

**MAKING NON-STATE ACTORS ACCOUNTABLE FOR VIOLATIONS OF SOCIO-ECONOMIC RIGHTS: A CASE STUDY OF TRANSNATIONAL CORPORATIONS IN THE AFRICAN CONTEXT**

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**By**

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## **LIST OF ABBREVIATIONS**

AfCHPR	African Charter on Human and Peoples' Rights
ATCA	(US) Aliens' Torts Claims Act
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESR	(UN) Committee on Economic, Social and Cultural Rights
ECHR	European Convention on the Protection of Human Rights
EPZ	Economic Protection Zone
ESCRS	Economic, Social and Cultural Rights
FDI	Foreign Direct Investment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
MNCs	Multinational Corporations
NGOs	Non-Governmental Organisations
NNPC	Nigerian National Petroleum Corporation
OECD	Organisation for Economic Co-operation and Development
SAPs	Structural Adjustment Programmes
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organisation)
UNDP	United Nations Development Programme

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Introductory remarks

The development of a common standard for holding governments accountable for human rights violations represented by international human rights law (IHRL) has been one of the major achievements of international law. However two conspicuously narrow foci marked and continue to mark this development. Firstly, IHRL has focused predominantly on civil and political rights to the exclusion of economic, social and cultural rights.<sup>1</sup> Indeed in this regard it has been observed that “of all domains where state and inter-governmental action have failed to achieve anything more than modest success, the development of effective measures for the prevention and remedying of violations of economic, social and cultural rights (ESCRs) must surely classify as one of the most glaring”.<sup>2</sup>

At least at the formal level of rhetoric, the international community has now diluted the narrow focus on civil liberties and political rights to the exclusion of ESCRs.<sup>3</sup> However while this points to a shift in paradigm on the subject of human rights, a second narrow focus still subsists. This is that, the state-centric paradigm of human rights still endures dominantly.<sup>4</sup>

This endurance emphasizes the traditional view in human rights law that is concerned primarily with the relationship between the state and the individual, the so-called, vertical

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<sup>1</sup> Eide “Economic, Social and Cultural Rights as human rights” in Eide et al (eds) (2001) 15.

<sup>2</sup> Leckie (1998) 20 *Human Rights Quarterly* 82 82.

<sup>3</sup> The inter-dependence and indivisibility of all human rights has been affirmed in a number of International law instruments, including the Vienna Declaration and Program of Action, 25/06/1993, UN. Doc. A/CONF.157/24 (1993); African Charter on Human and Peoples’ Rights, adopted, 27/06/1981, pmbI, para. 8, O.A.U. Doc.CAB/LEG/67/3/Rev.5 (1982) (entered into force, 21/10/1986); The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, guideline 4, reprinted in (1998) 20 *Human Rights Quarterly* 691.

<sup>4</sup> Jochnick (1999) 21 *Human Rights Quarterly* 56 57, Clapham (1993) 89-93.

application.<sup>5</sup> In the words of Donnelly, “grossly [but] helpfully oversimplified the problem has been seen as the modern state possessed of both the power and the inclination to abuse its citizens”<sup>6</sup>.

## 1.2 Statement of the problem

The exclusive focus on the state-centric paradigm of IHRL fails to address the increasing number of an array of private (non-state) actors who may come into play in terms of violations of human rights. Therefore while this study proceeds from the premise that the state is the primary focus of IHRL, it will be argued that the state cannot certainly be deemed the sole bearer of responsibility for human rights violations in view of the increase in the number of potential violators.

Consequently, the study aims to address three issues. Firstly, it seeks to investigate the increase in the number of violators of human rights to include non-state actors (particularly transnational (multinational) corporations TNCs)<sup>7</sup> and the effect of this increase on the violations of ESCRs. While the discussion will focus on the accountability of private actors vis-à-vis the protection of ESCRs, the area of civil and political rights is considered no less important. The discussion takes cognisance of the indivisibility and inter-dependence of all human rights in the sense that no precise contours separating all human rights can be said to exist.

Secondly, the study seeks to review the dominant approach to human rights including human rights treaties and other relevant instruments to assess their potential in asserting the human rights obligations (including, ESCRs obligations) of non-state actors.

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<sup>5</sup> Clapham (as above). The limitation of human rights law to state actions may be traced to early Bills of Rights, for instance, the 1689 English Bills of Rights, the 1776 American Declaration of Independence, the 1789 French Declaration on the Rights of Man and the Citizen.

<sup>6</sup> Donnelly in Castermans et al (eds)(1998) 401 [emphasis added].

<sup>7</sup> MNCs/TNCs may be defined as “...a complex of legally discrete entities (i.e. companies) established in several countries, forming a single economic unit (enterprise) which engages in operations transcending national borders under the direction of a sole decision making centre” per, A Fatouros *Transnational Enterprise in the Law of State Responsibility* 362 cited in Bergman “Corporations and Economic Social and Cultural Rights” available at < <http://www.hrusa.org/hrmaterials/IHRIP/circle/modules/module25.htm> > (accessed on 23/09/02).

Thirdly and with specific reference to the TNC as a non-state actor in the African context, the study seeks to investigate the challenges to the problem of implementing the accountability of TNCs through the IHRL framework and suggest ways of addressing these challenges.

Central focus will be placed on the accountability of TNCs for human rights violations, particularly ESCRs. The choice of TNCs in this study is justified on account of the immense economic power wielded by these entities vis a vis the changing notion of state sovereignty as will be emphasized in chapter 2.

At a more specific level, the case study on the problem of accountability of TNCs is narrowed down to an African context particularly for two reasons. Firstly, the problem of control of TNCs is highlighted more in the case of the weaker state in the African context. Secondly, the African Commission on Human and Peoples' Rights' recent decision in the *SERAC case*<sup>8</sup> that forms the basis of the case study in chapter 4 brings into light within a human rights treaty monitoring framework, the challenges of TNC-accountability within the context of Africa.

### 1.3 Literature review

The subject of the application of IHRL in the private sphere has been discussed by the work of Clapham<sup>9</sup>. At the specific level of accountability of TNCs for human rights violations, two recent works, one edited by Addo<sup>10</sup> and another by Kamminga and Zia-Zarifi<sup>11</sup>, are some of the few publications on the subject of the accountability of TNCs for human rights violations. The work of Scott<sup>12</sup> generally addresses the emerging international and municipal law jurisprudence on the accountability of TNCs for violations of ESCRs.

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<sup>8</sup> *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 decided at the African Commission's Ordinary Session held from 1 to 27 October 2001 (Annex).

<sup>9</sup> Clapham (n 4 above).

<sup>10</sup> Addo (ed)(1999).

<sup>11</sup> Kamminga & Zia-Zarifi (eds)(2000).

<sup>12</sup> Scott in Eide et al (eds) (n 1 above).

The work of Clapham addresses the question of the application of human rights norms to private actors generally within the European context. On the other hand, while squarely on the issue of the human rights obligations of TNCs, the other above-mentioned works contain few contributions, which delve into a discussion of ESCRs in particular. An example of an exception in this regard is the work of Scott. Further, the discussions are in a general context rather than with specific reference to regions for example the African human rights system.

This study therefore contributes in giving more focus to the question of accountability of TNCs for violations of ESCRs. It also addresses through a case study, some practical implications that arise in the consideration of human rights standards of TNCs in the context of Africa.

#### **1.4 Limitations of the study**

The subject of private actor responsibility for human rights violations is a very wide one encompassing a wide range of non-state actors that would merit a broader field of inquiry. However the focus of this study is with reference to TNCs thus avoiding an array of other non-state actors relevant to the question of private actor responsibility for human rights violations.

In the attempt to delimit the study to the African context, the case study places a heavy reliance on the activities of TNCs involved in the production of oil in Nigeria. This is in light of the availability of literature on the question and the SERAC decision that forms the basis of chapter 4. This inevitably leads to a generalised picture. Suffice to say that it would have been more appropriate to assess the examples of a number of individual African states in this regard.

The subject of accountability of TNCs for human rights violations invites an in-depth study of both the legal and non-legal (informal) approaches to the issue. In the interests of time and space, the study is limited mainly to the legal approaches on the subject and thus avoids an otherwise legitimate detailed discussion of the non-legal approaches to the question of accountability.

## 1.5 Overview of chapters

Chapter 1 highlights the basis and structure of the entire study. Chapter 2 focuses on a discussion of the impact of the changes to the notion of state sovereignty relating this to the increase in the number of non-state actors, particularly TNCs and the effects of this increase on the realisation of ESCRs. Chapter 3 reviews the application of the existing traditional human rights norms to private actors (including TNCs) as interpreted by a number of human rights treaty monitoring bodies and municipal courts. The discussion concentrates on the relevance of these norms and jurisprudence to the protection of ESCRs. Chapter 4 narrows down on a case study of the *SERAC* decision<sup>13</sup> vis a vis the activities of oil TNCs in Nigeria. This is done in order to demonstrate the challenges that arise in the implementation of the human rights obligations of TNCs (in this case ESCRs) within the framework of IHRL particularly in the African context and to offer some ways of addressing these challenges. Chapter 5 is a summary of the conclusions drawn from the whole study and makes some recommendations.

