in other developing countries, the notion that companies are more responsible for violations is a view endorsed also by August Reinisch.⁶⁴ Reinisch takes the view that in the contemporary world system the state may even be on retreat with a lot of space or power ceded out to TNCs, a view equally espoused by Ratia Kapur⁶⁵. So, if the state has ceded out more space to NSAs then it stands to reason that NSAs should have much higher level of responsibility for the violations that ensue within contemporary states where they wield enormous power. Celia Wells and Juanita Ellias examined more critically the violations of human rights by NSAs and attempted to show that human rights violations by TNCs mainly occur in the manufacturing sector in the form of practices such as payment of low wages, poor working conditions, suppression of trade unions and poor labour standards carried out by NSAs. In their view, states and NSAs are equally culpable.⁶⁶

It would be worthwhile if scholars could have also interrogated further to ascertain if between the states in Africa and the NSAs there could be varying levels of legal culpability.

⁶⁴ August Reinisch, "The Changing International Legal Framework for Dealing with Non State Actors" in: Philip Alston, *supra* note 4 at 37-89.

⁶⁵ Ratia Kapur, "From Human Tragedy to Human Right: Multi National Corporate Accountability for Human Rights", *10 Boston College Third World, L.J.*, 1990

⁶⁶ Celia Wells and Juanita Elias, "Catching the Conscience of the King; Corporate Players on the International Stage" in Phillip Alston *supra* note 1.

Olivier de Schutter⁶⁷ added a very interesting dimension to the discourse on the violation of ECOSOCR by NSAs. He pointed out that TNCs violated rights through their subsidiaries and absolved themselves from responsibility because each of their subsidiaries possessed different legal personalities. In a sense, this amounts to manipulation of the law so as to escape any legal responsibility. Olivier also argued that host governments were unable to control the TNCs, either because of lack of interest or inability to do so. As a result the TNCs cleverly moved capital between various countries to create a flexible structure and convey the impression that each of the subsidiaries was independent of the parent company. In the absence of a political will or the inability of the developing countries to subject NSAs to national and international human rights standards, the host countries are made to appear as the violators of rights when in fact the violations to all intents and purposes are committed by NSAs.

The desperation for foreign direct investment makes it all the more difficult for the host country to insist on the protection of ECOSOCR.⁶⁸

It is clear that ECOSOCR and other human rights are violated by NSAs which could therefore also be held accountable. However, scholars have so far failed to reflect on the legal basis either to make them accountable or to apportion legal responsibility between them and states when there is complicity among them in the violation of ECOSOCR of the people within the jurisdiction of a state.

⁶⁷ Oliver De Schutter, “The Accountability of Multinationals for Human Rights Violations in European Law” in: Philip Alston *supra* note 1.at 227- 314.

⁶⁸ *Ibid*

According to Chris Jochnik⁶⁹ impunity committed by the NSAs needs to be confronted if human rights protection is to be improved worldwide. As his point of departure, he criticised the undue focus on the state as the sole addressee and violator of human rights when actors such as the NSAs are also involved and should be held to account. To him, such an approach does not reflect the realities of a globalised world where the state authority has declined whilst NSAs like TNCs have become more powerful and also do violate human rights even more than states in this era dominated by neo-liberalism and globalisation. Chris Jochnik analysis presents a very useful analytical understanding of the problem of this study although his analysis stops short of making a case for a paradigm shift in international human rights law and human rights advocacy.

Rachel Murray⁷⁰ also took on the liberal ideology and registered her concern about how it defines the role of the state in the market place by requiring the state to deregulate and allow the market forces, including NSAs, to play an unbridled role which, in her view, results in human rights violations. She argued that with the possible exception of the right to education, all other categories of ECOSOCR were generally violated by NSAs whereas civil and political rights are violated by the state and its agents. Nevertheless, there are no binding rules for NSAs to account for their violation of ECOSOCR.

The frustration with the absence of binding legal norms at the international level for holding NSAs accountable has prompted a good number of scholars to not just analyse the problem but re-visit international human rights law with the view to identifying principles and giving expert opinion that could possibly be relied upon to hold NSAs accountable for the violations.

⁶⁹ Chris Jochnik, "Confronting the Impunity of Non State Actors: New Fields for the Promotion of Human Rights", *Human Rights Quarterly* number 21, 1999, at 56-79.

⁷⁰ Rachel Murray, *supra* note 59.

According to a report of the International Council on Human Rights⁷¹ entitled “Beyond Voluntarism,” there is a basis in international human rights law for extending the legal obligations to NSAs, such as companies. Two main principles seem to have been canvassed. First is the due diligence principle that imposes obligations on states to protect rights against third parties or private entities. Second is the principle according to which companies can be held accountable for certain human rights violations. Unfortunately, these principles only amount to indirect accountability for NSAs as the primary obligation to protect human rights remains on the state.

Further attempt was made in the same report to suggest that international law could be used to hold NSAs directly for human rights violations. The International Council on Human Rights relied on the UDHR and other UN human rights treaties to substantiate this claim. The Council cited the preamble to the UDHR, which urged “every individual and every organ of society” to “strive through teaching and education to promote respect for these rights and freedoms” enshrined in the UDHR considered “a common standard of achievement for all peoples and all nations”⁷² Almost all UN human rights treaties referred to the UDHR in their respective preambles. In the words of Louis Henken,⁷³ the concept of “every individual and organ of society” would seem to suggest that no one is excluded, including companies. The preamble, read together with article 28, calls for a social and international order wherein rights and freedoms in the declaration are to be realised. Article 29 also imposes duty on “*everyone to the community in which alone the free and full development of his personality is possible.*” This provision, as contended above, would seem to impose a duty on both entities that belong to the private sphere and public realms not to violate the rights stipulated in the UDHR.

⁷¹ See Report of International Council on Human Rights, *supra* note 50.

⁷² *Ibid*

⁷³ See Louis Henkin, “The Universal Declaration at 50 and Challenge of Global Markets” 25 *Brooklyn JIL* 17, 1999.

Concerned about the same problem of accountability of NSAs for human rights violations, the UN held in a document published in 2003⁷⁴ that states do have primary responsibilities to protect human rights but TNCs as “organs of society” were also responsible for the promotion of human rights as set forth in the UDHR.

Michael Addo stressed that TNCs could themselves be victims and could therefore have themselves to exercise some duties to prevent the violations of rights.⁷⁵

In a resolution on 2003/16 of 13th August 2003, the UN came to the conclusion that there was some form of soft law that could bind NSAs but clearly no clear legal remedy at the international level in case NSAs violated ECOSOCR. The UN was categorical that the human rights norms it had articulated to guide the operations of TNCs were useful and contained important ideas although, it conceded, they had no legal binding effect⁷⁶.

John Ruggie argued that human rights norms purporting to be directly applicable to TNCs are only a re-statement of already existing legal principles that are applicable to states and therefore would have no authoritative basis in international law. This is because to make such norms legally binding on states requires a different procedure. In fact, Ruggie raises doubts as to whether the human rights norms articulated by the UN for TNCs could even pass for a definition of soft law.⁷⁷

In the search for legal norms and code of conduct to regulate NSAs and make them accountable for the violation of ECOSOCR, the Bretton Wood Institutions ou IFIS, namely the IMF and the World Bank have received little attention as compared to big TNCs. And yet, these IFIs are also involved in the violation of ECOSOCR in developing countries, especially those from the African continent.

⁷⁴ E/cn.4/sub.2/2003/12/rev.2

⁷⁵ Michael K. Addo, “The Corporation as a Victim of Human Rights Violation” in: M. Addo, (ed) *Human rights Standards and the Responsibility of Transnational Corporations* Kluwer Law International, 1999, at 187-196.

⁷⁶ John Ruggie, *supra* note 17 at para 56

⁷⁷ *Ibid* para 60

All too often they have taken refuge in the fact that they are UN entities regulated by UN articles of agreements as specialised agencies focusing on its mandate of economic development. Responding to the clarion call for the Bank and the IMF to adhere to human rights standards, the legal counsel to the Bank stated:

each of these organisations is a juridical body, the legal capacity of which its confined by its respective mandate as defined in its charter...It does not belittle any international organisation of its Charter If its charter specifies its specialised functions in a manner that excludes certain aspects of human rights...it demeans the organisation to ignore its Charter and act outside its legal powers. This is simply a matter of specialisation of international organisation.⁷⁸

Sigrun Skogly⁷⁹ contended that the Bank and the Fund being UN specialised bodies are subject of international law, because they are created by the UN Charter. They are therefore bound to respect the principles of the UN Charter as provided for by Article 63 and the principal purpose of the UN which is respect for human rights as provided for in Article 1(3) of the Charter. However, after analysing considerable authority on public international law and the different levels of obligation in relation to ECOSOCR, namely the obligations to respect, protect and fulfil, Sigrun concluded that the Bretton Wood Institutions could only have an obligation to respect but certainly no obligation as such to protect or fulfil because these are obligations that are imposed on the state. In sum, there was no legal obligation that she could locate to bind them, thus taking us back to the traditional legal framework according to which only the state could violate human rights and therefore be held responsible in international human rights law.

⁷⁸ Cited in: Annual Report of Special Rapporteur on Human Rights on the Right to Education, E/cn.4/2001/para52

⁷⁹ Sigrun Skogly, *supra* note 51 at 193

Thus far it appears that the only avenue for re-dress, which is close to remedy, is the concept of independent inspection panel which allows groups of individuals whose material rights or interests have been severally affected by the Bank projects to register a written complaint before the project is completed. The Bank's inspection panel then investigates if the alleged adverse effects have arisen out of an action or on mission by the Bank or significantly as a result of the Bank following its own procedures.⁸⁰ Such a process of complaint is likely to be shrouded in the mystery of the technical jargons and technicalities, which will make it inaccessible as a mechanism to ordinary persons whose rights maybe violated by the Bank. In the case of Africa, as stressed earlier, it is more the impact of the decisions that are imposed on the governments which results in the violation of ECOSOCR.

The conclusion arrived at by many scholars and experts is that there is no avenue at the international level where redress for alleged violations of ECOSOCR by NSAs can be granted despite common agreement that they too violate human rights.

By attempting to make a paradigm shift from the dominant legal and expert discourse holding the state the only entity responsible for the violation of human rights, including ECOSOCR to a new one that would include NSAs, this study aims at contributing to the development of knowledge in international law and to a better protection of human rights in developing countries, especially those from Africa.

⁸⁰ Sanan Zia/Zarif, *The Lack of Responsibility of Multi national Companies, Oil Companies in the Proposed Chad-Cameroon Pipeline Liability for an Environmental Damage/nc-iucn Symposium*, University of Rotterdam, 2004, at 52

6 Relevance and Justification of the Study

The nature of contemporary global political economy is likely to remain altered for some time to come. It is therefore safe to speculate that NSAs are going to be dominant players in the international system, including in the African states, for a very long time to come. Therefore being able to hold them accountable for violations they commit will improve human rights regime in Africa.

ECOSOCR could help marginalized groups like women, youth, and peasants, to participate in the mainstream political and economic activities of their respective countries. This is because ECOSOCR empower people to participate in the political processes of a given African state. This will in turn deepen the democratic project, which has been underway on the continent since 1990s.

In addition the protection of ECOSOCR could contribute to the minimization of violent conflicts. All too often it is the inability of governments to satisfy the core minimum of ECOSOCR that lead to, *inter alia*, to the eruption of violent conflicts.

A good number of NSAs are more powerful than the average African state. This makes it impossible for these African states at the domestic level to use national laws, even when they do exist, to hold the NSAs accountable for the violations they commit within their respective jurisdiction. The relationship between the two entities (African states and NSAs) is one of asymmetry.

As Steiner and Alston correctly pointed out,

Governments are often loathe to take measures necessary to ensure complaints by trans-national cooperation especially in relation to labour markets: such matters are costly and perceived to be beyond the resources capabilities of governments in developing countries.⁸¹

⁸¹ Henry Steiner and Philip Alston, *International Human Rights Law in Context: Law, Politics, and Morals*, Oxford University Press, 2000, at 1349.

So, for African states with genuine commitment to human rights it will be a relief if pronouncements on violations by NSAs operating within their jurisdiction are made by an independent inter- governmental entity such as the African Commission on Human and Peoples Rights rather than by the states themselves. Equally, for NSAs that adhere to international human rights standards, such a legal regime that can hold them legally liable, will afford them the opportunity to prove their case and not be lumped together with other NSAs as human rights violators. This approach will also deprive some of the African states of the pretext they use that all violations are externally driven, in this case committed by NSAs. So, if a legal framework is to be found that binds both the state and NSAs then the two actors will be required to prove their case in respect of violations committed and possibly the levels of culpability.

As far back as the 1990s, Issa Shivji critiqued human rights activism in Africa as being parochial and “legalistic” in approach without making the necessary organic links to the bigger issues of development and self-determination on the continent.⁸²

The scope of African NGOs’ activism should be broadened to enable NGOs to make the requisite linkages between violations of ECOSOCR and the complex phenomena of globalisation and related issues of the role of trans-national NSAs. Contributing to such paradigm shift in human rights advocacy adds to the relevance of this study.

7 Research Methods and Sources of Data

Methods refer to the principles and procedures relied upon in a study.⁸³ The methodology of this study was informed by the theoretical and conceptual framework of international human rights law with emphasis on ECOSOCR and the legal principles of establishing violations of the rights in this category.

⁸² Issa Shivji, *The Concept of Human Rights in Africa*, CODESRIA Book Series, Dakar, 1989.

⁸³ See generally Charles Chatterjee, *Methods of Research in Law*, 2nd edition, Old Bailey Press, 2000.

This study was predominantly desktop research entailing a review of existing literature in the form of books, journals, UN reports, commentaries, and expert opinion, on the legal issues examined. Data and other sources were relied upon in an attempt of establishing ECOSOCR violations by NSAs. Data on the work of extractive industry in the mining and oil sectors in Africa were also employed in trying to establish ECOSOCR violations resulting from the work of TNCs operating in these sectors.

Gathering general information and data relating to these sectors was faced with some challenges in terms establishing the trends that could constitute protection or violation. A reason could be that establishing relationship between practices of TNCs in the extractive sector and violation of ECOSOCR is still relatively new field of inquiry. Attempting to show ECOSOCR violations was another challenge.

No clear consensus has as yet emerged amongst scholars and activists as to when a violation of ECOSOCR has occurred. Reference was made to the International Covenant on Economic, Social and Cultural Rights (ICESCR), to experts' opinion as contained in the Limburg Principles⁸⁴ and to the Maastricht Guidelines on Violations of ECOSOCR⁸⁵.