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<sup>13</sup> (n 8 above).

## CHAPTER 2

### THE CASE FOR IMPOSING SOCIO-ECONOMIC RIGHTS OBLIGATIONS ON PRIVATE ACTORS

#### 2.1 Introduction

The subject of non-state actor responsibility for human rights proceeds from the premise that actors other than the state may violate human rights. This assumption however does not answer the question of the increase of non-state actors particularly in relation to ESCRs. The discussion in this chapter therefore seeks to address the issue of the increase in the number of non-state actors in the field of IHRL. This will be done through the lens of globalization, firstly to give a brief explanation as to the evolving change in the traditional notion of state sovereignty and secondly, to provide some illumination as to why it is in the realm of violations of ESCRs that the impact of globalization can be felt most. Subsequently, the discussion will be done with particular reference to TNCs.

#### 2.2 Globalization and state sovereignty

The term “globalisation” is not amenable to precise definition.<sup>14</sup> In general, however, it refers to developments in the political, economic and cultural spheres. Specifically, “economic globalisation” is concerned with the removal of barriers to trade and investment, growth in foreign direct investments and the movement of capital across national boundaries.

The accelerated transformations affecting the world economy and the shift from production for local and national markets, point to the conclusion that large structural changes are now affecting states and that states are brought to share authority both in economy and society with other entities. In these times of globalization, the role of the individual state has changed and, in some measure, diminished.<sup>15</sup>

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<sup>14</sup> McCorquodale & Fairbrother (1999) 21 *Human Rights Quarterly* 735 736.

<sup>15</sup> Skogly & Gibney (2002) 24 *Human Rights Quarterly* 781 783.

The traditional notion of state sovereignty faces a serious threat with the emergence of forces that are global in scale and that affect the state's internal and external dependence. In the words of McCourdale and FairBrother, "in today's globalisation, the actors involved are not only states but also transnational corporations and inter-governmental institutions".<sup>16</sup> Indeed, of the world's 100 biggest economies, only 49 are states, while the remaining 51 economies are corporations.<sup>17</sup> While states have never had exclusive control over their economic, legal, and political and security affairs, the current rate of economic globalisation has drastically affected the concept of state sovereignty.<sup>18</sup>

The impact of globalisation on the traditional notion of state sovereignty has been recognised by the UN Committee on Economic, Social and Cultural Rights (CESR Committee) in the following terms:

[Globalisation] has also come to be closely associated with a variety of specific trends and policies including an increasing reliance upon the free market, a significant growth in the influence of international markets and institutions in determining the viability of national policy priorities, a diminution in the role of the state and the size of its budget, the privatisation of various functions previously considered to be the exclusive domain of the state, the deregulation of a range of activities with a view to facilitating investment and rewarding individual initiative, and corresponding increase in the role and even responsibilities attributed to private actors, both in the corporate sector, in particular to the transnational corporations and in civil society.<sup>19</sup>

A host of outside actors such as transnational corporations (TNCs) over whom states are increasingly losing control therefore besiege today's governments.<sup>20</sup> In this sense, globalisation can restrict the choices open to governments and people, particularly in the

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<sup>16</sup> McCorquodale & FairBrother (n 14 above) 738.

<sup>17</sup> McCorquodale & FairBrother (as above) quoting R.C. Longworth, "Large Companies Now Economically Bigger Than Some Countries", *CHICAGO TRIBUNE* 15 Oct 1996. See also Anderson & Cavanagh, "The Top 200: The Rise of Global Corporate Power (1996)" available at < <http://www.corpwatch.org/corner/glob/ips/top200.html> > (accessed 23/09/02).

<sup>18</sup> McCourdale & FairBrother (n 14 above) 737-738.

<sup>19</sup> Statement of the Committee on Economic, Social, and Cultural Rights on Globalisation and Economic, Social and Cultural Rights adopted 11/05/98 available at < <http://www.unhchr.ch/html/menu2/6/cesrnote.htm> > (accessed 23/09/02).

<sup>20</sup> Jochnick (n 4 above) 63.

human rights area, and thus make it more difficult to attribute responsibility for violations of human rights.<sup>21</sup> This limited scope of choice of the individual state is particularly highlighted in the case of smaller and poorer states.<sup>22</sup>

### 2.3 Impact on ESCRs

The limitation of government prerogatives in terms of controlling private actors is particularly relevant to ESCRs, whose realization, as opposed to that of civil liberties and formal political rights (CPRs), are generally not consistent with the demands of the market place.<sup>23</sup>

The conflict between the demands of the market place in the scheme of today's globalisation and the protection of ESCRs is evident in the fact that the role envisaged for the modern individual state is that of allowing markets to "flourish".<sup>24</sup> The traditional roles of the state in the allocation of resources, dealing with social goods, and protecting human rights are all sublimated to the "market"<sup>25</sup> with negative consequences for the protection of ESCRs.<sup>26</sup>

It is in this changed role of the state that one finds the reasons why it would be the realization of ESCRs (rather than that of CPRs) that is preponderantly hampered by the process of globalization. This is because the realization of ESCRs envisage to some appreciable extent, an interventionist role of the state. In the words of Jochnick, "while the positive/negative distinction between civil and political rights and ESCRs should not be exaggerated, the promotion of ESCR would seem to require a stronger state with

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<sup>21</sup> McCourdale & FairBrother (n 14 above) 746-7.

<sup>22</sup> Skogly & Gibney (n 15 above) 783.

<sup>23</sup> Jochnick (n 4 above) 64, Donnelly (n 6 above) 406.

<sup>24</sup> McCourquodale & FairBrother (n 14 above) 747. For a detailed critique on this point, see Oloka-Onyango and Udagama "Globalization and its full impact on the enjoyment of human rights" UN. Doc. E/CN.4/Sub.2/2000/13, 15/06/2000, available at < <http://www.unhchr.ch/> > (accessed on 23/09/02).

<sup>25</sup> McCourdale & FairBrother (n 14 above) 747.

<sup>26</sup> Donnelly (n 6 above) 406.

greater resources. Moreover, the legal norms and most powerful institutions governing international relations are more amenable to civil and political rights than ESCRs”.<sup>27</sup>

The above premise finds support in the 1992 study of the UN Special Rapporteur on the realization of ESCRs, which argued thus:

The legal basis upon which economic, social and cultural rights rest, essentially assumes the presence of a “strong” state as the motor behind realizing these rights, combined with a correlative national approach toward this category of legal entitlement. This view, however, is clearly at odds with the prevailing political realities of a majority of states, as well as views of the allegedly “appropriate role” of the state.<sup>28</sup>

The dominant theme in the process of economic globalisation is such that it is often taken for granted, albeit in most striking terms, that economic growth leads to the protection of economic rights in providing for the general welfare.<sup>29</sup> The argument therefore goes that economic growth through globalization leads to an automatic protection of economic rights such as the right to an adequate standard of living and the right to development.<sup>30</sup>

To a free-market reformer, “short term suffering is necessary for long-term growth, and that growth alone will provide for the general welfare”.<sup>31</sup> In this endeavour, the human welfare issues and the need for environmental protection have increasingly been left to the vagaries of the market with the states romantically embracing the market forces as the ultimate solution to all of society’s ills.<sup>32</sup> This is boldly illustrated in much of the developing world where welfare states have been said to face further attacks from internationally mandated and managed structural adjustments programmes, which while purporting to anchor the free market pursuit of curbing waste and inefficiency, also

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<sup>27</sup> Jochnick (n 4 above) 64.

<sup>28</sup> Danilo Turk, “The Realization of Economic, Social and Cultural Rights - Final Report”, UN Doc.E/CN.4/Sub.2/1992/16, 3/07/1992, 23 85 (hereinafter, TURK Report) available at < <http://www.unhchr.ch> > (accessed 23/09/02).

<sup>29</sup> Jochnick (n 4 above) 64

<sup>30</sup> McCourdale & FairBrother (n 14 above) 743.

<sup>31</sup> Jochnick (n 4 above) 64.

<sup>32</sup> TURK Report (n 28 above) 27.

typically target social welfare expenditures.<sup>33</sup> The upshot of this surrender of control by the state is that there is the “corresponding rush to denationalise and leave economics, politics and social matters to the whims of the private sector, although the theme of the day, will inevitably have an impact upon the full realization of ESCRs”.<sup>34</sup>

Within the individual state, there is even a more nuanced aspect of this change of the role of the state. This relates to the fact that non-state actors have come to occupy central positions in the provision of services and goods. In keeping with the demands of the free-market reform, states have given away many of their prerogatives to private entities with examples including, the privatisation of prisons, private security companies, privatised education systems and health care services.

It is for these reasons that it must be borne in mind that the subject of potential violators of human rights has transcended the state-centric paradigm, referred to earlier in chapter 1.

## **2.4 ESCRs and non-state actors**

As the individual state’s authority declines, we must look to those sectors that have filled the void. In this regard, the list of potential violators of all human rights has expanded to include entities capable of causing harm to the enjoyment of human rights.<sup>35</sup>

Leckie<sup>36</sup> categorizes potential violators of ESCRs into five distinct groups; (1) the individual state and public actors; (2) private actors; (3) international financial and other institutions; (4) transnational corporations (TNCs); and (5) the international community. While an intra-group distinction between these groups is discernible, it is important to note that there may not be a watertight difference between some of the groups, for example the category, “private actors” on the one hand, and “TNCs” on the other. They may both be labelled “non-state actors” along with the international financial and other institutions.