Socio-economic data, useful as they are, as indicators, had to be supported by qualitative analysis to make the study more meaningful. UN human rights instruments and general comments made thereof by relevant treaty bodies were critically examined with the view to ascertaining their provisions and the emerging jurisprudence that could be relied upon for holding NSAs legally liable for violations of ECOSOCR. The provisions of the ACHPR as the primary source of the African human rights system and the decisions of the African Commission were carefully examined in light of the objectives of this study.

⁸⁴ Limburg Principles published in: UN Doc.E/CN.4/1987/17.annex reprinted in *9Human Rights Quarterly* 122-35(1987) and ICJ rev dec 1986, at 43-45.

⁸⁵ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol 20, 1998, at 691-705.

Judgements and decisions of other regional human rights systems and selected African states were examined. Internet sources were also visited which proved an invaluable source of information and data. In sum, the study relied upon quantitative and secondary sources or data.

8 Work Division

In order to systematically address the main objective of this study which is an inquiry into the legal basis for holding NSAs liable and accountable for their violations of ECOSOCR in Africa, this dissertation has been divided into four chapters.

Chapter 1 is the general introduction to the study. It discusses the background and highlights the research problem and questions, assumptions and hypotheses, objectives, scope, methods, relevance, methodology, and division of the study.

Chapter 2 identifies the existing operative international human rights law on ECOSOCR and the corresponding state obligations under the UN, the European and the Inter-American systems and the domestic law of some foreign countries.

Chapter 3 deals with the status of NSAs and the protection of ECOSOCR in the ACHPR, the jurisprudence of the African Commission and the application of the Bill of Rights to NSAs under the domestic law of some selected African countries, namely Ghana and South Africa.

Chapter 4 concludes the study by highlighting its main findings and making recommendations for a paradigm shift in the discourse and the jurisprudence with regard to the accountability for NSAs for violation of ECOSOCR in developing countries, especially those from Africa.

CHAPTER 2 UNITED NATIONS NORMATIVE STANDARDS, AMERICAN AND EUROPEAN JURISPRUDENCE AND DOMESTIC LAW ON NON-STATE ACTORS

1 Introduction

This Chapter identifies international human rights law that already exists on the protection of ECOSOCR and the obligations that it generally imposes on states in relation to NSAs. It further examines the regional human rights law and jurisprudence under the European and American human rights systems as well as the domestic law of some countries to find out whether there are any binding or soft rules and principles that may be used to impose direct obligations on NSAs and make them account for violations of ECOSOCR.

2 United Nations Normative Standards and Protection of Human Rights by States and Non-State Actors

The preamble to the UN Charter reaffirmed the principles of human rights and human dignity of a person. Article 1 (3) states that the purpose of UN include the promotion of human rights without any form of distinction such as race, sex, language and religion. Articles 55 and 56 are more explicit in stating the *raison d'être*⁸⁶ of the UN. Prior to the creation of the UN and the adoption of the UN Charter, the cardinal principle of international law was sovereignty of the state and how such sovereign states related to each other. The way and manner a state treated its citizens were matters within the purview of its internal affairs.

⁸⁶Article 5 of the UN Charter states that: “with a view to the creation conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights as self-determination of peoples’, the United Nations shall promote.....Universal respect for , and observance of, human rights and fundamental freedoms for all without distinction as to race, sex and language or religion. Article 56 in the charter also provides that: “all members pledge themselves to take joint and separate action in corporation with the organisation for achievement of the purposes set forth in article 55”.

With introduction of international human rights law these principles changed radically. There was thus a fundamental paradigm shift in international law.

The UN Charter did not elaborate on the scope of the rights. Consequently, the Universal Declaration of Human Rights (UDHR) was adopted in 1948 in an attempt to spell out the scope and contents of the respective rights. Articles 3 to 21 deal with civil and political rights.⁸⁷ Articles 22 to 27 elaborate on economic, social and cultural rights,⁸⁸ whilst articles 28 to 30 state that everyone is entitled to an international order which makes the enjoyment of the rights proclaimed by the declaration. A person's duty to the community was also emphasised.

The UDHR was only a common "standard of achievement for peoples and nations." It did not constitute a binding piece of international law. A school of thought exist and argues that over years some of its provisions have acquired the status of customary international law⁸⁹.

Between 1948 and 1966, two human rights treaties were negotiated within the UN. Both were adopted in 1966 and entered into force in 1976. These two treaties were the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UDHR, the ICCPR and the ICESCR constitute what is commonly referred to as the International Bill of Rights, which is the framework of our modern human rights system. In its contemporary formulation, it is a package that several world governments negotiated and adopted on behalf of their societies and countries.⁹⁰

⁸⁷The Civil and Political rights included principle of non discrimination and equality; article 3 rights to life, liberty and security of a person; article 4, freedom from slavery or servitude and prohibition of slave trade; article 5, freedom from torture, cruel and inhuman and degrading treatment; article 6, equality before the law and others.

⁸⁸Economic, social and cultural rights included: right to social security; article 22, right to work and to free choice of employment; article 24, right to rest and leisure; article 25, right to standard of living adequate for health, well-being of a person and his family; article 26, right to education and others.

⁸⁹See for eg Alina Kaczorowska, *Public International Law*, Old Bailey press, 2002 at.257.

⁹⁰Asbjorn Eide, *Sovereignty and International Efforts to Realise Human Rights*. UN Published Paper presented at a Nobel Symposium, Oslo, 1988, at .5.

Other UN or regional human rights treaties⁹¹ are derived from the International Bill of Rights, as the core human rights normative framework. The other instruments focus on specific themes and regions of the world.

A consensus has now emerged that human rights are indivisible, inter-related, and inter-dependent⁹². Not only is this an agreement of normative structure but also the legal principles that underpin the categories of rights and even their practical application often overlap.

2.1 The International Covenant on Economic, Social and Cultural Rights: Obligations of States and Non-State Actors

The ICESCR provides for ECOSOCR, their content and scope as well as states' obligations in protecting them. In terms of Article 2(1) of the ICESCR, each state party to

present covenant undertakes to take steps, individually and through international assistance and corporation, especially economic and technical to the maximum of its available resources, with the view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures.

⁹¹These human rights treaties include the Convention on the elimination of all forms of racial discrimination(CERD), the Convention against Torture and other cruel, Inhuman or degrading Treatment or punishment (CAT); the Convention on the Elimination of all forms of Discrimination Against Women and its optional protocol on the Right of individual and group communications (CEDAW); the Convention on The Rights of the Child and its two optional protocols on sale of Children, Child Prostitution, and Child Pornography and on involvement of Children in Armed conflict(CRC); and the Convention on the Protection of Rights of all Migrant workers and Members of their families (CMW). Major regional human rights treaties are the African Charter on Human and Peoples' rights (ACHPR) (1981), the American Convention on Human Rights (AMCHR) (1969), and the European Convention for The Protection of Human Rights and Fundamental Freedoms (ECHR) (1950).

⁹² Vienna Declaration and Programme of Action, UN World Conference on Human Rights, June 1993, UN Doc.A/ Conf.157/124(Part 1) Art 5.

Key operative words in this article spelling out the obligation of states are: “progressive realisation to the maximum of a state’s available resources and through international assistance and corporation”.

General Comment number 3, 1990, elaborates on the nature of state parties’ obligations. In paragraph 2 states that each state party is to it to take steps meaning measures taken by the state within reasonable time. Paragraph 6 states that retrogressive measures are *prima facie* human rights violations. Paragraph 10, cautions state parties that the progressive implementation principle notwithstanding, there should be a minimum core obligation to ensure the satisfaction of the minimum essential levels of the rights. For example, in the case of right to health, there should be a primary health care.

According to article 16 state parties are to submit state reports showing how they are implementing their obligations. General Comment number 1 elaborates on the scope of state party reporting and paragraph 8 of the General Comments, states have to show the difficulties they encounter when implementing the rights. In all this, there is no mention of NSAs. In the manual spelling out the guidelines for state reporting, again there is no mention of violations by NSAs.⁹³ Generally, the obligation of states under the Covenant is defined at three separate but inter-related levels: obligation to respect, obligation to protect and obligation to fulfil.⁹⁴

⁹³ Philip Alston, *The International Covenant On Economic, Social and Cultural Rights in; Manual on Human Rights Reporting Under the Six Major International Human Rights Instruments*, UN Publications, New York 1991 at.39-76

⁹⁴ See generally, Asbjorn Eide, “Realisation of Social and Economic Rights and the Minimum Threshold Approach”, 10 *Hum. Rts. L.J* 38(1989)

The obligation to respect requires the state to refrain from interfering directly or indirectly in the enjoyment of economic, social and cultural rights. It thus protects the citizen from arbitrary interference with the enjoyment of any of the specific rights that belongs to this broad category of rights. On the other hand, the obligation to protect is an obligation upon the state to prevent third parties such as individuals and non-state actors including corporations and other entities from violating rights of persons living within their jurisdiction.

Finally, the obligation to fulfil constitutes a positive obligation upon states to embark upon measures of creating the enabling climate for the realisation of the rights provided for by the covenant. Such measures may include public expenditure earmarked for certain sectors that makes the right exercising.⁹⁵

From the preceding sections, it is clear that the state is the entity vested with the obligation of protecting the rights as provided for in Article 2(1) of the ICESCR. As part of its obligations, a state party should protect the rights of the people within its jurisdiction against their violation by third parties or private entities such as NSAs. This is confirmed by General Comment number 3 of the Committee on ECOSOCR, which deals with the nature of state parties' obligation.

⁹⁵ See generally Asbjorn Eide, Special Rapporteur on the Right to Adequate Food as a Human Right, UN Publications, Sales no: E89, XIV2.

The Maastricht Guidelines on ECOSOCR and Limburg Principles on the implementation of the ICESCR assign the obligation to the state in the manner that is consistent with the General Comment 3, and elaborate on the same. They both define violation as either commission or omission. Acts of commission may include formal removal or suspension of legislation necessary for the enjoyment or protection of a right, including denial of any group of peoples' access to ECOSOCR. They occur through the direct action of the state and or its agents.⁹⁶ Violations result from acts of omission or failure of a state to take necessary steps or measures stemming from legal obligation.⁹⁷

The expert opinion as contained in the Limburg principles calls upon the state to take into account its ECOSOCR obligations when entering into bilateral or multilateral agreements.⁹⁸ Such requirement does not seem to take into account the relative weakness of the African states when negotiating with NSAs and which tend to dictate their policies.

⁹⁶ The acts of commission may include the following: removal or suspension of legislation necessary for the enjoyment or protection of rights; the denial of rights of a person or any group of peoples access to the rights in question, whether by legislation or sheer practice, the visible support for third parties which are inconsistent with the enjoyment of the rights; the adoption of any deliberately retrogressive measures; the calculated hindrance of or halt the progressive realization of the rights provided for in the Covenant unless the state is acting within limitation permitted by the covenant or it does so due to lack of available resources or *force majeure*; and deliberate reduction of or diversion of specific public expenditure. See Limburg Principles, published in: UN Doc.E/CN/4/1987/17 annex, reprinted in *Human Rights Quarterly* 1987 at 122-135.

⁹⁷ Such acts of omission include, failure to take steps as required under the covenant; failure to reform or repeal legislation which is manifestly inconsistent with obligation under the covenant; failure to enforce legislation or put into effect policies designed to implement provisions of the covenant; failure to regulate the activities of individuals or groups so as to prevent them from violating economic, social and cultural rights; failure to monitor the realization of economic, social and cultural rights, including the development of the application of criteria and indicators for assessing compliance; failure to take into account its international legal obligations in the field of ECOSOCR when entering into bilateral and multilateral agreements.

⁹⁸ *Ibid.*

Even when it comes to periodic state reporting the Committee on ECOSOCR, in its General Comment number 1 paragraph 7 stressed that the state should show progressive realisation of the rights in the Covenant. There is no hint whatsoever of a recognition of inability on the parts of some states (as weak states of Africa) to live up to their obligation because of NSAs. Elsewhere though the Committee recognises the pressures of globalization by noting “ and the shrinking role of the state, as more and more social services are turned over to non State entities which have no comparable commitment to the progressive realization of economic, social and cultural rights, nor to the protection of the environment”. This observation notwithstanding, the Committee goes on to conclude and affirm the current position of the law that “ failure to enact or enforce laws to prevent...”⁹⁹ these violations it is this same weak state that is held singularly responsible in law.

In addition, the Committee recognises in paragraph 11 of General Comment no 3, 1990 that IMF and World Bank imposed SAPs may be a hindrance towards the realization of ECOSOCR. In spite of this recognition it goes on to impose the obligation on the state to implement all the rights. The only issue that the Committee seems to recognise is the possibility of a country’s inability to protect all the rights due to lack of resources.

However, even in this case, there should be a “minimum core” that the state has to protect regardless of its resource situation. Hence the concept of minimum core obligation of states as stipulated in the General comments.¹⁰⁰ This notion of inability and unwillingness is contained in a great number of the general comments such as paragraph 47 on General Comment number 14 (2000) which deals with article 12 on the right to the highest attainable standard of health.¹⁰¹ The issue here is that from the evidence adduced above it is not so much a state’s inability as rather the state rendered incapable by operations, activities, and decisions of powerful NSAs. Yet, the law does not seem to accommodate this particular violation by NSAs.

⁹⁹ Statement of the Committee on Economic, Social and Cultural Rights to the Commission on Sustainable Development acting as the Preparatory Committee for the World Summit on Sustainable Development, Bali, Indonesia May 27th -7th June 2002.

¹⁰⁰ See Committee on Economic, Social and Cultural Rights, General Comments number 3,5th session, 1990,undoce/1999/23 annex at10

¹⁰¹ UN Doc E/ C.12/ 2000/ 4, 2000.

General Comment number 14 provides for in paragraph 12 that the right in question should be availability, acceptability, accessibility,¹⁰² and quality; all an obligation that the state has a primary responsibility to guarantee in the exercise of right to health by persons within its jurisdiction. It is contended that state at certain times is placed in a situation, as seen above, where it cannot address these core minimums.

The Committee on ECOSOCR seems to have shown some sensitivity to this emerging problem when it adopted a statement on the 11th of May 1998 on globalisation and its down side. The Committee pointed out its adverse effects that must be mitigated by the adoption of other policies. It recognised the incompatibility of IMF and World Bank imposed SAPs and ECOSOCR.¹⁰³ Despite the fact that the Committee assigns obligation to private actors or NSAs, as it does with General Comment number 16 on Article 3 that deals with the equal treatment of women and men in the enjoyment of ECOSOCR, it enjoins all private entities with an obligation not to discriminate.

A careful reading of this General Comment is that it does not impose a direct obligation on NSAs but rather it comes back to impose the burden of ultimate protection on the state calling on it to ensure that it passes requisite legislation to create an enabling climate to ensure that discrimination does not happen.¹⁰⁴ This is at best an indirect obligation.