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<sup>33</sup> Donnelly (n 6 above) 408.

<sup>34</sup> TURK Report (n 28 above) 27.

<sup>35</sup> Leckie (n 2 above) 108, TURK Report (n 28 above) para 18-19.

<sup>36</sup> Leckie (n 2 above) 108.

Further, there may also be added to these groups, another group, “third-party states” acting beyond their borders.<sup>37</sup>

Further at a general level, the list of non-state actors in the sphere of human rights encompasses other groups such as armed opposition groups, terrorists and organised crime syndicates and individual perpetrators of racial discrimination and domestic violence.<sup>38</sup>

Although for a number of the above non-state actors the question of asserting responsibility for human rights violations may be straightforward, for others, this may not be so. The difficulty of asserting responsibility for human rights violations is particularly evident in the case of TNCs.

## **2.5 TNCs: The problem of accountability**

The process of globalisation has to a large extent contributed to the increasing role of TNCs in both the global and domestic economies quite apart from the TNCs themselves playing a central role in the process.<sup>39</sup> In terms of the global economy, TNCs have been said to constitute the “linchpins of the contemporary world economy” with around 53 000 of them accounting for at least 20-30 per cent of world output and an estimated 70 percent of world trade.<sup>40</sup> Further, a couple of years back, it was estimated that over 73 million people were employed by TNCs.<sup>41</sup>

From a human rights perspective, the vexing problem remains how to ensure that corporate activities are consistent with human rights standards and to ensure an element

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<sup>37</sup> Jochnick (n 4 above) 72-76. For a discussion on the transnational obligation of states for human rights violations, see Skogly & Gibney (n 15 above) generally.

<sup>38</sup> Clapham (n 4 above) 54. It is in the last example of domestic violence that feminist critiques of the dominant human rights paradigm have intensified their campaign for a broader basis of asserting responsibility for human rights violations.

<sup>39</sup> Steiner & Alston (2000) 1349.

<sup>40</sup> D Held et al *Global Transformations* (1999) 1, cited in Steiner & Alston (n 39 above) 1349-1350.

<sup>41</sup> UNCTAD, “World Investments Reports 1996 and 1997”, E/C.10/1993/11:36.

of accountability.<sup>42</sup> Generally, by the very nature of their activities, TNCs acting alone or in association with government and other actors have the potential to violate the interests that IHRL has tended to categorize in terms of ESCRs.<sup>43</sup> The potential violation of ESCRs by corporations can therefore span through a number of rights including the rights to self-determination, the right to work and favourable working conditions, the right to form trade unions, the right to adequate living standards and health.<sup>44</sup>

From an international law perspective, the main problem of accountability for corporate activities remains that private actors are technically immune to human rights as they are non-signatories/ parties to treaties guaranteeing human rights.<sup>45</sup> However, at the level of enforcing domestic law to give effect to human rights in the wake of the activities of corporate actors, several problems arise as will be discussed at a later stage of this work.<sup>46</sup>

## **2.6 Conclusion**

The discussion in this chapter establishes that partly as a result of the phenomenon of globalisation there has been an increase in the number of violators of human rights beyond the state. This has witnessed the emergence of a number of non-state actors with some like TNCs having powers akin to those of states. Concomitantly, there has been a decrease in the sovereignty of the individual states inevitably leading to negative impacts to the realization of ESCRs.

The impact of the process of globalisation against the backdrop of the withering notion of state sovereignty especially in the developing countries therefore offers a powerful basis upon which to argue for a response by IHRL to the question of increased non-state actors (particularly TNCs) and especially with regard to the protection of ESCRs. This calls for a broader basis for asserting responsibility for human rights.

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<sup>42</sup> Steiner & Alston (n 39 above).

<sup>43</sup> Scott (n 12 above) 564-568.

<sup>44</sup> Bergman (n 7 above).

<sup>45</sup> Jochnick (n 4 above) 58.

<sup>46</sup> Discussed in chapter 4 section 4.5.

On the basis of the foregoing, the next chapter seeks to discuss the emerging trends on the question of non-state actor violations of human rights including ESCRs.

## CHAPTER 3

### EMERGING TRENDS TOWARDS ASSERTING RESPONSIBILITY OF PRIVATE ACTORS FOR VIOLATIONS OF ESCRS

#### 3.1 Introduction

In keeping with the fact of increased actors in the sphere of human rights the question of private actor responsibility for human rights violations has generated considerable increased attention especially in the last 10-15 years.<sup>47</sup> This development is a challenge to the traditional understanding of human rights law, which has been defined as a relationship between the state and the individual.<sup>48</sup>

It is now acknowledged that although general international law is understood to be based on a mix of customary practice and consent to treaties as binding on the state, human rights law has in large measure defied these narrow categories by suggesting an additional foundation premised on human dignity.<sup>49</sup> Human dignity makes certain claims on all actors, state and non-state, regardless of the individual State's consent to custom or treaty.<sup>50</sup>

It is in line with this trend that the general question of non-state actor responsibility for human rights has been approached with a move towards asserting responsibility for non-state actors. Nevertheless, the existence of obligations for non-state actors in the field of human rights is no foregone conclusion.<sup>51</sup>

The first section of the discussion in this chapter focuses on the emerging trends towards asserting direct obligations of non-state actors in light of a number of human

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<sup>47</sup> Skogly in Addo (ed) (n 10 above) 239.

<sup>48</sup> Skogly (n 47 above) 239.

<sup>49</sup> Jochnick (n 4 above) 61.

<sup>50</sup> Van Hoof in Castermans et al (eds) (n 6 above) 55.

<sup>51</sup> Van Hoof (n 50 above) 48.

rights instruments with implications for ESCRs and briefly, at a practical level through non-legal initiatives represented by codes of conduct. In the second section, the discussion considers the issue of asserting responsibility through the medium of the state. The third section discusses national approaches to the question of private actor (corporate) responsibility for human rights violations and highlights the implications of these approaches for the protection of ESCRs.

### 3.2 Human rights instruments imposing direct non-state actor obligations

A number of human rights instruments while speaking principally to governments, arguably seek to apply to individuals, groups and corporations thus placing unequivocal direct obligations on non-state actors.

The UDHR<sup>52</sup> proclaims in its preamble the pledge by states to achieve, in co-operation with the UN, the promotion of universal respect for human and observance of human rights and freedoms. At the same time, the Declaration imposes explicit direct obligations on non-state actors. It provides thus:

...this [Declaration] as a common standard of achievement for all peoples and all nations, to the 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.<sup>53</sup>

Thus the UDHR does not clearly identify the bearer of the responsibility to respect and promote the rights guaranteed in it. The Declaration affirms the inter-link and inter-dependence of ESCRs with other rights including civil and political rights referring to all rights recognized in it as the highest aspiration of common people.<sup>54</sup>

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<sup>52</sup> Universal Declaration on Human Rights, adopted 10/12/1948; UN.G.A Res 217 A (III), UN.GAOR, 3d Sess, UN. Doc. A/810 (1948).

<sup>53</sup> Pmbl [emphasis added]. Commenting on this provision, Henkin notes, "*Every individual* includes juridical persons. *Every individual and every organ of society* excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all", L Henkin cited in International Council on Human Rights Policy (2002) 58.

<sup>54</sup> Pmbl, para 2.

This perspective is important as it implies that any non-state actors' violation of ESCRs has implications for civil and political rights and the so-called third generation of rights including the right to development as well. The Declaration recognizes non-state actor duties by affirming that "everyone has duties to the community".<sup>55</sup> It further expresses that nothing in it 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 in it.<sup>56</sup>

At the treaty level, it is important to note that although it is not the principal thrust of the ICESCR<sup>57</sup> to impose direct human rights duties for private actors the Covenant appears to encompass the question of direct private actor responsibility. The preamble expresses the individual's responsibility to strive for the promotion and observance of the rights recognized under the Covenant.

While there is no indication on the basis of the *travaux préparatoires* to the ICESCR that the drafters of the Covenant expressly intended the rights to have horizontal effect<sup>58</sup>, the Covenant no doubt entails duties on private actors. This view is anchored firstly on the premise that many of the rights provided for in the Covenant mirror the provisions in the UDHR which in turn does impose obligations on both state and non-state actors alike. Secondly, the ICESCR's monitoring organ, the Committee on Economic, Social and Cultural Rights (CESR), whose general comments are considered to be an authoritative exposition of the nature of obligations under the Covenant, has interpreted the obligations under the Covenant to impose obligations on non-state actors.

Thus for example, with regard to the right to health, the Committee has stated that:

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<sup>55</sup> UDHR, Art 29.

<sup>56</sup> UDHR, Art 30. Art 5(1) of the ICCPR and Art 17 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS (entered into force 3/09/1953) as amended by Protocols Nos 3, 5 and 8 (entered into force on 21/09/1970, 20/12/1971 and 1/01/1990 respectively) are of the same wording. The European Commission on Human Rights invoked Article 17 of the ECHR in holding that a private actor (political party) was obliged to respect the rights contained in the Convention, see, *Kammunistische Partei Deutschland v Federal Republic of Germany* (1955-7) 1 YearBook 223, discussed in Clapham (n 4 above) 185.

<sup>57</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 993 UNTS 3 (entered into force 3/01/1976).

<sup>58</sup> Craven (1995) 112.

While only state parties are parties to the Covenant and thus ultimately accountable for compliance with it, all members of the society - individuals, including health professionals, local communities, inter-governmental and non-governmental organisations, civil society organisations, as well as the private business sector-have responsibilities regarding the realization of the right to health...<sup>59</sup>

The ICESR's sister covenant, the ICCPR<sup>60</sup> also provides for the obligations of non-state entities.<sup>61</sup> Regarding the ICCPR, Nowak has referred to the "horizontal effects" that human rights produce between private parties as opposed to the vertical relationship, which exists between the individual and the state.<sup>62</sup> He asserts therefore that it is possible to read article 2(3)<sup>63</sup> of the ICCPR as inferring that the Covenant rights are protected not only from violations by the state. Clapham therefore suggests that indicative of a certain consensus regarding the importance of threats from, individuals or private bodies is the following passage from the Covenant's *travaux préparatoires*:

Although a suggestion was made that the freedom of assembly should be protected only against 'governmental interference', it was generally understood that the individual should be protected against all kinds of interference in the exercise of this right.<sup>64</sup>

Other Covenants that assert direct duties on non-state actors include the Convention on Elimination of All Forms of Racial Discrimination (CERD)<sup>65</sup> the Geneva Conventions of

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<sup>59</sup> General Comment No 14 'The Right to the highest attainable standard of health (Art 12)' 4/07/2000, UN. Doc E/C.12/2000/4 para 42. The Committee has also included direct responsibility of non-state actors within the purview of the right to food (article 11) thus, 'While only states are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society-individuals, families, local communities, non-governmental organisations, civil society organisations, as well as the private business sector-have responsibility in the realisation of the right to adequate food.' General Comment No. 12 "The Right to adequate food (Art 11) 12/05/1999, UN Doc: E/C.12/1999/5 para 20.

<sup>60</sup> International Covenant on Civil and Political Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 999 UNTS 171 (entered into force, 23/03/1976).

<sup>61</sup> ICCPR, PmbI and Art 5.

<sup>62</sup> Nowak (1993) 38.

<sup>63</sup> Art 2(3)(a) ICCPR imposes an obligation on each State party "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

<sup>64</sup> Clapham (n 4 above) 97.

<sup>65</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS (entered into force 4/01/1969), Art 2.

1949<sup>66</sup> and their additional Protocols of 1977<sup>67</sup> and the Genocide Convention<sup>68</sup>. The question of direct responsibility of non-state actors for human rights violations is also addressed under the Convention Relating to the Status of Refugees<sup>69</sup> and its Amending Protocol<sup>70</sup> both of which explicitly contain the nuance that agents of persecution for the purposes of defining 'refugee' can be state or non-state actors<sup>71</sup>.

It is instructive to note that within the realm of international criminal law, direct liability may be enforced against individuals for established international crimes such as genocide, war crimes and crimes against humanity<sup>72</sup>. Individual criminal responsibility therefore serves as a necessary addition to the state-centric human rights paradigm with the purpose of ensuring that individual perpetrators of international crimes do not escape personal responsibility under the disguise of the abstract notion of the state.<sup>73</sup>

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<sup>66</sup> The four Geneva Conventions comprise of; the Geneva Convention for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at the Sea; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Geneva Conventions for the Protection of Victims of Armed Conflict, Conventions I-IV, adopted 12/09/1949, 75 UNTS 31, 85, 135, 287 (entered into force 21/10/1950). These instruments acknowledge that 'humanitarian provisions may be applied for the benefit of the victims of the armed conflict' and make no distinction between state and non-state actors, see L Gabriel "The Red Cross-Red Crescent Movement: Is it a Model for Non-state Participation?" cited in Weissbrodt "Non-State Entities and Human Rights within the context of the Nation-State in the 21<sup>st</sup> Century" in Castermans et al (eds) (n 6 above) 186.

<sup>67</sup> Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (entered into force 7/12/1978); Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 (entered into force 7/12/1978) both of which place certain duties on all persons taking active part in conflict while not affecting the legal status of the parties, see Gabriel (n 66 above) 89.

<sup>68</sup> Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 78 UNTS 277 (entered into force 12/01/1951), Arts 4 & 5.

<sup>69</sup> 189 UNTS 150 (entered into force 22/04/1954).

<sup>70</sup> Protocol Relating to the Status of Refugees, 606 UNTS 267 (entered into force 4/10/1967).

<sup>71</sup> Office of the UN High Commissioner for Refugees (UNHCR) *Handbook on Procedures And Criteria for Determining Refugee Status*, UN Doc.H/IP/4/Eng.Rev.1 (1988) 11-17.

<sup>72</sup> Genocide Convention (n 21 above), Rome Statute on the International Criminal Court (Rome Statute) adopted 17/07/98 (entered into force 1/07/02) Art 5. The drafting process of the Rome Statute reveals that corporate crimes were only excluded from the Final draft of the Statute on account of the fact that only some states have criminalized corporate crimes a fact which would have made the Rome Statute's preference of national criminal procedure unworkable. See Clapham "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Court" in Kamminga & Zia-Zarifi (eds) (n 11 above) 139-195.

<sup>73</sup> Paraphrasing the Judgment of the International Military Tribunal at Nuremberg, reprinted in

Thus where appropriate, there is the possibility of asserting criminal responsibility of individual officers of a corporation within the context of corporate responsibility. It is important to recollect that the Nuremberg Military Tribunal in the *I.G Farben Trial* deemed the corporate defendant, Farben, as a legal entity, capable of violating the laws of war.<sup>74</sup> While the Tribunal lacked jurisdiction over the corporate entity itself, the court found that the directors of Farben were guilty of knowingly participating in crimes through the fact of belonging to an organization or group connected with the commission of war crimes.

Although the circumstances in which such individual criminal responsibility may be exercised are very limited (only for the international crimes where ‘private responsibility’ has been established)<sup>75</sup>, this development represents a nominal procedure by which IHRL may be applied to private actors including corporations.

It is instructive to note that the procedure of international criminal responsibility, although limited in scope, represents the only procedure by which the foregoing direct obligations of non-state actors may be enforced at a legal binding level.

The example of the above human rights instruments and the developments in international criminal law (all of which protect and have implications for the protection of a number of human rights, including ESCRs) point to the existence of direct obligations of private actors. It must be pointed out however that although the above human rights instruments seek to establish direct non-state actor responsibility, implementation mechanisms to enforce these obligations remain non-existent because the treaty monitoring procedures put central focus on the state.

### **3.3 Regional human rights instruments**

A number of regional human rights instruments also attempt to impose direct duties on private actors. This is particularly with reference to the imposition of duties on

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(1947) 41 *American Journal of International Law* 172-333 221.

<sup>74</sup> *The I. G. Farben Trial*, US Military Tribunal, Nuremberg, 14/08/1947 (29/07/1948) (Case No. 57) 1132-1133, discussed in Clapham (n 72 above) 167.

<sup>75</sup> Skogly (n 47 above) 251.

individuals. Foremost in this regard are the African Charter on Human and Peoples' Rights (African Charter)<sup>76</sup> and the American Declaration of the Rights and Duties of Man, the latter of which as its name suggests, contains clear language as to both the rights and duties of individuals.<sup>77</sup> The African Charter provides that every individual shall have duties towards his family and society, the state and the international community and that the rights of each individual shall be exercised with due regard to the rights of others.<sup>78</sup>

### **3.3.1 Implications of the inclusion of duties for direct non-state actor responsibility under the African Charter**

Specifically with regard to the African Charter, the issue of whether human rights should and do provide protection in the private sphere (involving non-state actors) may turn on the issue of the role which the concept of duties may play in practise.<sup>79</sup>

In this regard Murray therefore emphasizes that the African Charter differs from the traditional dominant paradigm of IHRL that tended to exclusively deal with the relationship between the state and the individual and thereby inevitably failed to recognize that violations of human rights can occur in the private sphere.<sup>80</sup> An African stance may take into account a wider range of violations involving non-state actors.<sup>81</sup>

The possibility of asserting direct responsibility of private actors under the African Charter is significant because of a number of reasons two of which deserve particular mention. Firstly, with regard to the protection of ESCRs from violations by private actors the African Charter offers an innovative approach for the protection of ESCRs by subjecting these rights to protection not only by means of the state reporting

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<sup>76</sup> African Charter (n 3 above).

<sup>77</sup> American Declaration of the Rights and Duties of Man, OAS Res.XXX, adopted 1948, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (Basic Documents), OAE/Ser.L.VII.82 Doc.6 rev.1 (1992) PmbI, Chapter 1.

<sup>78</sup> African Charter, Art 27.