¹⁰² UN DOC E/ C. 12/2000/4, 2000 *supra* note 101

¹⁰³ UNDOC /1992/22paragraph 515-516

¹⁰⁴ General Comment no 16, art 3:the Equal Treatment of Men and Women in the enjoyment of Economic, Social and Cultural Rights, UN Doc.E/C.12? 2005 3, 13th May 2005 at para 19.

The counter-argument for imposing direct obligation on NSAs could be that any legal obligations placed on them would undermine state sovereignty and also let the state off the hook of its responsibilities. Any such argument would only be a theoretical view of state sovereignty. Sovereignty would suggest a reasonable degree of autonomy in decision-making but, in Africa as elsewhere, states are sometimes compelled by external forces like foreign governments, NSAs or TNCs to make certain political, economical or social decisions affecting the lives of their populations. This is not to project an innocent African state always acting under “duress”. There are times when the violations of ECOSOCR are committed by the state itself or by NSAs supported by the state. However, international human rights law as formulated now does not hold NSAs responsible for violation of ECOSOCR in Africa.

There is no binding legal regime to be relied upon in holding them NSAs accountable for violations of ECOSOCR. In most cases, even where they exist, states are very wary to invoke national laws to make juristic persons such as NSAs liable at the domestic level. Redress is only to be sought at the international level. For the time being, the African system appears to be the only supra-national forum to which individuals or people may turn to seek remedy when their ECOSOCR have been threatened or violated by NSAs.

In the absence of any such a legal regime at the international, what exists is the adoption of voluntary codes of conducts by several companies. These codes and voluntary standards have the endorsement by their home governments who in this sense are mostly governments of the developed Western countries. It is worth noting that some few companies have taken the concept of voluntary codes of conducts seriously and striving to adhere to the human right standards that they espouse. The overall picture however and experience with NSAs is such that the voluntary codes of conduct have not been effective¹⁰⁵. The intentions and the behaviour of companies' shows that the CRS's are carried out as minimalist's policy response to criticism that comes from civil society advocacy. In African countries where states are weak and most politicians are prone to corruption, there is very little to show that corporations are committed to adhering to any human right standards.

2.2 Voluntary Codes of Conduct and Non-State Actors' Obligations

Mindful of the mounting criticisms by NGOs and other civil society actors against NSAs for human rights violations, TNCs have been adopting voluntary codes of conduct to avoid violating ECOSOCR in their operations.

Since the early 1970s, there has been a tendency on the part of some western governments and the UN to develop codes of conduct for companies to regulate them against the interference in the affairs of host countries, mostly developing countries.¹⁰⁶ However, in the last twenty, or so, years, many of the TNCs have themselves been adopting codes of conduct. These have included top companies such as Royal Dutch Shell and Body Shop. The latter company was more explicit in its adoption of Codes of Conduct by committing to establishing a framework to ensure that human and civil rights set out in the UDHR were respected throughout its business activities.¹⁰⁷

¹⁰⁵ See generally Beyond Voluntarism *supra* note 50.

¹⁰⁶ See generally August Reinisch, "The Changing International Legal Framework for Dealing with Non- State Actors", in Philip Alston, (ed) *supra* note 1.

¹⁰⁷ Report of International Council on Human Rights Policy, *supra* note 50

Generally though when a UN Commission was set up to produce a much more comprehensive Code of Conduct for TNCs it was rejected¹⁰⁸ by big companies and the dominant Western countries, the parent country of most of the TNCs.

Voluntary self- regulatory regime became a commonplace practice of TNCs, especially after Earth Summit in Rio de Janeiro, 1992. Corporate Social Responsibility (CSR) was introduced in the stead of any mandatory regulation. The aim of which was for companies to regulate their own activities by agreeing upon certain sets of principles to address human rights or ethical issues that may arise in course of their operations. In countries such as UK both government and corporate world expressed preference for self- regulation to any mandatory international regime of laws.¹⁰⁹ Some critics saw most of the corporate social responsibility initiatives as public relations exercise aimed at reacting to advocacy against them by activists.¹¹⁰

The Organization of Economic Cooperation and Development (OECD) as an inter-governmental body of 29 states control about 70% of the world market of goods and services.

In 2000, the OECD set out guidelines for its companies. They were revised later to include a statement that multinational corporation should respect human rights. Paragraph 11.2, provides that “Enterprises should respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”¹¹¹

¹⁰⁸ See ECOSOC Resolution 1913, UN ESCOR, 57th session, 5 December 1974, Supp no. 1,3, Un Doc.5570/ Add.1(1975).

¹⁰⁹ See Christian Aid Report, *Behind the Mask, The Real Face of Corporate Social Responsibility*, 2005.

¹¹⁰ See for eg CSR- Religion with too many Priests? Interview with Michael Porter, European Union Business Forum, Copenhagen Business School, September 2003, *ibid* at 9.

¹¹¹ See International Council on Human Rights Policy Report, *supra* note 50.

Useful as these new additions were, in that it called upon enterprises not only to respect human rights of host countries but also their international obligations; that is the human rights obligations that the host country has undertaken. In spite of this promise there is a let down by a categorical insertion that the guidelines are non legal in character of which the multinational enterprises are called upon to adhere to voluntarily.¹¹² In sum, a voluntary regime with no legal sanctions is what the companies and parent countries in the West preferred.

Since 1919, the International Labour Organisation (ILO) has been developing standards for the protection of rights of workers. In 1977, the ILO adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.¹¹³ The Tripartite Declaration provided for in Article 8 thus:

All parties (ie government, employers, and trade unions) ... should respect the Universal Declaration of Human Rights and corresponding international Covenants (on Civil and Political Rights and on economic, social and cultural rights) adopted by the General assembly of the United Nations as well as the principles (of the ILO) according to which freedom of expression and association are essential to sustained progress.¹¹⁴

The Declaration itself states that it is not intended to be legally binding. Meaning NSAS are not bound in law to uphold the rights so provided for in the instrument cited: UDHR.

There are other such voluntary codes and guidelines all aimed at voluntarily regulating the activities of TNCs. They include Extractive Industry Transparency Initiative (EITI), and Kimberly Process Certification Scheme (KPSC) launched in 2002, to prevent revenue from illegal diamond mining from fuelling conflicts and the human rights violations that ensue from it.

A number of extractive industries are reputed for human rights violations, as a result in 2000, the Voluntary Principles on Security and Human Rights were adopted, as a guide for companies on three pertinent issues. This includes the identification of the

¹¹² International Council on Human Rights Policy Report *supra* note 50 at 67.

¹¹³ This Tripartite Declaration of Principles Concerning Multinational Enterprises was adopted by the Governing Council of ILO 204th Session, Geneva.

¹¹⁴ See Report of International Council on Human Rights, *supra* note 50 at 69.

likely challenges that companies are likely to face in respect of human rights protection. Companies are further required to record cases of serious human rights abuses by public security forces in their areas of operation to the host government and press for investigation.¹¹⁵

In 1999, the European Parliament adopted a resolution calling upon the member states within the Commission to adopt a Code of Conduct for European multinational companies operating in developing countries. A Green Paper spelt out the framework for corporate social responsibility for the European multinational corporations. The Green paper did not leave any one in doubt that compliance was only voluntary.¹¹⁶

A number of human rights NGOs in the North, such as Amnesty International and Human Rights Watch, have also been proposing Code of Conduct for NSAs with the object of making them comply with international human rights standards or at least not to become complicit in any human rights violations by the host countries themselves.¹¹⁷

Governments of the North and TNCs have shown preference for voluntary self-regulation than the promulgation of any set of binding laws, arguing that any rigid legal regime is likely to have backlash and negative reaction from companies.¹¹⁸ This approach is also consistent with the neo-liberal approach of doing business, which calls for de-regulation.¹¹⁹ In the end though business is tempted to maximise its profit and act in its own self-interest if no form of sanctions exist.

¹¹⁵ John Ruggie, *supra* note 17 at 11-12. The only countries that have signed up to these principles are: United States, United Kingdom, Netherlands, and Norway.

¹¹⁶ European Parliament (EP) Resolution on EU Standards for European Enterprises operating in developing countries: towards a European Code of Conduct, adopted 15th January 1999, Resolution A4-0508/98 of 1998, OJ C 104/180, 14th April 1999, see August Reinisch “The Changing International Legal Framework for Dealing with Non State Actors”, in Philip Alston *supra* note 1, at 45.

¹¹⁷ See for eg Amnesty International, *Human Rights Principles for Companies*, AI Index: Act 70/01/98.

¹¹⁸ see for eg the views expressed by the International Chamber of Commerce (ICC) when reacting to a draft report by the International Council on Human Rights arguing for the development of international legal obligations for Companies. The ICC stated that the proposed legal regime will invite negative reaction from business and therefore expressed preference for the corporate social responsibility initiatives. This was contained in a letter from the Secretary-General, dated 7th March 2001. International Human Rights Council Report *op cit supra* note 50 at 7.

¹¹⁹ Neil Kearney, “Corporate Codes of Conduct: The Privatized Application of Labour Standards” in Pacciotto and R. Mayne, (eds) *Regulating International Business: Beyond Liberalization* (2000) Cf: Henry Steiner and P. Alston, *supra* note 81 at 1359.

Codes of conduct or voluntary principles are by definition not legally binding. It seeks to locate responsibility in the “moral” realm, so to speak, and as such not mandatory.

The absence of a legal regime means that there is no mechanism for redress in an event of violation of rights by NSAs. Thus, there is lack of supervisory and enforcement structures for the voluntary principles, and even where there are, monitoring is very weak. They are therefore unreliable regime for holding NSAs accountable for violations.¹²⁰ It is not even clear whether companies act in good faith and whether they sincerely intend to be bound by the codes or have other considerations for adopting them¹²¹.

In recognition of these limitations, the UN has since 1997 set in motion a process to devise a normative regime that could hold NSAs responsible for the human rights impact of their operations. This started with the creation of a Working Group on Working Methods and activities of Transnational Corporations in compliance with a resolution of the Sub-Commission.¹²²

The mandate of the Working Group was *inter alia*:

identifying issues, and gathering and examining information regarding the effects of trans national corporations on human rights agreements; making recommendations regarding the method of work and activities of Transnational corporations in order to ensure the protection of human rights; and considering state obligation to regulate Transnational corporations.¹²³

¹²⁰ UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional Working Group on Methods and activities of trans national corporations, Transnational corporations and Other Business Enterprises, E/CN.4/ sub.2/WG.2/WP.1/Add 1, 24th May 2002, 17: stated that: “ the use of an entirely voluntary system of adoption and implementation of human rights Codes of Conduct, however, is not enough. Voluntary principles have no enforcement mechanisms, they may be adopted by Transnational Corporations and other Business Enterprises for public relations purposes and have no real impact on business behaviour, and they may reinforce corporate self-governance and hinder efforts to create outside checks and balances.”

¹²¹ *Ibid*

¹²² see UN DocE / CN.4/ Sub.2/ 1997/50 (1997).

¹²³ See UN Doc / E/ CN4/ sub2.1998/45 (1998).

Between 1998 and 2003, the drafting of norms to regulate the conduct of TNCs went through several stages with the Working Group, the Sub-Commission, and the Commission. The issues considered by these various UN bodies were whether international obligations could be placed on NSAs and whether it was appropriate to place human rights obligations upon business.¹²⁴

The Global Compact proposed in 1999 by the then UN Secretary-General was a UN attempt to infuse international human right standards into NSAs operations. The Global Compact acknowledges the primary responsibility of the state but envisages that corporations acting on their own could still actualise the principles it enunciates which are derived from human rights norms such as the UDHR, the ILO Declaration on Fundamental Principles and Rights at Work. It included two principles which are very instructive for this study. The first principle urged business to support and respect the protection of internationally proclaimed human rights. According to the second principle, business should make sure that they were not complicit in human rights abuses.¹²⁵ This search did not stop at the Global Compact but continued.

Efforts within the UN to hold NSAs accountable culminated in the drafting of universal human rights guidelines for companies¹²⁶ which were inspired by the UDHR. The preamble of the declaration was found to be instructive since provides:

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to this end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among peoples of member states themselves and among peoples of territories under their jurisdiction.¹²⁷

¹²⁴ David Weissbrodt and Muria Krugger, "Human Rights Responsibilities of Business as Non –State Actors," in Philip Alston (ed) *supra* note 1 at 328.

¹²⁵ See Secretary –General Kofi Annan, Address at World Economic Forum in Davos, Switzerland, (1991), UN Doc, SG/SM/6448(1999).

¹²⁶ UN Doc.E/CN.4/ Sub.2/2001/WG 2./WP.1 (2001).

¹²⁷ Universal Declaration of Human Rights, GA Res 217A (III), UN. Doc. A/ 180/ at 71 (1948)

There have also been attempts by scholars to infer that the UDHR imposes human rights obligation on “organs of society” could be construed to include NSAs, such as TNCs and possibly the IFIs, thereby lending a legal basis for holding NSAs responsible for human rights violations.¹²⁸

Undoubtedly, the “organ in society” could be stretched to refer to NSAs since they are entities located within society but there are issues of international law that do arise. First, the UDHR is not a treaty as to create a binding obligation on states let alone any other entity, such as NSAs. And, even if it were to be, the cited relevant paragraph, purporting to bind NSAs, is part of the preamble, thus making it at best an aid in interpretation of the substantive provisions of the Declaration since preambles of legal instruments are themselves not binding. Article 30, in this respect becomes relevant. It provides that “ Nothing in this Declaration may be interpreted as implying for any state, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

The Declaration is deemed to be declaratory of international law.¹²⁹ However, it is not legally binding although some scholars contend that some of its provisions have achieved the status of customary international law.¹³⁰ Others too opine that it was possibly not intended to impose any legally binding obligation.¹³¹ There is lack of consensus among experts as to the legal status of UDHR. Even if it were a legally binding right, there seem not be a procedure for the enforcement of the rights it provides for. In the case of *Sosa vs Alvarez Machain*,¹³² the US Supreme Court gave a test of how a norm could pass the test of constituting part of customary international law. The conditions that must be satisfied are that the norm must be specific; it must confer obligations, and must be universal.¹³³ Therefore, basing the obligations for the protection of human rights on UDHR as a legally binding instrument may be doubtful.

¹²⁸ see for example Louis Henkin, *supra* note 73 at 17-25.

¹²⁹ Proclamation of Teheran, Universal Declaration at 50 Proclaimed by the International Conference on Human Rights at Teheran, May 1968.

¹³⁰ Louis Henkin *supra* note 73; see also Asbjorn Eide, *supra* note 71.

¹³¹ See Opinion of Experts as contained in Report by the International Council on Human Rights Policy, *supra* note 50 at 59

¹³² *Sosa vs Alvarez Machain*, 542 US 692,732 (2004).