<sup>79</sup> Murray (2000) 34 citing W Benedek "Peoples' Rights and Individual Duties as Special Features of the African Charter on Human and Peoples' Rights" in P Kunig, et al (eds) *Regional Protection of Human Rights in International Law: The Emerging African System* (1985) 89.

<sup>80</sup> Murray (n 79 above) 39.

<sup>81</sup> Murray (as above) citing Clapham (n 4 above) 134.

mechanism<sup>82</sup> but also the violations-based approach through the complaints mechanism.<sup>83</sup>

A second reason lies in the high premium on and relevance of the petitions that highlight corporate harms in present-day Africa. This is because in a number of African countries, it is the complete non-regulation of activity of all kinds, including transnational corporate activity, in regions subject to no meaningful structures of government, or throughout the entire territory of the state, as in some ‘failed states’.<sup>84</sup>

Scott therefore argues that in the absence of meaningful governmental capacity, corporations could themselves be impleaded under the African Charter itself as *de facto* governing authorities, at least in some contexts.<sup>85</sup> This view would hardly be feasible in view of the position that the complaint procedure under the Charter and indeed all other treaty-complaint procedures focus on the state.<sup>86</sup> No complaints can be lodged against private individuals or non-state entities.<sup>87</sup>

### **3.3.2 The ‘drittwirkung’ or horizontal effect of the European Convention on Human Rights<sup>88</sup>**

Particular developments within the European system of protection of human rights are significant to the question of direct responsibility of non-state actors under IHRL instruments. Unlike the African Charter and the American Declaration, the European

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<sup>82</sup> African Charter, Art 62.

<sup>83</sup> Odinkalu (2001) 23 *Human Rights Quarterly* 327.

<sup>84</sup> Scott (n 12 above) 580-581.

<sup>85</sup> Scott (n 12 above) 580 (citing the example of the plunder of fisheries off the coast of Somalia by international long-distance trawlers).

<sup>86</sup> African Charter, Arts 47 & 55. However this argument would certainly be of limited importance in the context of the growing importance of domestic law (courts) in the implementation of international law for as van Hoof notes, “Although the formal status of international law in the domestic legal system concerned in the form of either a monistic or dualistic system remains relevant it does not constitute the only decisive factor. The attitude of the national judiciary is nowadays considered to be equally important to the effective implementation of international law” van Hoof (n 50 above) 57.

<sup>87</sup> African Charter, Arts 47 & 55, Optional Protocol to the ICCPR, Art 22.

<sup>88</sup> ECHR (n 56 above).

Convention on Human Rights (ECHR) does not expressly include the concept of duties. However, the ECHR has been said to cover not only human rights violations by states but also the actions of private bodies and individuals.<sup>89</sup> Thus it has been contended that in the ECHR context, the *drittwirkung* (or third-party/ horizontal effect) of the Convention renders the Convention applicable in the private sphere.<sup>90</sup>

In the answer to the question of not only whether, but also exactly what international legal obligations corporations may have in the field of human rights, the discussion cannot therefore completely escape the question of the horizontal effect of provisions in the field of IHRL.<sup>91</sup>

The doctrine of *drittwirkung* may entail the idea that human rights provisions apply in relations between private parties with the horizontal duty of states to ensure human rights (indirect *drittwirkung*).<sup>92</sup> In another, albeit wider context, the doctrine can be defined as a possibility for an individual to enforce his rights against other individuals.<sup>93</sup> The application of the doctrine in this latter context is not uncontroversial based on the many different interpretations of the concept of *drittwirkung*.<sup>94</sup> The European Court on Human rights has however upheld the view that while the drafters of the Convention intended to provide protection against State entities, such an intention does not preclude extension of the Convention's protection vis-a-vis other entities in view of the changed circumstances which bear witness to private actor violations.<sup>95</sup>

Therefore in particular contexts, the jurisprudence emanating from the European human rights system shows that non-state actors may have duties and obligations stemming from the ECHR even if these actors are (and cannot be) respondents before the

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<sup>89</sup> Clapham (n 4 above) 93.

<sup>90</sup> Harris et al (1995) 21. For further discussion of the concept of *drittwirkung*, see Clapham (n 4 above) Chap 7 and Clapham "The *Drittwirkung* of the Convention" in St J MacDonald et al (eds) (1993).

<sup>91</sup> Van Hoof (n 50 above) 54.

<sup>92</sup> Harris (n 90 above) 21.

<sup>93</sup> Harris (n 90 above) 21.

<sup>94</sup> Van Hoof (n 50 above) 54.

<sup>95</sup> Clapham (n 4 above) 178-224.

Strasbourg organs. The European Commission has for example concluded that “[if] it is the role of the Convention and the function of its interpretation to make the protection of individuals effective, the interpretation of Article 11<sup>96</sup> should be such as to provide, in conformity with international labour law, some protection against private interference”<sup>97</sup>.

Therefore the recognition of the doctrine of horizontal effects is drawn on a case-by-case analysis.<sup>98</sup> The question is no longer whether the ECHR applies to the private sphere, but rather whether the nature and content of a norm renders the application of the ECHR possible in legal relations between non-state entities.<sup>99</sup> Further, this recognition of the doctrine opens up the possibility of directly invoking the ECHR before national courts.<sup>100</sup>

The recognition of the applicability of the ECHR to private actors holds significant potential for the protection of human rights in the private sphere and this extends to the protection of ESCRs. It is noteworthy that whilst the ECHR sets forth what are essentially civil and political rights, the European Court has acknowledged the social and economic nature of these rights with the consequence that there is no “watertight division separating the rights protected under the ECHR from social and economic rights”<sup>101</sup>.

### **3.4 Soft-law/non-binding efforts aimed at direct responsibility of non-state actors**

A number of initiatives evidenced by codes of conduct developed by States, civil society and private actors themselves, have attempted to assert direct state responsibility on non-state actors, particularly, TNCs.

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<sup>96</sup> Art 11(1) of the ECHR provides for the right to freedom of assembly and freedom of association including the right to form and join trade unions.

<sup>97</sup> *Swedish Engine Drivers’ Union Case*, Application No. 5614/72 (1974), 18 Eur.Ct.HR (Ser.B) 42-6 (1977).

<sup>98</sup> Van Hoof (n 50 above) 55.

<sup>99</sup> Clapham (n 4 above) 90 Van Hoof (n 50 above) 55.

<sup>100</sup> Clapham (n 4 above) 90.

<sup>101</sup> *Airey v Ireland*, 2 Eur.Ct. H.R.61 (1979), 2 Eur.H.R.REP.305 316.

In this category of initiatives is the UN Draft Code of Conduct on TNCs<sup>102</sup>, which expresses a number of human rights obligations of companies. In 1977, the International Labour Organization (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO Declaration)<sup>103</sup> which calls upon governments, employers and workers to respect the sovereign rights of states, obey the national laws and regulations and give due consideration to local practises and to respect relevant international standards.<sup>104</sup> The Declaration refers to the UDHR and the corresponding UN International Covenants as well as the Constitution of the ILO and the ILO Recommendations and Conventions.<sup>105</sup>

By virtue of the 1976 Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises<sup>106</sup>, the member countries of the OECD signalled their agreement to control multinationals doing business abroad. The Guidelines provide that enterprises should respect the human rights standards of those affected by their activities consistent with host government's international obligations and commitments.<sup>107</sup>

Although these efforts represent a positive attempt in asserting direct responsibility of private actors, the standards and review of such codes often vary enormously and the codes will often be ignored in a competitive environment, particularly when profits are at risk.<sup>108</sup> This, coupled with the voluntary nature of these initiatives and the fact that they are not legally binding would indicate that these voluntary standards may not be the best

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<sup>102</sup> UN Draft Responsibilities of Transnational Corporations and Other Business Enterprises With regard to Human Rights, UN Doc. E/CN.4/Sub.2/2002/13 available at < <http://www.business-humanrights.org/Draft-UN-Human-Rights-Responsibilities-of-Business-Aug-2002.htm> > (accessed 15/10/02).

<sup>103</sup> Reprinted in Kamminga & Zia-Zarifi (n 11 above) 315.

<sup>104</sup> ILO Declaration, para 11.2.

<sup>105</sup> ILO Declaration, para 8.

<sup>106</sup> Reprinted in Addo (ed) (n 10 above) 97.

<sup>107</sup> OECD Guidelines, Para 11.2.

<sup>108</sup> McCorquodale "Feeling the Heat of Human Rights Branding: Bringing Transnational Corporations Within the Human Rights Fence" (2001) 1 *Human Rights & Human Welfare* 26, also available at < <http://www.du.edu/gsis/hrhw/volumes/2001/1-4/mccorquodale-addo.pdf> > (accessed 15/10/02).

tool to ensure that TNCs act in accordance with internationally recognised human rights standards, including standards for ESCRs.<sup>109</sup>

### 3.5 State responsibility and non-state actor obligations for human rights

Despite the much heralded withering notion of state sovereignty as was pointed out in the last chapter, the position of states as primary actors in international law remains unthreatened. The next level of asserting responsibility for human rights violations for non-state actor responsibility therefore inevitably becomes that of the state. Through the effective discharge of the state's duty to protect human rights, TNCs may be indirectly held accountable for human rights violations.<sup>110</sup> State responsibility for human rights violations of private actors can be invoked both as a question under general international law and/or the obligation of states under particular human rights instruments.

#### 3.5.1 General state responsibility

The obligations of non-state actors for human rights violations including the violations of ESCRs derive from the general "law of state responsibility". The International Law Commission's (ILC) Draft Articles on State Responsibility (the Draft Articles)<sup>111</sup> can be used in this respect as an indication of established and developing customary law.<sup>112</sup>

The Draft Articles provide that there is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to a state under international law and constitutes a breach of an international obligation of the state.<sup>113</sup>

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<sup>109</sup> Skogly (n 47 above) 251.

<sup>110</sup> McCorquodale (n 108 above) 27.

<sup>111</sup> Reprinted in Report of the International Law Commission (Fifty-Third Session (23 April-1 June and 2 July-10 August 2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No.10, UN Doc.A/56/10 (2001).

<sup>112</sup> Lawson in Castermans et al (eds) (n 6 above) 91. The ILC Drafts have however not been universally endorsed by states. The assertion in respect of their customary international law nature would thus be qualified with respect to the new and controversial aspects of the Draft Articles as opposed to the older and less-disputed part of the Draft Articles adopted between 1973 and 1975. For this older version of the Draft and the ILC's Commentary in relation thereto, see *Yearbook of the International Law Commission* (YBILC) vol. II, 1973, YBILC vol II, 1974 and YBILC vol II, 1975.

<sup>113</sup> Draft Articles, Art 2.

Therefore in relation to human rights issues, state responsibility applies when a state is in breach of the obligation to respect internationally recognized human rights norms that arise from treaties, custom or *jus cogens*.<sup>114</sup> An act of a State that constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.<sup>115</sup>

The Draft Articles also cover acts of state organs or entities exercising elements of governmental authority, acts carried out under the direction or control of the state and acts acknowledged by a state as its own.<sup>116</sup> If a corporation is in such proximity with the state then the activities of the corporation invites state responsibility. The usage of the general state responsibility doctrine in this sense faces the major constraint that this mechanism cannot be used in situations where there is no connection between the private violation and the state.

At another level, state responsibility also implies an obligation on the state to ensure private actors' compliance with international obligations and an obligation to prevent violations by them.<sup>117</sup> A number of human rights instruments specifically express the state's responsibility for human rights violations of private actors and this has been accorded recognition in the jurisprudence of a number of human rights monitoring bodies as is discussed in the next section.

### **3.5.2 State responsibility under human rights instruments**

All human rights instruments contain explicit obligations for states to take effective measures to prevent violations of human rights, civil, political or ESCRs.<sup>118</sup> This has

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<sup>114</sup> Leckie (n 2 above) 109. It is to be noted that although mutually applying, there are differences between the general law of state responsibility and IHRL generally, an example is that that IHRL does not recognise the element of reciprocity or counter-measures, which apply for the general law of state responsibility.

<sup>115</sup> Draft Articles, Art 19(1).

<sup>116</sup> Draft Articles, Chapter 2.

<sup>117</sup> Leckie (n 2 above) 109.

<sup>118</sup> For example, ICCPR, Art 2 (3)(a); CEDAW, Art 2(e); CERD, Art 2 (e); ECHR, Art 1; African Charter, Art 2; American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123 (entered into force 18/07/1978) reprinted in Basic Documents (n 77 above) Art 1.

been confirmed by the famous judgment of the Inter-American court on Human Rights in the *Velasquez Rodriguez* case that affirmed that: -

An illegal act which violates human rights and which is initially not directly imputable to a State 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.<sup>119</sup>

The requirement of “due diligence” as dictated by the *Velasquez Rodriguez* case may be likened to the common law duty of care in the municipal law context.<sup>120</sup> “Due diligence” has therefore been interpreted to require such reasonable measures of prevention of human rights violation that a well-administered government could be expected to exercise under similar circumstances.<sup>121</sup> In this regard, the states have a duty to prevent, investigate, punish and remedy human rights violations committed by private actors.<sup>122</sup>

Further, the delineation of state obligations for human rights as being those to respect, protect, fulfil and promote these rights has now been widely acknowledged.<sup>123</sup> Each of these types of obligations is susceptible to violation.

Therefore, in relation to the obligations under the ICESCR, the Maastricht Guidelines on Violations of ESCRs recognize “the state’s responsibility to ensure that private entities or individuals, including TNCs over which they exercise jurisdiction, do not deprive individuals of their ESCRs”.<sup>124</sup> In line with the delineation of the state’s duty as the duties

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<sup>119</sup> *Velasquez Rodriguez v Honduras* Inter-American Court of Human Rights (Ser. C) No. 4 (1988) 28 *ILM* (1989) para 172.

<sup>120</sup> This is with reference to the requisite of “reasonableness” in the common law duty of negligence.

<sup>121</sup> Shelton “State responsibility for covert and indirect forms of violence” in Mahoney & Mahoney (eds)(1993) 272.

<sup>122</sup> *Velasquez Case*, para 173-174.

<sup>123</sup> The obligation to protect entails the state’s duty to prevent abuse by third parties, including non-state actors. The obligation to respect entails duties of restraint on the state akin to negative obligations. Obligations to fulfil involve tertiary positive duties on the state to take appropriate legislative, administrative, budgetary, judicial and other measures to ensure the rapid enjoyment of the rights concerned. The obligation to promote requires the state to facilitate the exercise of rights for example by promoting tolerance, raising awareness and creating the necessary infrastructures. With regard to these obligations in relation to ESCRs, see Eide (n 1 above) 37.

<sup>124</sup> The Maastricht Guidelines (n 3 above) para 18.

to respect, protect, fulfil and promote, this obligation entails a composite of both negative and positive duties of the state.

The Maastricht Guidelines further endorse the view of the Inter-American Court in *Velasquez Rodriguez* by stating that “states are responsible for violations of economic, social and cultural rights that result from the failure to exercise due diligence in controlling the behaviour of non-state actors”.<sup>125</sup>

In practise, the CESR Committee has affirmed this position in its state reporting procedure thus confirming that the realm of state responsibility extends not only to the acts of the state but also to third parties over whom the state should have control.<sup>126</sup>

Other human rights treaty monitoring bodies have considered the question of state responsibility for corporate violations. There exist decisions of the Human Rights Committee<sup>127</sup>, the European Court on Human Rights<sup>128</sup> and the Inter-American Commission<sup>129</sup> affirming the responsibility on individual states to ensure that corporate conduct does not violate human rights. The recent *SERAC* decision of the African Commission<sup>130</sup> on this aspect of indirect state responsibility forms the basis of the discussion in the next Chapter.

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<sup>125</sup> Maastricht Guidelines (n 3 above), para 18.

<sup>126</sup> Craven (n 58 above) 113 citing the CESR’s Concluding Observations in regard to Iran’s initial State Report in 1993 where the Committee stated thus, “While appreciating that fatwahs are issued by the religious authorities and not by State organs *per se*, the question of State responsibility clearly arises in circumstances in which the State does not take whatever measures are available to it to remove clear threats to the rights applicable in Iran in consequence of its ratification of the Covenant”.

<sup>127</sup> *Hopu and Bessert v France*, UN Doc.CCPR/C/60/D/549/1993.

<sup>128</sup> *Guerra and Another v Italy*, Judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and Decisions 1998-1, No. 64.

<sup>129</sup> Inter-American Commission on Human Rights, Report of the Situation of Human Rights in Ecuador, OAS Doc.OEA/Ser.L/V/II.96 (1997).

<sup>130</sup> *SERAC* decision (n 8 above) (Annex).

## 3.6 National approaches to the question of responsibility

### 3.6.1 The United States' courts

A number of domestic legal systems have recognised private actor obligations for human rights violations. Foremost in this regard has been the use in the United States (US), of the 1789 Aliens Torts Claims Act (ATCA). The Act was enacted to provide for a procedure for civil actions by aliens (in the context of the U S) for torts committed outside the US.<sup>131</sup> For almost 200 years the Act had remained unused but in the past decade it has increasingly gained prominence since the case of *Filartiga V Pena-Irala*<sup>132</sup>.

In *Kadic v Karadzic*<sup>133</sup> the Circuit Court recognised the importance of IHRL in ATCA actions holding that “the law of nations” as understood in the modern era, does not confine its reach to state action. Instead, forms of conduct violate “the law of nations” whether undertaken by those acting under the auspices of a state or only as private individuals”.

Although the cases that have arisen under ATCA thus far have related to alleged gross violations of civil and political rights mainly alleging torture claims<sup>134</sup>, a number of cases have contained allegations regarding ESCR violations by corporations. For example in *Doe v Unocal*<sup>135</sup>, farmers in Burma sued UNOCAL for complicity in a number of violations in connection with a joint venture of gas exploration with the Burma

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<sup>131</sup> In its modern form the ATCA provides that “the district courts shall have original jurisdiction of any civil action by an alien for a tort committed in violations of the law of nations/treaty of the US”, quoted in Steinhardt “Litigating Corporate Responsibility” 4 available at < <http://www.globaldimensions.net/articles/cr/steinhardt.html> > (accessed 23/09/02).