¹³³ *Ibid*

3 European and Inter-American Human Rights Jurisprudence on Non-State Actors

This section deals with the jurisprudence under the European and the Inter- American systems with regard to the accountability of NSAs for ECOSOCR protection.¹³⁴

3.1 European Jurisprudence

At the regional European level, the community law provides good insight as to how it treats NSAs in situations that involve human rights violations. Community law imposes obligation on both private and public entities not to discriminate on the grounds of race, sex, religion, age, disability and sexual orientation.

The obligation it gives rise to, is referred to as horizontal direct effect.¹³⁵ In the *Defrenne case*,¹³⁶ the issue that arose for determination was that of equal pay for men and women, the community court ruled that the right to equal pay must be protected by all establishments whether in the private or public realm.¹³⁷ There are times that the directives from the community are enforceable only against the state especially when the rights in question in the directive are enforceable against organs of the state.¹³⁸

Clapham makes the following observation about the emerging jurisprudence of the European Community and Union in respect of human rights protection by stating, among other things, that

the prospects of EU acceding to the European convention on human rights reminds one how obvious it has become that non-state actors have the capacity

¹³⁴ The jurisprudence of the African regional human rights system is treated in Chapter 3 of this dissertation. It is under this same Chapter that we test out the hypothesis of this study.

¹³⁵ Andrew Clapham, *supra* note 4 at 190

¹³⁶ Case 43/75 (1976) ECR 455

¹³⁷ Andrew Clapham, *supra* note 4 at 482.

¹³⁸ *Ibid* at 193

to bear international human rights obligations, and that they may be held accountable for any violations at the international level.” He adds that: “the community legal order has been interpreted by courts as generating direct obligations on private individuals, and associations, corporations and trade unions. These obligations, he continues, of non-discrimination could be said to be human rights obligations binding on non-state actors.¹³⁹

Ostensibly, a core right such as non-discrimination do have horizontal application under the European system but it does not appear to be applicable to rights such as right to work, education and other rights of that category. In any case, the European Convention does not even make ECOSOCR justiciable *per se*.

3.2 Inter-American Jurisprudence

The inter-American regional human rights system has shown considerable sensitivity to the NSAs as actors contributing to human rights violations. For example, the Inter-American Commission on Human Rights has a mandate for the issuance of reports on the state of human rights within the respective member states within the region. The commission has taken notice of violations committed by NSAs but attributed the same to the state for the failure to regulate the activities of the NSAs.

In one such instance, in 1999, whilst examining Columbian periodic state report, the Commission clarified its jurisdiction by stating, amongst other things, that it deals exclusively with member states and their international human rights obligation, and such situations include the violations of rights by private groups and persons who are in effect agents or organs of the state as well as the violations of rights by private actors which are acquiesced in, tolerated or condoned by the state¹⁴⁰

¹³⁹ Andrew Clapham *supra* note 4 at 193-194

¹⁴⁰ *Ibid* at.424-429

Perhaps the most authoritative case that has become almost a test for establishing the obligation of states when third parties or private actors, NSAs, are involved in human rights violations is *Velasques Rodriguez v Honduras*¹⁴¹. This is a celebrated case establishing the principle of due diligence by the Inter-American Court on human rights. The brief facts are that *Velasques* was a student who was involved in activities that were considered dangerous to national security. It was known that *Velasques* was kidnapped by men wearing civilian clothes who used a vehicle without a licensed plate.

The Court also ruled admitted that a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984; that *Velasquez* disappeared at the hands of or with the acquiescence of officials within the framework of that practice; and the government had failed to guarantee the human rights affected by that practice.

The Court reasoned that when a public official or state agent commits a human right violation it becomes imputable to the state. The Court went on to add readily that there are certain instances when the state can be held liable not because the state or its agents are involved directly in the violations but because the Court concluded:

an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it the act of a private person r because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention (The American convention on human rights).¹⁴²

This decision has since laid down the due diligence principle which is relied upon as an authority in international human rights law.

¹⁴¹ *Velasquez Rodriguez v. Honduras*, *supra* note 11.

¹⁴² *Ibid*

4 Domestic Law, its Extra-Territorial Application and Implications for Human Rights

Domestic laws of some of the developed Northern states, the parent countries of most TNCs, have been invoked against TNCs for violations committed outside the jurisdictions of their home country. The emerging domestic laws and jurisprudence in countries such as the US and UK allow the NSAs be tried the domestic courts.

In the US, the Aliens Tort Claims Act of 1789¹⁴³ (ATCA) has become a very important source of litigating human rights issues that involve NSAs. Some of the litigations in recent years have involved big TNCs such as Shell, Chevron, Texaco, Exxon Mobil, Coca-Cola, Unocal and others.

The ATCA stipulates that district courts in the US shall have original jurisdiction on any civil action by an alien for a tort committed in violation of laws of nation¹⁴⁴ or treaty of United States¹⁴⁵. This law has therefore afforded the opportunity for action alleging violations of human rights¹⁴⁶ (by interpretation) to be brought against US companies. The key stipulations of ACTA are that

1. someone who is an alien should have brought the claim;
2. the claim must have a tort claim; and
3. the tort claim must involve violations of the laws of nations or a United States treaty¹⁴⁷.

¹⁴³ 28US Code (USC) S 1350.

¹⁴⁴ The laws of nations as used in the Act is broadly defined to include norms of international of law.

¹⁴⁵ See Kyle Rex Jacobsen, “Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity”, 56 A.F Rev.167,214(2005).

¹⁴⁶ Some of the human rights claims are couched in terms of principles of law of tort.

¹⁴⁷ Alien is defined by US law as any person who is not a citizen or national of the US, and laws of nations are defined as norms of international law, *Filartiga v Pena –Irala*, 630,f2d 876 ,2nd cir 1980, see generally Kyle Rex Jacobsen, *supra* note 145 at 214

An instance where a human rights case has been brought from Africa under ATCA is *Wiwa v. Royal Dutch Petroleum Company and Shell Transport*.¹⁴⁸ This case was filed for and behalf of a community in Nigeria, called Ogonis. Wiwa alleged that human rights violations have been committed by Shell Company on the territory of Nigeria, contrary to the stipulations of ACTA. He was such availing himself of ATCA by suing Shell in a US court.¹⁴⁹ So are there other cases of violations brought from other jurisdictions¹⁵⁰ under ACTA.

UK domestic courts have also been entertaining complaints against UK companies having allegedly committed human rights violations outside the UK. A notable case is the one brought in 1997. In this case, a group of South Africans complained against a British manufacturing company and demanded compensation. The plaintiffs had contracted cancer by working for a subsidiary of a British domiciled that manufactured asbestos. There was an attempt by the defendant UK Company to argue that because the exposure to the asbestos took place in South Africa the case should therefore be heard in that country, South Africa. After contestation at several levels of the British judicial system, the House of the Lords, which is the highest court of the land, held that the case should be heard in England although the violations had taken place in South Africa.¹⁵¹

¹⁴⁸ 2002 WL 319887 (S.D.N.Y. 2002)

¹⁴⁹ Olivier de Schutter, in P. Alston, (ed) supra note 67.

¹⁵⁰ A more illustrative case of the use of ATCA for the protection of human rights against an NSA is: *Doe v. Unocal corporation*. The facts are that in 1998, the Government of Myanmar set up a company to produce and sell the country's gas resources. Unocal was one of the companies with an interest in the project. The military government provided security and other services for the company. The plaintiff in this case alleged that they were tortured and subjected to forced labour, some raped during the execution of the gas project through their village by Unocal supported by the military government. The plaintiff availed themselves of ATCA and the US court ruled that torture, slave trading and murder as *jus cogens* have takes place and thus violation of law of nations within the meaning of ATCA. An issue that came before the court was whether the alleged torts require the private party to engage a state action for a liability under ATCA, and whether private party was engaged in state action. The court ruled that while some crimes require the state for liability, with respect to the crimes in question, individuals could be held liable (US Court of Appeal for the 9th Circuit, 18th September 2002, available at: www.elaw.org/wnets/pdf/unocal.case.pdf).

¹⁵¹ *Lubbe v. Cape Plc (2000) 1 W.L. R. 1545 (HL)*. It is not too difficult to know why the UK parent company wanted the case to be heard in South Africa rather than in England. This is because NSAs are all to aware that in developing world, such as Africa, there is a lot of timidity on the part of political authorities to regulate them with domestic law.

Useful as the US and UK cases are for making NSAs accountable for their violation of ECOSOCR, it is not clear, however, whether they have created a precedent that can be relied upon. In the US, the ATCA provides some level of remedy. However, it does not address the challenge posed by the technical doctrine of *forum non-conveniens* that *inter alia*, questions the appropriateness of extra-territorial litigation.¹⁵² Nor is it completely useful for remedying the violations of ECOSOCR by NSAs. Moreover, the record of seeking remedy for violations of ECOSOCR by NSAs has not been so far impressive.

John Ruggie found that out of thirty cases where the ATCA was at issue up to 2006, twenty had been dismissed, three were settled, none was decided in favour of the plaintiffs and the rest were still pending.¹⁵³ What is more, ATCA is an expensive form of litigation thereby raising the question of access to justice.

As compared to founding instruments of the UN and other regional human rights systems, the ACHPR contains provisions that may be used to hold NSAs accountable for violation of ECOSOCR and contribute to the paradigm shift that would result in a better protection of these rights in Africa.

¹⁵² see for eg *Spilada Maritime Corporation v. Cansulex Ltd* (1987) AC 460. In the Lubbe Case (*supra* note 151) The argument of *forum non conveniens* was rejected.

¹⁵³ John Ruggie, *supra* note 17 at 16.

CHAPTER 3 NON-STATE ACTORS AND PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

1 Introduction

This Chapter attempts to test out the hypothesis of this study by arguing that properly interpreted, the provisions of the ACHPR could be made legally binding on NSAs for them to be held accountable for their violations of human rights in Africa.

It briefly discusses African cultural systems and philosophy of law and concentrates on ECOSOCR in the ACHPR and their enforcement. The jurisprudence of the African Commission especially in the *Ogoni case* is examined critically to demonstrate how and whether the ACHPR and the decision of the Commission can be relied upon to hold NSAs liable for violations of ECOSOCR. Finally, the chapter revisits the jurisprudence of some African states on the violation of ECOSOCR by NSAs.

2 African Cultural Systems and Philosophy of Law

The formulation of human rights discourse in our contemporary world has its origin in 17th and 18th centuries Europe that was characterised by feudal absolutism. With the emergence of a capitalist class the feudal class were in some cases like France compelled to give way to the capitalist system and its bourgeois class. The ideology that was articulated to justify the new social system of capitalism was liberalism. Liberalism therefore came as a top dressing of capitalism. According to Claude and Strouce, there is a strong relationship between the Western concept of human rights and the ideology of liberalism.¹⁵⁴

¹⁵⁴ R.Claude and J.C Strouce, "Human Rights and Development Theory", *Research and Sociology*, Vol 1 1978

The African concept of state and philosophy of law was informed mainly by the type of social organisations and political systems that existed in the pre-colonial period. In the main, societies were characterised by kinship ties that were the units from which political power sprung. Social relationships included rights and duties.

Makau wa Mutua observes that African societies place emphasis on both rights and duties. According to him, “the African language of duty offers a different meaning for individual/state society relations, while had rights they also bore duties.”¹⁵⁵ In pre-colonial Africa, social organisation and the exercise of political power were marked by a fusion of state and non-state actors just as the social philosophy was that there were no rights without duties. Makau refers to this as the African dialectics.¹⁵⁶ Makau also cited Keba Mbaye, the distinguished African jurist (referred to generally as the father and author of the ACHPR) who stated that in Africa, laws and duties were regarded as being two facets of the same realities: two inseparable realities.¹⁵⁷

The main points underscored here are that rights are exercised collectively by individuals and by communities. Every right calls for correlative duty. Some of these issues have become the focus of the never-ending debate on African cultural relativism *versus* universalism. The African relativist school of thought maintain that the African philosophy of law and social values as outlined above should inform African human rights system as distinguished from European traditions of liberalism. In their view the core of the International Bill of Rights¹⁵⁸ is informed by the European traditions of liberalism.

¹⁵⁵ Makau wa Mutua *supra* 59 at 2 - 3.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at 7.

¹⁵⁸ For such a discussion and debate see African relativists arguments as articulated, for example, by: Josiah Cobba, “African Attitudes to International Protection of Human rights Debate: An African Perspective,” *Human Rights Quarterly*, no:9, 1987, pp312-31; :Latif O.Adegbite, “ African attitudes to International Protection of Human Right,” in: Asbjorn Eide and August Schou (eds) *The International Protection of Human Rights* , Forlag , 1968; Chris C. Mojekwu, “International Human Rights; the African Perspective,” in :Green et al (eds) *International Human Rights: Contemporary Issues*, New York: Human Rights Publishing Group, 1980, For the advocates of universalism see for egs Jack Donnelly, “Cultural Relativism and Universal Human Rights,” *Human Rights Quarterly*, Vol. 6, no 4, 1984, Rhoda Howard, “Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons,” *Human Rights Quarterly*, Vol 6,1984.

What is more, African societies in the 1870s or thereabout were forcibly incorporated into the global capitalist system through the classical international division of labour whereby colonies produced raw materials or cash crops and imported manufactured items from Western countries. This relationship also came with its own cultural practices. Of note, is that this process of incorporation of African societies into global capitalism was an uneven process leading to uneven development. Consequently, postcolonial society is often characterised by a dualism whereby you have a co existence of the pre-capitalist often rural and agrarian in outlook but autonomy lost, functioning for capitalist accumulation.¹⁵⁹

The post-colonial state in Africa and its relationship with society is different from an European classical state. Abdelahi Doumou argues:

the process of globalization of capitalist system seems to be accompanied by a globalization of political institutions and a cultural model, it must be asked whether the hierarchical ordering of the capitalist world economy into centre, semi periphery and periphery is not reflected at the level of forms of social organization in a composite typology of a state.¹⁶⁰

The ACHPR as a legal instrument seems to reflect these chronology of events in their historical, cultural and as well as their political and economic forms.¹⁶¹ The drafters of the Charter were very mindful of these characteristics of the African state in their drafting just as they were informed by other legal initiatives and experiences of other regional jurisdictions.

The African Charter constitutes as a continental normative framework for the promotion and protection of human rights in Africa. The peripheral status of the Sub-Saharan Africa as an under developed region seems to have been upper most in the minds of drafters.

¹⁵⁹ See Generally Mahmood Mamdani, *Politics and Class formation in Uganda*, Heineman, London, 1976. See also Samir Amin, "Unequal Development," *Monthly Review Press*, 1976

¹⁶⁰ Abdelahi Doumou, "The State and Popular Alliances: Theoretical Preliminaries in Light of The Moroccan Case" in: Peter Anyang Nyong'o (ed) *Popular Struggles for Democracy*, Zed Press, 1987.