<sup>132</sup> 630 F.2d.886, 887 (2r Circ 1980). The case was concerned with State sponsored torture in violation of international customary law. The 1991 Torture Victim Protection Act (section 2 of), which also allows foreign nationals to bring suit in US federal courts “for a tort committed in violation of international law or US treaty” now supplants the ATCA-procedure. See “Corporate liability for violations of international human rights law” (2001) 114 Harvard Law Review 2025 also available at < <http://www.globalpolicy.org/intljustice/atca/2001/05crplbly.htm> > (accessed 15/10/02), Stephens “Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts” in Kamminga & Zia-Zarifi (n 11 above) 209-229.

<sup>133</sup> 70 F.3d.232 (2d Cir.1995) 239.

<sup>134</sup> “Corporate liability for violations of international human rights law” (n 132 above).

<sup>135</sup> 963 F.Supp.880 (C.D.Cal, 1997).

government. The claim centred on torture and forced labour by the government in clearing the way for a pipeline. However, the case also alleged the forced displacement and relocation of the local inhabitants from their homelands. Although the court dismissed the case on the merits holding that there was no requisite degree of connection of UNOCAL with the government as to establish complicity, the court acknowledged by implication that with the presentation of such evidence, UNOCAL could be found liable.

In one of the recent cases, *Wiwa v Royal Dutch Petroleum Co*<sup>136</sup>, the claim alleges that the Respondent TNC had participated in a number of grave human rights including summary executions; crimes against humanity; torture; cruel and human and degrading punishment perpetrated by the Nigerian government. However the basis of the allegations springs from the environmental degradation in the Ogoni region of Nigeria leading to community protests and the response by the government thereto resulting into the alleged violations as will be pointed out in the discussion in the next chapter.

While the use of the ATCA is an important development indicating a positive attitude of the US courts to enforce IHRL, commentators generally agree that the ATCA procedure suffers from a number of constraints that reflect the obstacles that ATCA plaintiffs would face in bringing suits to enforce human rights obligations of non-state actors.<sup>137</sup> These have been cited as including<sup>138</sup>, the high factual threshold that such parties must meet, the obstacle of having to overcome a *forum non conveniens* motion and the problem of having to obtain personal jurisdiction over the defendant.

### **3.6.2 Other examples from domestic courts**

In other jurisdictions such as England, Canada and Australia, similar suits alleging responsibility of corporations have been brought to these countries' courts on the basis

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<sup>136</sup> 226 F.3d 88 (2d Cir.2000), *cert denied*, 532 U.S.941 (2001). For a discussion on the implications of this case for the role of U.S Courts in enforcing International Law, see, Fellmeth [2002] 5 *Yale Human Rights & Development L.J.*241.

<sup>137</sup> Saunders "Rich and Rare are the Gems they War: Holding De Beers Accountable for Trading Conflict Diamonds" (2001) 24 *Fordham Int'l L J.* 1402 also available at < <http://www.globalpolicy.org/injustice/atca/2001/debeers.htm> > (accessed 15/10/02).

<sup>138</sup> Saunders (n 137 above).

of the “duty of care” principle under common law.<sup>139</sup> For example in *Connelly v RTZ Corp Plc*<sup>140</sup>, the plaintiff-employee of the defendant alleged the failure by the defendant to take steps to protect its workers in its Namibian mine against the foreseeable risk of contracting laryngeal cancer from the hazards of exposure to uranium dust.

Similarly, in *Lubbe & Others v Cape Plc*<sup>141</sup>, the claims centred on allegations against the defendant corporation for breach of duty of care following the health hazards caused by exposure to asbestos in South Africa. In both cases, the English courts determined that the cases could be properly maintained in the UK.

As with the US’ ATCA-litigation, such suits face a number of constraints including the problem of having to satisfy the *forum non convenience* requirement.<sup>142</sup>

In the context of the question whether other states should adopt similar procedures to the question of private actor responsibility, it is to be noted that weaker states are not sufficiently capable of instituting mechanisms such as the ATCA-procedure and the other examples of litigation in English and other courts.

Although limited in reach, these municipal court cases however show increasing attempts at ensuring that private actors, particularly corporations, are accountable for their human rights violations (including ESCRs).

### 3.7 Conclusion

The discussion in this Chapter sought to lay the legal basis for asserting private actor responsibility for ESCRs violations and looked at a number of human rights instruments and the emerging jurisprudence in this regard. The discussion shows that provisions in a number of traditional human rights instruments as interpreted by several treaty monitoring bodies provide for direct obligations of non-state actors. While the precise

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<sup>139</sup> Scott (n 12 above) 590-592.

<sup>140</sup> [1997] 4 All ER 335 (H.L.).

<sup>141</sup> [2000] 4 All ER 268.

<sup>142</sup> Meeran “The Unveiling of Transnational Corporations: A Direct Approach” in Addo (n 10 above) 161-170.

nature of these obligations remains to be set out, at the very minimum it can be said that private actors have an obligation to respect human rights obligations, including ESCRs.

The main constraint with regard to the direct obligation of non-state actors (including TNCs) emerged to be the absence of mechanisms towards such enforcement (with the exception of the nominal procedure under international criminal law and the emerging trends in domestic courts to assert corporate responsibility).

Through the medium of state responsibility, non-state actors may be held responsible for ESCRs violations and this entails the state's duty to protect human rights. Unlike the direct responsibility of non-state actors, this duty is amenable to monitoring through the treaty procedures of state reporting and the complaints mechanism.

## CHAPTER 4

### STATE RESPONSIBILITY AS AN ENFORCEMENT FRAMEWORK FOR PRIVATE ACTORS' OBLIGATIONS FOR ESCRS: THE CASE STUDY OF TNCs AND OIL PRODUCTION IN NIGERIA

#### 4.1 Introduction

The discussion in the preceding chapter concluded that there remains the issue of implementation of private actor responsibility for human rights violations. The indirect assertion of responsibility of private actors through the medium of the state is however enforceable through both the state reporting and complaints procedures under the various human rights instruments discussed.

As with all IHRL procedures of supervision of treaty obligations, the use of the word “enforceable” in this context may not be unambiguous. Effective protection of human rights, for example, depends on state action at the domestic level. Theo van Boven thus points out that human rights are first and foremost, protected domestically and that international procedures exist to complement the domestic protection of human rights.<sup>143</sup> For this reason it is inevitable that the regulation of private actors through the mechanism of state responsibility by means of the treaty monitoring mechanisms should rely heavily on the practical regulation at the domestic level.

Thus, this chapter discusses the constraints in using the state responsibility mechanism with particular reference to the case of TNCs engaged in oil production in the Ogoni region of southern Nigeria vis a vis the recent decision of the African Commission on Human and Peoples' Rights (the Commission) in respect of the violations in this regard.

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<sup>143</sup> Van Boven “The International System of Human rights: An overview” in P Alston (ed)(1997) 10.

## 4.2 The human rights violations

The extent of the human rights violations in the Ogoni region is epitomised by the execution of Ken Saro Wiwa and eight other Ogoni activists after a sham criminal trial, which attracted international condemnation.<sup>144</sup>

Most of the human rights abuses have arisen from the violent clashes between the Ogoni community and the Nigerian government's security forces leading to the violation of a number of civil and political rights. This has been on occasions when members of the community have sought to protest against the environmental degradation of Ogoniland caused by the persistent pollution as a result of oil production. The resultant effect of the environmental degradation and violence has been the violations of a number of socio-economic rights through the increase of health hazards and the destruction of food resources and housing.

Intricately linked with the violation of these rights are a number of salient violations of other rights including the rights to culture, compensation concerns of the local community (touching on the right to natural resources) and the indigenous community rights of the local population.<sup>145</sup>

Environmental pollution has been attributed to the fact of the mostly outdated and outmoded materials in the operations of the oil companies.<sup>146</sup> Uncontrolled gas flaring running continuously, some for the last thirty years, has resulted into soot, noise and acid rain.<sup>147</sup> The practise by oil companies of laying canals has been faulted as altering

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<sup>144</sup> Human Rights Watch (1999) "The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities" 3 available at < <http://www.hrw.org/reports/1999/Nigeria>> (accessed 15/10/02).

<sup>145</sup> Idowu (1999) 17(2) *Netherlands Quarterly of Human Rights* 161 166.

<sup>146</sup> Idowu (n 145 above) 171 (noting that 95 per cent of oil spillage and gas flaring have been caused by persistent utilisation of obsolete and worn-out equipment).

<sup>147</sup> G Schulman "Nigeria's Crude Relationship with Shell" *Human Rights Tribune* vol. 4, No. 2-3, June 1997 27 cited in Butegwa & Awori "Globalization and its Impact on Economic and Social Rights in Africa" 22-23, paper presented for AAAS/HURIDOCAS project on Economic and Social Rights Violations, Associates for Change, Kampala, September 1998 available at < <http://www.associatesforchange.com/Globalization%20in%20Africa.PDF>> (accessed 15/10/02).

the ecology of the areas by flooding fresh water with saline water and altering the flood pattern in the region.<sup>148</sup>

Oil-leaking above-ground pipelines have despoiled fields and villages.<sup>149</sup> The effect of this despoliation on the right to food for example is dire. Between June and August 1997, in two separate incidents in Ogoniland, a total area of approximately 300 hectares of farmland was polluted by oil spillage.<sup>150</sup> In the pre-oil production period, the Ogoni are said to have placed considerable premium on the use of their land for subsistence agriculture.<sup>151</sup> After the oil discovery, this position changed drastically with the agricultural value of the land diminishing to a considerable extent.