¹⁶¹ See for eg Mohammed Komeja, "The African System of Human and Peoples Rights: An annotated Bibliography" 3 *East African Journal of Peace and Human Rights*, 1996, at 262-265

As shall be shown below, the wording of the preamble and some of the substantive provisions attest to this claim. It clearly shows an awareness of Africa's post-colonial status as underdeveloped region that has to deal with powerful metropolitan states and NSAs alike in a global system of asymmetrical relations. In this respect, the drafters acknowledge in paragraph 8 by stating thus:

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Examining the African Charter will shed more light on the issues under exploration.

3 Rights and Duties in the African Charter on Human and Peoples' Rights

The ACHPR presents the main framework of the African regional human rights regime. In terms of its provisions, the ACHPR adheres to the international (UN) standards as expressed through the International Bill of Rights. Yet also departs from it by presenting its own unique features to reflect peculiarities of the continent.

The drafters of the Charter took due cognisance of the African philosophy of law, social organisation, level of economic development, all of which combined to inform the principles that underpin the Charter provisions. That is an African concept of human rights. Central to this conception of human rights is the principle of interrelatedness of categories of rights.¹⁶²

¹⁶² We here use categories of rights to refer to the three generations of rights as traditionally used in human rights discourses. First generation being civil and political rights are provided by articles 2 to 13; second generation rights being economic social and cultural rights are contained in articles 14- 18 of the Charter; and 19-24, are the provisions on third generational or also called solidarity rights.

ECOSOCR are therefore reinforced by the other categories of rights. An example that comes readily to mind is how right to life is guaranteed, among other things, if there is a right to work in a safe and healthy conditions. Equally, right to health and education may contribute to higher life expectancy, thus right to life. The ACHPR provides for ECOSOCR that are exercised by peoples as collective rights. This is the case of the right to development, the right to satisfactory environment and the right to enjoy the common heritage of mankind.

All these collective rights are also protective of ECOSOCR. For example, the right to development necessarily includes the rights to work, health, and education, as key components of the right to development.

Peoples' rights to their heritage, satisfactory environment and self-determination, do all create the enabling national climate for the enjoyment of ECOSOCR. A state needs its resources to create wealth out of which jobs can be created, education, and other similar rights are protected. The Charter therefore presents a holistic and inter-dependent view of ECOSOCR.

Consequently, a striking feature of the African human rights system is that all the categories of rights are placed on an equal legal footing. ECOSOCR have therefore the same legal status as civil and political rights and also the solidarity rights that the Charter provides for.

Evidence of which is that all the rights are contained in one single document. There is no attempt to create a varying hierarchical status for the rights. Consequently the Charter provides for civil and political rights, especially the right to freedom from discrimination¹⁶³ and equality before the law.¹⁶⁴

¹⁶³ Article 2 of the African Charter on Human and Peoples' Rights.

¹⁶⁴ Article 3 *ibid*

The ACHPR further protects rights such as the right to life,¹⁶⁵ the right to respect of dignity, and freedom from exploitation, degradation, slavery, slave trade, torture, cruel, inhuman and degrading punishment;¹⁶⁶ the right to liberty and security of person;¹⁶⁷ the right to have ones cause heard,¹⁶⁸ the right to freedom of conscience and the practise of ones religion,¹⁶⁹ the right to receive information and express and disseminate the same;¹⁷⁰ the right to freedom of association,¹⁷¹ the right to assemble freely with others,¹⁷² the right to freedom of movement,¹⁷³ and the right to participate freely in the government of one's country.¹⁷⁴

The ACHPR is also unique in the sense that it makes provisions for what has become known as third generation or solidarity rights. These rights are excisable as collective or group rights, hence the concept of peoples. The rights that peoples' have are introduced in the Charter. The peoples or the collective have a right to existence and self- determination¹⁷⁵; dispose of their wealth and natural resources;¹⁷⁶ right to their economic, social and cultural development with due regard to their freedom in identity and enjoyment of common heritage of mankind¹⁷⁷. There are people's rights to peace;¹⁷⁸ to a general, satisfactory environment favourable to their development.¹⁷⁹. Yet, another hallmark of the Charter is the insertion in to it of the concept of duties and elaborating on the same.

¹⁶⁵ Article 4 *ibid.*

¹⁶⁶ Article 5 *ibid*

¹⁶⁷ Article 6 *ibid*

¹⁶⁸ Article 7 *ibid*

¹⁶⁹ Article 8 *ibid*

¹⁷⁰ Article 9 *ibid*

¹⁷¹ Article 10 *ibid*

¹⁷² Article 11 *ibid*

¹⁷³ Article 12 *ibid*

¹⁷⁴ Article 13 *ibid*

¹⁷⁵ Article 20 *ibid*

¹⁷⁶ Article 21 *ibid*

¹⁷⁷ Article 22 *ibid*

¹⁷⁸ Article 23 *ibid*

¹⁷⁹ Article 24 *ibid*

In other words, the African Charter not only does it make provisions for rights as seen in the other instruments but also goes on to elaborate on duties of the individual. This inclusion, in the initial stages, drew a lot of concern and scepticism on the part of some scholars as a feature likely to undermine the rights that are provided for in the Charter¹⁸⁰. This scepticism has not been borne out by the interpretation of the Charter by the Commission. The inclusion is relevant for this study because of the principle that duties can be imposed on NSAs, as an entity located within society.

The ACHPR provides for the duty towards one's family and society¹⁸¹ and the duty to respect and consider fellow beings without discrimination¹⁸². Other duties include the duty for the individual to preserve the harmonious development of her family and work towards its cohesion; the duty to respect and serve his national community by placing his physical and intellectual abilities at its service; the duty not to compromise the security of the state of which one is a national or a resident; the duty to preserve and strengthen social and national solidarity; the duty to preserve and strengthen national independence and territorial integrity; the duty to preserve and strengthen positive African cultural values in one's relations with other members of society and to contribute towards the promotion and achievement of African unity¹⁸³.

4 Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights and in Other Regional Human Rights Instruments

As pointed out earlier, the ACHPR protects the so-called three generations of rights, including ECOSOCR, and make them justiciable in the sense that their violation may be litigated by the African Commission, which is a quasi-judicial body or enforcing mechanism established by the ACHPR itself.¹⁸⁴

¹⁸⁰ See for eg Joe Oloka Onyango, "Beyond The Rhetoric: Reinvigorating the Struggle for Economic, Social and Cultural Rights in Africa" 26 *California Western International Law Journal* Fall 1995, at 42-43.

¹⁸¹ Article 27 African Charter on Human and People's Right

¹⁸² Article 28 *ibid*

¹⁸³ Article 29 of the African Charter on Human and People's Rights

¹⁸⁴ Justiciability is here used to mean that alleged violation of these rights against individuals or peoples as a collective or group can become subject of litigation by a *quasi*-judicial body such as the African Commission on Human and Peoples Rights.

Accordingly, ECOSOCR like civil and political rights are also justiciable under the ACHPR.

The preamble to the ACHPR appears to support this view when in paragraph 8, it states “civil and political rights can not be disassociated from economic, social and cultural rights in their conception as well as universality in that the satisfaction of the economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights.” In addition to the preamble, a careful reading of the *travaux préparatoires*¹⁸⁵ and experts’ opinion¹⁸⁶ corroborates this view.

Whereas some scholars¹⁸⁷ have been fascinated by the inclusion of ECOSOCR in the ACHPR, others do not share this excitement. For the latter, there is no evidence of any novelty or revolutionary approach to these rights in Africa.¹⁸⁸

Arguably, the African human rights system takes ECOSOCR more seriously than other human rights systems, including the UN, the Inter-American and the European ones.

¹⁸⁵ See Decision 115 Rev 1 of the 16th Ordinary Session of the Conference of the Heads of State and Government of the Organisation of African Unity (OAU), Monrovia, Liberia, 17- 20 July 1979; Expert Meeting on the Proposal of the ACHPR, Dakar, Senegal, 28 November - 8 December 1979; 35th Ordinary Session of the Council of Ministers of the OAU, Freetown, Sierra Leone, 18-28 June 1980; Meeting of the OAU Council of Ministers on the Proposal of the ACHPR, Banjul, Gambia, 7-19 January 1981; 37th Ordinary Session of the Council of Ministers of the OAU, Nairobi, Kenya, 15-26 June 1981.

¹⁸⁶ See Keba Mbaye, *Les Droits De L’Homme En Afrique*, Pedone Paris, 1992 at 174.

¹⁸⁷ See Rose D’sa, “ Human and Peoples’ Rights: Distinctive Features of the African Charter”, 29 *Journal of African Law* (1985), at.72-81

¹⁸⁸ Joseph Oloka –Onyango *Human Rights and Sustainable Development in Contemporary Africa: A new Dawn, or Retreating Horizons?*, http://hdr.undp.org/docs/publications/background_papers/Oloka-Onyango2000.html. at 9

Under the UN human rights system, for instance, the ICESCR is implemented in accordance with article 2 (1), which only provides for their progressive implementation subject of course to the “maximum available resources” of the country. ECOSOCR considered programmatic rights since they are not immediately justiciable. This approach is similar to that of the two other regional human rights regimes, namely the European and the Inter-American human rights systems.

The European human rights system as articulated through the 1950 European Convention on the Protection of Human Rights and Fundamental freedoms¹⁸⁹ does not make provision for ECOSOCR as justiciable rights although the Social Charter of 1961 and the Additional Protocol of May 1988 single out rights such as the right to education, and make them actionable rights. It needs to be noted though that in recent years a good number of lawyers are creatively praying the European Court on Human Rights to make pronouncements on violation of ECOSOCR with the result that the European system¹⁹⁰ is adjusting rapidly in dealing with such claims. The fact remains though that it is still very much markedly different from the African approach when it comes to the legal status of ECOSOCR.

The Inter-American regional system as expressed through the American Convention on Human Rights of 1969 adopts an approach that is very much akin to that of the ICESCR although there have been several attempts to enumerate some ECOSOCR and accord them a justiciable status. These include the right to education and the right to form trade unions. In the main, the Inter-American system adopts the programmatic approach to ECOSOCR.

This comparative approach of examining the UN, the European and the Inter-American human rights systems has been done with the aim to underscore the unique status of ECOSOCR under the African system.

¹⁸⁹ The European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov.4 1950,213 U.N.T.S 221 (hereafter called, “the European Convention”).

¹⁹⁰ See for eg Aisling Reidy, Françoise Hampson and Kevin Boyle, Gross “ Violations of Human Rights: Invoking the European Convention on Human Rights in the case of Turkey “ *15 Netherlands Quarterly on Human rights*.161(1997).

3.5 Enforcement of Economic, Social and Cultural Rights under the African Charter and the Jurisprudence of the African Commission on Human and Peoples' Rights¹⁹¹

In view of the foregoing analysis, the obligation of states under the African Charter with regards to ECOSOSCR would appear to be that of “immediate¹⁹²” implementation as distinguished from the “progressive” or programmatic approach cited above regarding the UN and the other regional systems. In that regard, the Charter provides that all the state parties are to act in accordance with article 2, which enjoins them to protect all the rights in the ACHPR, including ECOSOCR.

3.5.1 The African Commission and the Enforcement of Rights in the African Charter on Human and Peoples' Rights

The body that is entrusted to ensure that the rights are complied with and also exercises oversight function is the African commission on Human Peoples' Rights. Article 30 of the ACHPR clearly mandates the Commission to promote and protect human rights in Africa.

Article 45 elaborates much more clearly on the function of the Commission, which includes the undertaking of research studies or problems in the field of human rights; organisation of seminars and symposiums all in pursuit of improving human rights in Africa; and formulation and lay down principles and rules aimed at solving legal problems that relate to human and peoples rights.

¹⁹¹ Recognising that the African Commission decisions are strictly advisory and as such not enforceable as remedies, led to agitations for the creation of African Court on Human and Peoples' Rights with a much clearer mandate to to make decisions and judgements binding and enforceable against state parties. In that regard, in 1995 a protocol was adopted and entered into in 2005 on receipt of the requisite ratifications. Article 3 spells out the jurisdiction of the Court to include all cases and dispute submitted to it by the African Commission for interpretation and application of the Charter, see Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/AFCHPR/PROT(111), June 1998.

¹⁹² Nana K A Busia, Jr and Bibiane Mbaye, *supra* note 60.

The Commission also has a protective mandate by ensuring the protection of human and peoples' rights provided for in the Charter. Related to this, it has the power of interpreting the provisions of the Charter, and, in so doing, laying down the scope and content of the rights that are provided for.

Article 58 also confers on the Commission the power to draw attention of the heads of states to any situations of serious and massive human rights violations. As Odinkalu¹⁹³ pointed out that “there is nothing in the charter to suggest that violations of economic, social and cultural rights on a massive scale will not constitute such an emergency”.

The Commission is empowered under article 47 pursuant of its protective function to receive inter state communication. This means that any state party to the Charter who has reasons to believe that a state party is not living up to its obligations can file a communication against that state with the Commission. This mechanism has never been used states. Article 55 provides for other communications¹⁹⁴ to be entertained by the Commission. This has been construed by the Commission to mean communications from NGOs, individuals, and other non-state entities as a whole¹⁹⁵. Finally, the Commission in accordance with article 62 of the Charter examines reports from state parties wherein they (the states) demonstrate how they are complying with the provisions of the Charter living up to their obligations including on ECOSOCR.

¹⁹³ Chidi A.Odinkalu, “Analysis of Paralysis or Paralysis of Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples Rights”. 23 *Human Rights Quarterly*, 2003.at 15

¹⁹⁴ Article 55 provides thus: “ (1) Before Each session, the Secretary of the Commission shall make a list of the Communications other than those of Sates Parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission”

¹⁹⁵ See Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures*, Martinus Nijhoff Publishers, 1996 at 51.

The African Commission is to be complemented by the African Court on Human and Peoples' Rights which was established by a protocol to the ACHPR. This Protocol was adopted in 1998 and entered into force in 2004. The African Court is still to become fully operational and its future even seems uncertain.

Accordingly, we shall only concentrate on the jurisprudence of the African Commission, especially on the comparatively few decisions it has made in response to communications related to the violation of ECOSOCR.

5.2 The Jurisprudence of the African Commission on Economic, Social and Cultural Rights

We here examine the decisions of the African Commission related to communications alleging the violation of rights that qualify as ECOSOCR by states and even NSAs. These rights include the rights to property, work, education, and health.

5.2.1 Violations of Economic, Social and Cultural Rights by States

5.2.1.1 Property Rights before the African Commission

Article 14 in the ACHPR provides for right to property, and it stipulates that this right “may only be encroached upon in the interest of public need or in general interest of the community and in accordance with provision of appropriate laws.”

The right to property occupies an intermediate position between civil and political rights and ECOSOCR. Some scholars believe that the right cannot be classified as exclusively civil and political rights, or as ECOSOCR. If one examines the history of human rights agitations, though, it has always been associated with the liberal school of thought, the ideological orientation of civil and political rights. Hence, some describe the dual nature of the right as belonging to the two categories of rights: civil and political rights and ECOSOCR.¹⁹⁶

It therefore stands to reason that in the ACHPR the right to property is inserted at an intermediate position between civil and political rights on the one hand and ECOSOCR on the other hand.

5.2.1.1.1 Communication 159/96 : *Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v Angola*¹⁹⁷

In this case, a communication was filed jointly by a number of NGOs acting on behalf of West African nationals who were expelled from Angola in 1996. The expulsion was preceded by acts of brutality during which the victims lost a lot of their property. The complaint alleged that the State of Angola was in violation of a number of provisions of the African Charter, especially its Article 14 which protects the right to property.

¹⁹⁶ Catarina Krause, "The Right to Property" in: Asbjorne Eide et.al (eds), *Economic, Social and Cultural Rights*, Kluwer Law International, at 191-193

¹⁹⁷ Source: Compilation of Decisions on Communications of the African Commission on Human and Peoples Rights, extracted from 17th Annual Activity Report of the Commission 1993-1994, published by Institute for Human Rights and Development, Banjul at 10-15.

After studying the facts and the merits of the communication, the Commission upheld the claim that “Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations constitute a special violation of human rights”. The Commission found that the State of Angola was in violation of Articles 14 (right to property), 15 (right to work), and 17 (right to education). In addition, because the deportation disrupted family life, the Commission further found the Angolan State in violation of Article 18 of the ACHPR that protects the right to family life.

5.2.1.1.2 Communication 140/94, 141/94/ 145/95: *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*

In this communication, a claim was made that decrees issued by the then military government of Nigeria in 1994 proscribed certain newspapers from publishing and circulating. The offices of the newspapers were closed and occupied by armed security personnel in defiance of court orders.

The complainants alleged that the government action amounted to a violation of property rights of the owners of the newspapers arguing further that the right to property includes having access to the property and as such not to have ones property invaded or encroached upon. The Commission upheld this claim.

5.2.1.1.3 Communication 225/98 (*Huri-Laws v Nigeria*),¹⁹⁸ Communication 54/91 (*Malawi African Association v Mauritania*), Communication 61/91 (*Amnesty International v Mauritania*), Communication 98/93 (*Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v Mauritania*), Communication 164/97 & 196/97 (*Collectif des Veuves et Ayants droit v Mauritania*), and Communication 210/98 (*Association Mauritanienne des Droits de l'Homme v Mauritania*)¹⁹⁹

The cases were filed separately but had a common facts which had to do with the state of Mauritania when a military government came to power through *coup d'état* during which black ethnic Mauritians experienced worse forms of discrimination and felt marginalized in the country started agitating for changes and to put a stop to discrimination that they felt they had been subjected to.

This was met with confiscation and looting of their properties, expropriation and destruction of their land including their houses before forcing them to go abroad mostly, Senegal as refugees. The Commission held that the cases amounted to the violation of Article 14 of the Charter.

¹⁹⁸ Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights *supra* note 197 at 300.

¹⁹⁹ *Ibid* at 161-190.

5.2.1.1.4 Communication 25/89, 47/90, 56/91 (*Free Legal Assistance Groups, Lawyers Committee for Human Rights, Union Inter-Africaine des Droits de l'Homme, les Témoins de Jéhovah v Zaire*)²⁰⁰

The facts of these cases are that the church of the Jehovah Witnesses alleged in its claim that its property has been seized and their members tortured. In same claim the government was said to have also closed universities and secondary school for two years. The communication invited the Commission to determine whether or not, amongst others, the right to education and other rights have been violated by Zaire, as a State Party to the Charter.

On examination of the merits of the case, the Commission decided that the closure of universities and secondary school constitutes a violation of article 17. In the earlier case which involved deportation of West African citizens from Angola which was treated under Article 14, the Commission again held that the mass expulsions also undermined the right to education in violation of Article 17 of the ACHPR.

5.2.1.2 The Right to Work before the African Commission

Article 15 provides that every individual shall have the right to work under equitable and satisfactory conditions with equal pay for equal work. A critique of this provision is that it is vague and quite sketchy in terms of its scope by not providing for the right to form trade unions and also engaging in a strike action.

²⁰⁰ Reproduced in Compilation of Decisions on Communications of the African Commission on Human and Peoples Rights, extracted from 19th activity report 1995-1996 by Institute of Human Rights and Development at 360-365

Critics²⁰¹ maintain that such an omission or silence undermines the full enjoyment of the right. Under the ICESCR the right is much more elaborate. Although the Charter on the face of it has such a restrictive provision, but an examination of the Commission's Guidelines, for national periodic reports under the Charter,²⁰² spells out in a much lengthy way the scope of the right which includes right to form trade unions, right to strike, and other principles enunciated in the ICESCR. This is further reinforced by a resolution of the Commission in Dakar in 2004 which even went much further on some of the principles of the right to work including providing for the prohibition of forced labour and economic exploitation of children labour and other vulnerable people.²⁰³

5.2.1.2.1 Communication 39/90 (*Annette Pagnouille v Cameroon*)²⁰⁴

This Communication was also filed under Article 15 of the ACHPR. In this case, a Cameroonian magistrate was unlawfully detained and removed from his job. The Commission decided that the failure of the Cameroonian government as a state party to the Charter to reinstate him after his release from what turned out to be an unjustified and illegal detention constituted a violation of his right to work under satisfactory conditions.²⁰⁵

²⁰¹ See for example Evelyn A. Ankumah, *supra* note 195.

²⁰² Guidelines for National Periodic Reports of the Commission, 1998

²⁰³ Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04

²⁰⁴ Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights, *supra* note 197 at 61

²⁰⁵ *Ibid* at 819 1999

5.2.1.2.2 Communication 97/93 (*John K. Modise vs Botswana*)²⁰⁶

An issue of interpretation of Article 15 arose in this communication. The facts of the case are that John Modise claimed citizenship of Botswana but the government maintained he was not and forcibly deported to South Africa without trial. South African government also refused him entry so he was made to settle in one of his homelands. Modise claimed further that during his forcible deportation he lost his properties and could not work because he had no work permit thereby alleging violation of ECOSOCR protected under Articles 15 (right to work), 16 (1) (right to mental and physical health), and 17 (2) (right to participate in the cultural life of one's community). Modise also claimed that during the deportation period, he was deprived of his family and family support in violation of Article 18 (1) (right to family life) of the ACHPR. The Commission found the communication admissible. It upheld Modise's claims and ruled that the State of Botswana had violated the ACHPR.

As far as the right to health is concerned, Article 16 (2) of the ACHPR obliges each State Party to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. The scope of this right is much more elaborated in the guidelines for state reporting which give a very exhaustive list of what this right should entail. This right is linked to other situations of health like HIV, poverty, in come levels.²⁰⁷ In the Dakar resolution,²⁰⁸ the Commission widened its scope by adding principles of availability, accessibility, affordability of these services, and what is more the principle of core minimum appears to have been addressed by the Commission when it spelt out the minimum core obligation of the state needed to nutritionally to guarantee a persons health by preventing malnutrition and hunger. HIV/AIDS, malaria and their prevention are also dealt with in the resolution.

²⁰⁶ *Communication 97/93.*

²⁰⁷ Dakar Resolution *supra* note 203.

²⁰⁸ *Ibid*

In the *Mauritanian cases* referred to above, the Commission held that the nature of the deportation and treatment meted out to the Mauritians especially during the period of trial and detention when most of them were denied access to medication, drinking water as alleged in the communication constituted violation of their right to enjoyment of the best attainable state of physical and mental health.

Finally, Article 18 brings in a cultural aspect of ECOSOCR by stating that the family shall be protected by the state, and it shall have a duty to eliminate all forms of discrimination against women. Read together with article 27(1),²⁰⁹ this provision could have created anxiety amongst some scholars because the state with record of male dominance and authoritarian rule could not be trusted as a protector of family and also eschew the discrimination that women suffer. Such sceptics fear that if the state is allowed to be involved in such a venture as protecting the values of society then it could also potentially degenerate into a authoritarian state which can impose its own values.

It is nevertheless commendable of the development of human rights jurisprudence that the Commission has attempted to determine the scope and the meaning of what constitutes cultural rights. All too often, when ECOSOCR are discussed what is intended and thus happens in practice is that it is economic and social rights to the exclusion of the cultural rights dimension. Because of the perennial debate on cultural relativism *versus* universalism of human rights, some advocates at times get very uncomfortable with the subject of culture.

The African Commission should be commended for its decision in the *Modise case* where it found Botswana in violation of the cultural right to the protection of family and family life entrenched in Article 18 of the ACHPR.

²⁰⁹ Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.

Against the above background, it is clear that the earlier concerns by scholars and commentators of the Charter that the provisions on ECOSOCR which were promised in the preamble is not matched by substantive provisions of the Charter,²¹⁰ and therefore will inhibit the enjoyment of those rights have not necessarily been borne out by the jurisprudence of the Commission. There has been more judicial creativity and innovativeness than was envisaged initially. The concept of inter-connectedness of rights has also been applied in a way that has strengthened ECOSOCR.²¹¹

This section concludes with a discussion on article 62. This article calls on state parties of the Charter to submit a report every two years “on the legislative or other measures taken with a view to given effect to the rights and freedoms recognised and guaranteed by the present charter.”

Discussing article 62 of the Charter is important to the extent that it gives a good insight as to how the African states, as State Parties²¹²s, perceive and construe their obligations under the Charter and they should report on the same. The challenge so far is that whereas the scope of the rights has been broadened under the guidelines, the state parties still lack clarity as to how they are to report to the Commission. Most states construe their obligation under these rights as the same as they have assumed under the ICESCR which makes these rights programmatic in implementation; meaning that the state parties under the African Charter conceive of their obligation as one of “progressive implementation”. This, is submitted, not, a true reading of the legal status of ECOSOCR under the African Charter²¹³.

²¹⁰ See for eg J Oloka Onyango *supra* note 180 at 17.

²¹¹ In the majority of cases that had involved mass deportations the Commission has been able to derive ECOSOC rights. Hence in Communication 212/98 *Amnesty International v. Zambia*, (12 Annual Activity Report of the African Commission on Human and Peoples' Rights, AHG/215(XXXV), Annex V, 52.) The Commission was able to construe the violation of right to family life in a very generous and purposeful manner for the protection of the right.

²¹² All the 53 African states have ratified the African Charter on Human and Peoples Rights, 1981.

²¹³ See Nana K.A Busia and Bibiane Mbaye, *supra* note 130. In this paper the authors argue forcefully that the report of Zimbabwe and Mauritius to the African commission at its 20th session, 1996, the state parties erred by assuming that their obligations were progressive as under the UN system as provided for the by Covenant on Economic, Social and Cultural Rights, but rather the states ought to have known that their obligations are “immediate” as envisaged by the African Charter.

5.2.2 Violations of Economic, Social and Cultural Rights by Non-State Actors

5.2.2.1 Communication 155/96²¹⁴ (*The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*)

The facts of this case are that Nigerian National Petrol Company and Shell Petroleum Development Co-operation had been causing environmental degradation with health problems resulting from the degradation. The complaints alleged that the exploitation of oil was carried out without due regard to the health of the Ogoni people living in the Niger Delta region of Nigeria where on shore drilling was taking place. The health issues included contamination of water, soil and air thereby causing skin infections, respiratory ailments, risk of cancer and other reproductive problems.

The complainants also argued that the Nigerian government gave Shell protection with armed security forces. At the time the case was filed, there was no policy or laws in place by the government to regulate the activities of the companies in respect of the environmental impact of their operations.

According to the complainants, the security forces sent by the Nigerian government to protect the oil companies burned and destroyed Ogoni villages in reaction to peaceful campaigns by the community against the effects of the operations of the oil companies. Before the African Commission, the Nigerian government itself admitted its role in these ruthless operations. The complainants further alleged that food sources were destroyed through poisoning of soil and water from which they derived their livelihoods, such as farming and fishing.

²¹⁴ 30th Ordinary session held in Banjul, the Gambia October 2001

At the time when the complaint was filed Nigeria was under a very notorious military regime that changed by 1999. In a response to the communication, the new Nigerian government admitted that “a lot of atrocities were and are still being committed by the oil companies in Ogoni land and indeed in the Niger Delta area.”²¹⁵

The Communication was declared admissible by the Commission. On the merits of the case, the Commission examined the obligations of the Nigerian government as a state party to the ACHPR.

It also relied on the general principles of international human rights law in respect of state obligation, especially the triple state duty to respect, protect, promote and fulfil ECOSOCR. Furthermore, in accordance with the stipulations of Articles 60 and 61²¹⁶ of the ACHPR, the Commission examined other relevant international and regional human rights instruments with the view to identifying principles that could be applied to the case in question. Article 2 of the ICESCR was analysed and applied in the reasoning.

²¹⁵ *Communication. 155/96* para 42.

²¹⁶ Article 60 provides that “ The Commission shall draw inspiration from international law on human and peoples rights, particularly from provisions of various African instruments on Human and People’s rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and other African countries in the filed of Human and Peoples’ Rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members .”

In view of the facts of the case, the issue that the Commission sought to answer was whether or not Articles 16 (right to health) and 24 (peoples' right to satisfactory environment) were violated. On the facts, it was alleged that the government participated directly in contamination of air, water, soil thereby causing health problems for the Ogoni population. The Nigerian government facilitated damage by sending security forces to oppress the Ogoni people instead of protecting them from harm caused by oil companies. The complainants also held that the government had failed to provide or permit studies of potential or actual environmental and health risk caused by the oil operations to the population. Evidence was led to show that the victims were not protected from the oil companies by the government. The oil companies destroyed the Ogoni land with no benefits at all to the local population.

In its ruling, the Commission relied on the authority of the landmark judgement of the Inter-American court,²¹⁷ which held that even when acts were not directly imputable to the state, it could nevertheless be held accountable if it did not take the necessary steps to prevent third or private parties from violating rights within its jurisdiction. The Commission also cited with approval the decision of the European Court in *X and Y v Netherlands*,²¹⁸ where the Court ruled that enjoyment of rights should not be interfered with by other persons or private third parties. It found that "contrary to its Charter obligations and despite such internationally established principles, the Nigerian government has given the green light to private actors, thus the oil companies in particular, to devastatingly affect the well being of Ogonis."²¹⁹

The Nigerian government was therefore found in violation of Articles 14 (right to property), 16 (right to health), 18 (1) (right to family life), and 24 (right to satisfactory environment) of the ACHPR. Equally, the Nigerian government was found in violation of violation of article 21 which provides:

Article 61 stipulates that : " The Commission shall also take into consideration , as subsidiary measures to determine the principles of law, other general or special international conventions , laying down rules expressly recognized by member Sates of the Organization of African Unity, African practices consistent with international norms on Human and Peoples' Rights ,customs and generally accepted as laws , general principles of law recognized by African Sates as well as legal precedents and doctrine"

²¹⁷ See, Inter-American Court of Human Rights, *Velasquez Rodriguez* Case, supra note 3.

²¹⁸ 91 ECHR (1985) (Ser. A) at 32.

²¹⁹ *Comm.155/96 para 58.*

1. All people shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawfully recovery of its property as well as to a n adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principal of international law.
4. States parties so the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from their international resources.

What is even more interesting is that the Commission found that the then Nigerian military government had massively and systematically violated the rights for Ogoni peoples to housing and shelter. These rights are not specifically provided for in the ACHPR and were not even invoked by the complainants. However, they were inferred by the Commission from the right to the attainment of mental and physical health (Article 16) and the right to property (Article 14).

The Nigerian government was also found in violation of the right to the protection of family life (Article 18) “because when housing is destroyed property, health and family life are adversely affected.”²²⁰ That was not all. The Commission further inferred the violation of the right to food which was linked to human dignity and considered a prerequisite for the enjoyment of the right to health, education and even political participation.

²²⁰ *Communication 155/96* para 60

5.2.2.2 Significance of the Decision of the African Commission in the *Ogoni case* and its Implications for the Role of Non-State Actors in Protecting Economic, Social and Cultural Rights

5.2.2.2.1 Significance of the Decision

What is more instructive, in view of the objective of this study, is the view stated forcefully by the Commission that the government of Nigeria had violated ECOSOCR in the ACHPR by allowing private companies to destroy and create obstacles for Ogoni people in realising their right to food by feeding themselves.²²¹

The decision of the African Commission in this case has been hailed as a groundbreaking and landmark decision, the most notable contribution of the African Commission to the jurisprudence on the protection of ECOSOCR by states and by NSAs as well.²²² Joe Oloka Onyango found it to be of “precedential value” and held that with this decision, the Commission had come of age in the protection of human rights.²²³ There is considerable merit in this commendation of the Commission’s decision. The African Commission clearly affirmed the principle that the three generations of rights are all justiciable and have equal legal significance under the African system. Arguably, this is one of the few instances when the intent of the Declaration of Vienna’s on invisibility and interconnectedness²²⁴ of human rights has been given a concrete legal expression.

The Commission further demonstrated judicial activism by protecting ECOSOCR entrenched in the ACHPR and even purposively interpreting the ACHPR in order to champion rights such as the rights to housing and food that are not specifically enshrined therein but protected by other international human rights instruments.

²²¹ *Communication 155/96* para 66

²²² see for example *Courts and Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Report of International Commission of Jurists, Geneva 2008.

²²³ Joe Oloka-Onyango *supra* note 4.

²²⁴ United Nations World Conference of Human Rights, Vienna Declaration and Programme of Action, adopted 25th June 1993, reprinted in 32 ILM 1661 1993, 14 HRLJ 352 19913.

By relying on the letter and spirit of Articles 60 and 61 of the ACHPR, the Commission pointed the future direction of its jurisprudence. It signalled that when it cannot find satisfactory standards protective of rights in the ACHPR, it will rely on other international human instruments that afford higher standards to protect human rights. Better still, it is highly commendable that in its cross-generational approach to interpretation, the Commission took cultural rights seriously and did not confine itself to economic and social rights when it held that Nigerian government had violated the right to family life of the Ogoni people.

The principal question at this juncture is how the African Commission dealt with the pertinent question of the violation of ECOSOCR by NSAs such as oil companies in the Niger Delta.

5.2.2.2.2 Implications of the *Ogoni Case* for the Role of Non-State Actors

The issue of whether or not the African Commission in its reasoning could have found the oil companies as NSAs also in violation of rights is relevant when we come to look at the facts of the case the implications of the decision of the Commission for the principal objectives of this study.

There was ample evidence that the destruction of the environment, water and land was done directly by the companies. More importantly the Nigerian government itself conceded that the oil companies on their own had committed atrocities in the Niger Delta,²²⁵ thus violated some provisions of the ACHPR. The Commission acknowledged “the destructive and selfish role played by oil companies in Ogoni land”²²⁶ although it tied the violation of human rights by the oil companies to what it called the brutal tactics of the Nigerian government. One therefore wonders why it did not find a provision in the African Charter or the jurisprudence to hold them accountable.

²²⁵ *Communication 155/97* para 42

²²⁶ *Ibid* para 55

It would appear that in spite of the purposeful and generous interpretation that the Commission had given to the rights in the Charter, it still found itself bound by established concepts and principles of international human rights law when it came to NSAs. It therefore held tenaciously to the principle that the state was the only entity to be held accountable for violations of human rights within its jurisdiction even when they were committed by private or third parties.

This explains why the Commission cited with approval the cases of *Valesquez Rodriguez*²²⁷ and *X and Y v Netherlands*; decided under the Inter-American and the European human rights systems respectively. Even when there was considerable evidence of violations or brutalities by Shell as a powerful TNC, the Commission could only held the Nigerian government accountable for giving “green light to the oil companies who devastated the Ogonis.”

Useful as this decision has been in terms of advancing human rights protection in Africa, the question remains why the Commission did not stretch its interpretation of the ACHPR so as to hold NSAs liable.

Oloka Onyango also levelled criticism at the Ogoni decision because it was only directed at the state and the Commission failed to hold Shell responsible even partially. The Commission should not have stopped at just holding the state liable for violations but gone ahead to do the same for Shell. It should have stretched the logic of its reasoning by finding Shell Company in violation as well. Oloka Onyango argued that under the African system when ever an NSA, Shell, can be shown to be directly involved in violations then it must be held accountable.²²⁸

The Commission should have taken into consideration the stark fact of the asymmetrical power relationship between the State of Nigeria, like any other peripheral or developing country and NSAs operating on the continent where host some countries are unable, and some times unwilling, to regulate the activities of these companies in the their desperation to get investment.

²²⁷ *Velasquez Rodriguez v Honduras* case *supra* note 11.

²²⁸ J. Oloka –Onyango *supra* note 4.

So, even when the political will is there the question of power and resources is such that these states can rarely control these powerful companies. This is not in any way to suggest that the Nigerian government was innocent in the case under examination. That is why the least that the Commission could have done was to have held the oil companies and the Nigerian companies jointly in violation of the rights of the Ogoni people.

Oloka Onyango²²⁹ posed a rhetorical question as to why the Commission thought that the Charter provisions were not adequate enough to have been relied upon in holding the oil companies liable for human rights violations on their own. According to him, there was no lack of legal basis or jurisprudence, but the African Commission probably feared a slippery slope which could have invariably led to some of the unchartered terrains of rights. He therefore deplored that the Commission criminalised the state only. He drew the attention to concept of duties as provided for in the ACHPR. In his view, duties refer to both natural persons and juristic persons or to corporate bodies like NSAs. This concept of duties could have therefore provided a legal basis of holding the oil companies in violation of the rights of the Ogoni people.²³⁰ Yet, the Dakar Resolution on Economic, Social and Cultural Rights in Africa also recognised this problem when it called upon State parties to:

Develop mechanisms to hold non-state actors especially multi-national corporations and business accountable for violations of economic, social and cultural rights in such matters relating to child labour, industrial safety standards, protection against forced evictions and low wages, protection of the environment, including global warming and its impact on ecosystems, livelihoods and food security.²³¹

In this respect the *Ogoni case* was a test case for the African Commission to hold NSAs, namely Shell, accountable for the violation of the rights of Ogoni people in the Niger Delta, together with the Nigerian government.

²²⁹ J. Oloka – Onyango *supra* note 4

²³⁰ *Ibid* at 910

²³¹ The Dakar Resolution on Economic, Social and Cultural Rights in Africa, *supra* note 203.

Whereas its decision was laudable, the African Commission erred by not taking due cognisance of the intention of the drafters and appreciation of the legal status of NSAs under the African Charter and the reality of unequal power relations or asymmetry between the NSAs and some states in Africa.

A careful reading of the provisions of the Charter could provide a legal basis to hold Shell or any other NSA liable for violation of human rights. The preamble²³² to the ACHPR itself acknowledges the challenges posed by underdevelopment in the realization of all categories of human rights. Article 21(1) of the Charter shows great awareness of actors on the continent, states and non- state actors, who may want to deprive peoples of their natural resources. It provides that “Peoples shall freely dispose of their wealth and natural resources” and “In no case shall people be deprived” of this right. Article 21(4) reinforces Article 21(1) by adding that “State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with the view to strengthen Africa’s unity and solidarity.” Article 21(5) is much more instructive as it provides that “State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their people to fully benefit from the advantage of derived from their natural resources.” Article 22 sums up the link between human rights and development, as hinted at in the preamble, by stating that “State shall have the duty individually and collectively to ensure the exercise of the right to development.”

Common to all these provisions is awareness that development is central to the realization of rights in Africa and there are actors whose actions impact adversely upon the development process and the state must endeavour to control them. NSAs are some of the powerful entities within the jurisdiction of the states. A unique feature of the African Charter is the concept of duties that are imposed on states and NSAs alike.

²³² Especially paragraph 7 of the Charter which reads; “Convinced that it is henceforth essential to pay particular attention to the right to development...”

The concept of duties has been part of the discourse of international human rights law since 1948 when the UDHR was adopted. It is, however, the African Charter that has elaborated on it and appears to have given it a juridical status. There is forceful expert opinion that duties apply to both natural and juristic persons. As far as the latter are concerned, duties in relation to human rights apply to both states and NSAs.²³³

International human rights law does not assume that the obligations to protect human rights should be exercised by only one actor, the state in this case, but other actors have specific duties.²³⁴ According to Andrew Clapham, the inclusion of duties such as the duty not to discriminate against as provided for in Article 28 of the ACHPR emphasizes the extension of the Charter into the private realm.²³⁵ Barney Pityana endorses this contention by stating that duties confer on actors the protection of and also make them provider of rights, in this case NSAs.²³⁶

Drawing on the Charter provisions and citing African customary law, some scholars also argue that within the African polities, there is no sharp and fast division between state and society; public and private sphere; rights and duties; and equally between state and NSAs.²³⁷ The wording of Article 18(2) where obligation is placed upon the state to assist the family and to ensure that discrimination against women is eliminated (Article 18 (3)) is cited as a shining testimony to the fact that under the ACHPR and according to the African philosophy of law, there are no demarcating borders between the private and public realms²³⁸

Is there any evidence that the Commission as the competent body has in the exercise of its interpretative function of the ACHPR has taken due cognisance of NSAs' legal responsibilities? Wolfgang Benedik was satisfied that the African Commission was moving away from the classical and state-centred human rights protection towards a

²³³ Duties Sans Frontiers- Human Rights and Global Social Justice, Report of International Council on Human Rights, 2003.

²³⁴ *Ibid* 16.

²³⁵ Andrew Clapham, *supra* note 4 at 433.

²³⁶ N.B.Pityana, "The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context" in: M.D Evans & R. Murray (eds) *The African Charter on Human and Peoples Rights: The System in Practice*, 1986-2000, Cambridge University Press, 2002.

²³⁷ See for example R. Gittleman, "The Africa Charter on Human and Peoples' Rights: A Legal Analysis", 22 *Virginia Journal of International Law*, 667-716; see generally Rachael Murray *supra* note 59 at 14.

²³⁸ See Chidi Anslem Odinkalu, *supra* note 193 at 12.

system of protection that places emphasis on other actors and entities with responsibilities at the international level.²³⁹ These actors and entities include NSAs.

Truly, the African Commission addressed recommendations to private entities whose actions could infringe on human rights. The Commission appealed, for instance, to the manufacturers of anti personnel land mines to be aware of the dangers of land mines.²⁴⁰ The Commission has also stated that peoples do have a role to play in the development of democracy.²⁴¹

Examining Ghana's periodic state report during its 14th session, the Commission demonstrated its awareness of the role of NSAs such as IFIs in the violation of human and peoples' rights, especially ECOSOCR. The members of the Commission asked the Ghanaian representative how the structural adjustment policies adopted by the country has impacted upon the right to work and how, Ghana, as state party to the Charter, was addressing the problems encountered. The response from the Ghanaian representative confirmed the concern the Commission had. He informed the Commission that since the adoption of SAPs both the rights to work and health had been adversely affected.²⁴² What the Commission did not do was to make a distinction between violations of ECOSOCR that ensue because of omission on the part of the state or even a connivance or lack of political will and instances where the state itself is helpless or is under some form of "duress" to embark on policies that violate rights.

²³⁹ W. Benedik, "Human Rights in Multi-Cultural Perspective" in: K. Ginther and W. Benedik (eds) *New Conception in International law: An Afro-European Dialogue*, Ostereiche Zeitschrift Rechtund Volkrechr, Vienna 84, at152.

²⁴⁰ Resolution on Anti Personnel land mines, 8 th Annual Activity Report of the ACHPR/ RTP 8annex VIII para 4. Rachael Murray *supra* note 59 at 80 –81.

²⁴¹ 7th Annual Activity Report of the ACHPR 1993-1994, ACHPR/RPT, 7th annex XIV, papa 2. *ibid*.

²⁴² Report of the 14 Session of the African commission on Human and Peoples Rights, held in Addis Ababa in Ethiopia, 1-10th December 1993.

At its 39th session the African Commission decided to undertake a study of the possible violations of human and people's rights by NSAs.²⁴³ Since its 40th session, it has requested civil society organizations (CSOs) that have observer status to submit reports of violations of ECOSOCR by NSAs to the Commission in addition to the reports submitted on states' violations. This in itself points to a practice of the Commission that would seem to acknowledge the role of NSAs in the violation of rights, including ECOSOCR.

²⁴³ This information is contained in a letter for the files received on 22nd June 2006.

6 Selected African States' Constitutions and Application of Bill of Rights to Non-States Actors

Ultimately, it is at the domestic national level that the implementation of human rights should take place. The question is whether the provisions of the ACHPR can be invoked within Africa states, especially when many African Constitutions deal with ECOSOCR under the chapter on directive principles of state policies and do not consider them justiciable. The status of the ACHPR in the domestic legal system of African countries depends upon the legal tradition or the constitutional provisions on how international law can be made part of a national legal system. There are broadly two main approaches, namely the dualist and the monist ones, which are generally followed by Anglophone and Francophone countries respectively.²⁴⁴

The dualist approach is generally adopted by the common law and Anglophone countries. According to dualism, a piece of international law can only be incorporated into the national legal system by an enactment by a competent body such as the legislature.²⁴⁵ The monist approach is endorsed by civil law and Francophone countries. According to monism, a treaty such as the ACHPR is self-executing. It is automatically domesticated it into national law on ratification.

²⁴⁴ There are countries that lie in between these two examples whose laws are also influenced by received Roman Dutch law, these include the former Portuguese colonies, Angola, Mozambique, Guinea-Bissau and Cape Verde and some aspects of the laws of South Africa and Zimbabwe.

²⁴⁵ For example section 231(2) of the South African constitution stipulates thus: “ An international agreement binds the Republic only after it has been approved by resolution in both National Assembly and the National Council of the Provinces....”

The hitch, however, is that Francophone or civil law countries do renege in their treaty obligations by adopting the reciprocity principle providing that they would comply only if other state parties also live up to their obligations under the treaty.

International human rights law could be a bit more complex than the position espoused by traditional international law.²⁴⁶ Regardless of the approaches to international law, judges are generally much more comfortable in their interpretation and enforcement of a treaty like the ACHPR when it is seen as part of national law or at minimum as an aid in interpreting national law.

Within the jurisdiction of some African states, there are both vertical and horizontal applications of human rights law. Two countries of such legal system are Ghana and South Africa. In both countries, human rights law apply to natural and legal persons horizontally.

In the Ghanaian Constitution of 1992, Article 12 (1) provides:

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, by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this constitution.

Rights under the Ghanaian Constitution are therefore enforceable against both private and public entities, and there have been cases of human rights violations brought against private companies and other NSAs.²⁴⁷

²⁴⁶ *Ireland v UK* case cited in: European Court on Human Rights, Series A, Vol 25, 1978 para 160.

²⁴⁷ See for eg *Tetteh v Norvor (1994–2000) CHRAG at 13–37*. This was case of equality and freedom from discrimination, brought by a staff of a private airline who claimed that her dismissal was because

Under the post-Apartheid South African Constitution of 1996, Section 8(2) also 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.” Section 8 (4) states that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. For example, sections 10, 11, and 12, clarify that a juristic person cannot be protected by right to dignity, life, freedom, and security of person. Juristic persons can, however, enjoy certain types of rights such as equality, right to property and access to courts. The Constitutional Court laid down the principle that the Bill of Rights applies to private law.²⁴⁸ In a number of cases, South African courts have consistently ruled that the Bill of Rights applied horizontally.²⁴⁹ South Africa is perhaps the most notable exception of global repute for having handed down some of the landmark cases on ECOSOCR.²⁵⁰

In the end, most national jurisdictions are wary of insisting on international standards against the NSAs for a number of reasons including political considerations such as investment or ability to negotiate with trans-national bodies such as the IMF or World Bank. So, because of the challenges posed by NSAs that are trans-national and whose power in some instances overwhelms the peripheral states, it is important that a supranational regional human rights enforcement mechanism like the African Commission or the African Court should exist to address the cases of the violation of human rights by NSAs when individual States are unable or unwilling to use their municipal laws to hold them accountable.

refusal to agree to sexual harassment at work place. The CEO of the company who is the respondent was found to have violated the right of staff member the female complainant; see also *Morgan and Another v. Ghana International School (no1) (1994-200) CHRAG at 293-313* This was a case brought by a private individual against a private school for alleged discrimination based on nationality or national origin it was held that the private school was in violation of the right to equality of Morgan.

²⁴⁸ See for eg *De Klerk v. Du Plessis* 1994 6 BCLR 124 (1) 1995 2 SA 40 (1)

²⁴⁹ *Holomisa v. Argus Newspapers Ltd* 1996 6 BCLR 836 (W) 1996 2 SA 588 (w) and *Motala v University of Natal* 1995 3 BCLR 374 (D). For a comprehensive discussion of such issues in the constitutional law cases of South Africa, see IM Rautenbach and EFJ Malherbe, *Constitutional Law* ButterWorth,, 1996, esp Chapter 13.

²⁵⁰ *Soobramoney v Minister of Health (KwazuluNatal)* 1998 (1) SA 765 (CC); *Government of RSA & Others v. Grootboom & Others* 2001 (1) 46 (CC); and *Minster of Health & Others v. Treatment Action Campaign & Others (no 2)* 2002 (5) SA 721 (CC)

CHAPTER 4 GENERAL CONCLUSION AND RECOMMENDATIONS

1 General Conclusion

The protection of ECOSOCR, as any other category or generation of human rights, is an end itself. In Africa, ECOSOCR also play an important role in empowering people, especially marginalized groups like women and youth to participate in the political and economic life of the society. In addition, the protection of ECOSOCR in a non-discriminatory manner helps prevent the eruption of violent conflicts. This is because all too often, it is the inability of governments to provide the basic needs (ECOSOCR) of the people, which, among other things, contributes to the eruption of violent conflicts that lead to the violation of civil and political rights.

Since colonization, NSAs have played an important role in the political economy of African states. However, with the advent of contemporary forms of globalisation in the 1990s, after the fall of the Berlin Wall, NSAs have assumed a much more prominent role in Africa, as elsewhere, by performing some of the traditional functions of the state and are more powerful than states. In spite of this asymmetry, international human rights law continues to hold the state as the sole entity with the duty to protect human rights within its jurisdiction. However, evidence available shows that NSAs are also involved in the violation of human rights, including ECOSOCR.

Advocacy for the promotion and protection of human rights would be improved if not only states but also NSAs were to be held accountable and if there were apportion level of responsibility between them for human rights violations.

The present study dealt with the role of states and NSAs in the violation of ECOSOCR. It made the case for a paradigm shift from a state centred to a much broader approach where NSAs are also held liable and accountable when the state is unable or unwilling to act against them.

The study was based on the hypothesis that the ACHPR properly interpreted could be employed to hold NSAs legally responsible for their violation of ECOSOCR.

The main aim of this study was to examine international human right law in general and the ACHPR and the jurisprudence of the African Commission in particular with a view to identifying legal provisions and decisions of judicial or quasi-judicial bodies that could be relied upon as a legal basis for holding NSAs legally liable for their numerous violations of ECOSOCR on the African continent.

A salient finding of this study was since its formulation in 1945, international human rights law since its formulation in 1945 remains state centric as it imposes the obligation of respect and protection of ECOSOCR on the state only. This means that the state alone has a duty to protect all persons under its jurisdiction against third parties or private entities. Even when the violation of ECOSOCR is not directly imputable to the state, the latter can still be held liable not because it committed the act but because of its failure to prevent the violation.

Given the role played by NSAs in the violation of ECOSOCR alongside the state, attempts have been made to prevent their violation of human rights by introducing codes of conduct and voluntary principles for self-regulation. Useful as these codes and principles have been in sensitising NSAs to their corporate social responsibilities, there is no clear evidence that they made them respectful of human rights.

Worthy of note though is that by definition voluntary principles are not mandatory or binding. So, no legal avenue for redress exists as yet for any person or persons who have their ECOSOCR violated by NSAs. Mindful of this lacuna, the UN has over the years attempted to develop normative standards that could be relied upon to hold NSAs accountable for violations. They are not laws but merely restatement of the existing international human rights instruments that are at best soft law but not binding legally on NSAs.

The laws and jurisprudence of the various regional and domestic legal systems were examined. They all endorsed the traditional approach of imposing the duty to protect and due diligence on the state only without any direct obligation being imposed upon NSAs. A positive development is the extra-territorial application of laws from developed countries such as the US. This allows aggrieved persons to file a suit in US Courts. However, courts are not easily accessible. Nor are they under the relevant law (ACTA) competent to entertain cases of violations of ECOSOCR by NSAs. The record of successful cases is also very minimal.

Attempt was made to identify and review some of the literature on the subject matter of this study. Whereas the literature showed considerable understanding of the role of NSAs in violating ECOSOCR and other rights, and how they exploit their global power in relationship with weak peripheral countries in the developing world, there was no clear attempt to make any distinction between the role played by NSAs in the world in general and in Africa in particular and its possible implications for international human rights law.

Under the ACHPR, the African Commission confirmed the status of ECOSOCR as justiciable. Several decisions were also handed down on the scope and content of

ECOSOCR provided for in the ACHPR. The *Ogoni case*²⁵¹ was the landmark case where the African Commission held NSAs accountable for the violation of ECOSOCR. However, the African Commission erred in its reasoning by relying on the traditional principles of international human rights law instead of the relevant provisions of the ACHPR.

Finally, the Constitutions of selected African states, namely Ghana and South Africa, were examined. By providing for both vertical and horizontal application of the Bill of Rights, they make it possible for NSAs to be held accountable for violation of human rights, including ECOSOCR.

²⁵¹ *Communication 155/96 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria.*

2 Recommendations and the Quest for a New Paradigm

The role of NSAs and the violation of human rights generally, and ECOSOCR in particular, in our contemporary world, is still new and under researched. Knowledge is also limited. There is therefore need for further research in Africa to deepen knowledge as a basis for new policy approaches to the problem. Such research could examine further the meaning and scope of the concept of duties as provided for under the ACHPR (Article 28 read together with Articles 27 and 29) as a probable legal principle to hold NSAs and all actors within the private realm accountable for violations they commit.

Research could also focus on trying to establish different levels of culpability of the state and NSAs. There is also need to research and adapt principles of direct and indirect effect as used in the jurisprudence of the European Court of Justice to use it to impose obligation upon private entities and legal persons for violations they may commit.

More rigorous research needs to be carried out to find out if UDHR constitutes, in part or whole, part of customary international law, and if so, if it could be relied on in holding NSAs accountable for violations of ECOSOCR. Finally, the changing role of the state because of the activities of NSAs should attract research with the view to finding out if the change in the legal obligations of state as provided for by international law.

The African states should endeavour, to the extent possible, to live up to the obligations they have undertaken under international human rights law to protect rights of persons within their jurisdiction against third parties, especially the NSAs discussed in this study.

Under the African human rights system, as expressed through the African Charter, the African Charter can be used to hold NSAs liable for human rights violations. Consequently the African Commission should through its interpretative role invest more intellectual efforts in the implementation of the Charter in a way that takes into account the provisions and contextual realities of the continent.²⁵²

In situations where an NSA is much more powerful than the state, and the NSA has the support of its powerful parent country behind it, the African state cannot, as reality of global politics, use its resources and power to prevent that NSA from violating the rights of the people within its jurisdiction.

Under these circumstances, NGO advocacy on violations of ECOSOCR should be sophisticated as to be able to apportion levels of responsibility of violations to states and NSAs. NGOs should be able to make the necessary linkages between the violations of ECOSOCR and the trade policies, the type of economic development strategy that a given African state is embarking upon and the role NSAs are playing contributing to violations of ECOSOCR. The violations of ECOSOCR within the extractive industries must also be monitored and complaints filed against the TNCs and states for complicity. It is a welcome approach that the African Commission since 2006 requires NGOs with observer status with the Commission to submit report on violations by NSAs within the countries where they operate.

The states are very unlikely to use national laws, even constitutions, to hold powerful NSAs accountable for violations. There are number of political factors that the state as rational actor would take into consideration when it comes to using domestic law to hold powerful NSAs accountable. NGOs have a role to play through advocacy and litigation that will bring such NSAs into account.

Litigating using quasi-judicial forums such as the National Human Rights Commissions whose mandate are often wide and deliberately vague as to give them competence over broad range of human rights issues will be strategic.

²⁵² Shadrack C. Agakwa, Reclaiming Humanity: Economic, Social and Cultural Rights as Cornerstone of African Human Rights”, *5 Yale Hum Rts & Dev. L.J.* 177,177 (2002)

Such litigation in addition to the use of the Charter could rely on principles of customary international law by presenting UDHR as constituting part of international human rights law and that binds both states and NSAs; argued earlier by some scholars in this study. Litigation on violation of ECOSOCR against state and NSAs should be very creative calling for enormous intellectual investment relying on soft law in the form of resolutions, authoritative statements, and non-binding laws, could constitute aid in the interpretation of law.

Legal creativity can import principles of criminal law and tort law when instituting an action against an NSA as a number of human rights claims can also be couched as tort especially in employment law in terms of relationship between TNCs and its workers which raises questions of duty of care (vicarious liability) that can encapsulate workers rights including ECOSOCR such as right to good health and safety standards. Principles of criminal law such as causation could also be applicable in bringing action against the state and NSAs that violate human rights, it is contended that all that needs to be shown is that it is the action of the company as a legal or juristic person that caused a given violation and therefore must be, in the face of evidence adduced, be held liable. Domestic courts, national human rights institutions can also play a central role in ensuring that NSAs are held accountable for the violation of ECOSOCR. Until there is clearer legal regime at the international level, NGOs in Africa can rely on the African human rights system for the protection of ECOSOCR. They need to develop their advocacy skills in relation to ECOSOCR with equal focus on violations by states and NSAs since there is a normative basis for such an approach under the ACHPR. Northern NGOs have made remarkable strides in advocating for improvement of civil and political rights by states in Africa but the same cannot be said when it comes to violation of ECOSOCR by NSAs.

In spite of the difficulties that are encountered in establishing direct and clear legal responsibility of NSAs for violation of ECOSOCR. The trend though in terms of current thinking in international human rights law is the quest for a legal normative framework that can be employed against NSAs for the violations they commit in the world as a whole and Africa in particular.

There is a deficit in international legal mechanisms in addressing the challenges that are posed by NSAs when it comes to human rights protection. A counter-argument has been that if NSAs are to be held liable for violations, they may enjoy legitimacy like states.

Such an argument can be said to be legally accurate in terms of affirming the principle of state sovereignty but politically naïve about the *de facto* powers that NSAs do have in the context of Africa, for instance, where they are more powerful than many states. After all, the nature, scope, and content of international law have not changed since the end of the Second World War when the victorious powers in Europe thought that there was need to devise a new regime of international legality to address the issues relating to the protection of human rights. It was therefore a paradigm shift away from the nature of traditional international law that had been operative in Europe since the Treaty of Westphalia in 1648.

If for over seventy years, there is a realisation that there are trans-national actors much more powerful than some states, at least in Africa, then, time has come to revisit the existing international human rights law and argue for a new dispensation. This is why this study argued for a paradigm shift through a proper interpretation of the ACHPR to address human rights violations committed by NSAs in Africa. The African Charter can also be amended so as to make it both vertically and horizontally applicable as the case is with the South African and Ghanaian constitutions and the respective Bill of Rights provided for therein.

Furthermore, instead of relying on voluntary Codes of Conduct, UN resolutions, other soft law and customary international law such as UDHR whose binding effect is dubious, it may be more appropriate for a new treaty to be negotiated amongst states that would be binding on states as well as NSAs and render them accountable for violations of ECOSOCR. Making such a paradigm shift in international human rights law, as advocated in this study, will not unfortunately be an easy task, as it would require a positive implication of the very same developing countries that have been supporting NSAs involved in the violation of ECOSOCR.

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