Further, the environmental degradation in Ogoni has created a situation in which it is difficult to realize the right to the highest attainable standard of health. For example, drinking water samples taken from Ogoniland in 1997 showed that the level of petroleum hydrocarbons they contained were 360 times the tolerable levels in European Union Countries.<sup>152</sup> The resultant water, soil and air contamination has resulted into serious short and long term health problems including skin infections, gastrointestinal and respiratory ailments, increased cancer and neurological and reproductive complications. Between 1982 and 1992, the 1.6 million gallons of oil spilled have left long-lasting environmental damage.<sup>153</sup>

The violence meted out at the hands of Nigerian government security forces in response to a number of community protests against the environmental degradation has directly resulted in further violations. These include not only the more immediate violations of a number of civil and political rights such as the right to freedom of association and expression but also the further violation of the above listed ESCRs, in addition to other

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<sup>148</sup> Idowu (n 145 above) 171-2.

<sup>149</sup> Schulman (n 147 above) 27.

<sup>150</sup> Butegwa & Awori (n 147 above) 23.

<sup>151</sup> Idowu (n 145 above) 166.

<sup>152</sup> Movement for the Survival of the Ogoni People, "Ogoni: A Test Case for the Commonwealth", submission to the Commonwealth Ministerial Action Group on the Harare Declaration, cited in Butegwa & Awori (n 147 above) 23.

<sup>153</sup> Schulman (n 147 above) 27.

classical ESCRs such as the right to shelter on account of the destruction of homes in the area and mass evictions from homes.

The violations of the ESCRs integral to the lives of the Ogoni community formed the basis of ESCR claims in the recent decision of the African Commission in the *SERAC* decision mentioned in Chapter 3 of this work.<sup>154</sup>

In the context of this work, the *SERAC* decision is significant in its challenge of the traditional research methodology for investigating human rights violations in the Ogoni region. This is because considerable research has tended to concentrate on the more publicised civil and political rights abuses (with ESCRs being treated as side-violations).<sup>155</sup> Further, in the documentation of the human rights abuses, there has been an over-emphasis on the state as the violator of the rights while the role of the private actors involved is under-played. Criticism is more easily levelled on the state for violating the civil and political rights of the Ogoni community than on “Shell for the detriment to the environment and the lack of revenue from natural resources resulting in violations of the rights to food, education and health”<sup>156</sup>.

### **4.3 The *SERAC* decision**

In light of the above-discussed background on the ESCR violations, two NGOs brought the *SERAC* case before the African Commission. The petition<sup>157</sup> alleged violations of a range of socio-economic rights including the right to health, the right to a clean and healthy environment, and the right to housing.

The basis of the complaint was that the government had violated these rights directly or indirectly by failing to protect members of the Ogoni community from the acts of private actors. Additionally, the petition highlighted the role of private actors in the Ogoni violations.

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<sup>154</sup> *SERAC* Decision (n 8 above) (Annex).

<sup>155</sup> See for example, Human Rights Watch (n 144 above).

<sup>156</sup> Skogly (n 47 above) 244.

<sup>157</sup> *SERAC* petition, available at < <http://www.cesr.org> > (accessed 15/10/02).

The African Commission basing its decision on the state's duties to respect, protect, promote and fulfil all human rights<sup>158</sup> found Nigeria in violation of a number of the above rights. In respect of the right to the highest attainable standard of health and the right to a clean and healthy environment <sup>159</sup>, the Commission cited the failure by the government to protect the Ogoni population from the harm caused by the NNPC-Shell consortium.<sup>160</sup> In addition, the Commission found a violation of these two rights on account of the failure by the government to provide or permit studies of potential or actual environmental health risks caused by the oil operations.<sup>161</sup>

Further, the Commission found that based on the lack of material benefits accruing to the local Ogoni population and the repressive tactics used by the government through its security forces <sup>162</sup>, the oil development by the government consortium fell short of the requirements of the Charter guaranteeing the peoples' right to free disposal of wealth.<sup>163</sup>

Remarkably, the Commission implied the guarantee of the right to shelter (which is not expressly provided for under the Charter) from a combined reading of the rights to property, health and the right to protection of the family.<sup>164</sup> The Commission thus found a violation by the government of its minimum obligation to respect the right to housing and afford protection to the citizens from forced evictions. This finding was based on the destruction of Ogoni houses and villages, the harassment and obstruction by government security forces of the community members who attempted to rebuild their

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<sup>158</sup> SERAC decision, paras 44-47. For a discussion of the delineation of the State's obligations into the obligations to respect, protect, promote and fulfil, see, discussion in chap 3 secn 3.5.2.

<sup>159</sup> African Charter, Arts 16 & 24 respectively.

<sup>160</sup> SERAC decision, paras 53-54. Idowu (n 145 above) 176 notes that by virtue of the Nigerian Indigenisation Decree of 1970, the Nigerian government's policy is to own 60 percent of the equity shares in the activities of the oil TNCs. This is borne out in practise by the joint ventures between the government (through the Nigerian National Petroleum Corporation (NNPC)) and the TNCs, see Human Rights Watch (n 144 above).

<sup>161</sup> SERAC decision, para 54.

<sup>162</sup> SERAC decision, paras 55-58.

<sup>163</sup> African Charter, Art 21.

<sup>164</sup> African Charter, Arts 14, 16 & 18(1) respectively, SERAC decision, para 60.

homes, and the violence meted out at the hands of government security forces (occasionally leading to fatal incidents).<sup>165</sup>

As with the right to shelter, the Commission implied the right to food from a combined reading of the rights to life, human dignity, health and the right to economic, social and cultural development.<sup>166</sup> By destroying food sources through its security forces, allowing private companies to destroy food sources and creating obstacles to the members of the community trying to feed themselves, the Commission held the state in violation of its minimum duties regarding the right to food.<sup>167</sup>

Finally, the widespread pollution and environmental degradation to unacceptable levels and the destruction of Ogoniland formed the basis for the Commission to hold that there was a violation of the rights to life and human integrity.<sup>168</sup>

The upshot of the *SERAC* decision is that it plausibly focuses on the state's responsibility involving, firstly, a non-interventionist role of the state regarding the ESCRs in question. Secondly, the decision affirms the duty of the state to protect the rights from violations by private actors thus:

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties.<sup>169</sup>

#### **4.4 Implications of the decision for TNC responsibility**

The decision serves to emphasize the indirect responsibility of private actors for human rights violations including socio-economic rights.<sup>170</sup> In the context of the violations in the

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<sup>165</sup> SERAC decision, paras 61-63.

<sup>166</sup> African Charter, Arts 4, 5, 16 & 22 respectively, SERAC decision, paras 64-65.

<sup>167</sup> SERAC decision, paras 65-66.

<sup>168</sup> African Charter, Art 4, SERAC decision, para 67.

<sup>169</sup> SERAC decision, para 57. The Commission draws from the jurisprudence of both the Inter-American Court in *Velasquez* (n 119 above) and the European Court on Human Rights in *X and Y v Netherlands* 91 ECHR (1985) (Ser. A).

<sup>170</sup> Chirwa "Towards Revitalizing Economic, Social and Cultural Rights in Africa: Social And Economic Rights Action Centre and Another v Nigeria" (2002) 10 (1) *Human Rights Brief* (forthcoming).

*SERAC* case however, the involvement of the powerful oil TNCs cannot be discounted. The production of oil has been mainly carried out by a number of oil TNCs of which the most visible have been, Shell, Mobil, Chevron, Agip, Texaco and Elf with Shell receiving the most attention.<sup>171</sup>

As was mentioned earlier, the ESCRs claims in the case were to a large extent directly traceable to the activities of the oil TNCs. Therefore an approach that concerns itself solely on the responsibility of the state would obscure the true nature of the violations, which would otherwise logically invite the direct obligations of the oil TNCs.<sup>172</sup> This is primarily for the reason that despite the share in formal ownership of the oil consortiums by the Nigerian government, at a practical level, the oil extraction is carried out solely by the oil TNCs with most of the risks to the environment being traceable to the activities of the oil companies.

While the petition sought to enforce the obligations of the private actors through the avenue of state responsibility, it also alleged the direct responsibility of the corporations. The petition thus highlighted the role of Shell thus "...The NNPC-Shell consortium, with Shell as the operator, has caused massive and systematic environmental and social problems as a result of irresponsible operations and faulty infrastructure..."<sup>173</sup>

Consequently, a let down in the *SERAC* decision is its failure to pay due regard by explicit discussion of the notion of direct private actor responsibility especially in view of the grave violations of ESCRs highlighted by the case.<sup>174</sup> This is particularly so with regard to the premise that in practise, the inclusion of the concept of duties under the

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<sup>171</sup> Human Rights Watch (n 144 above).

<sup>172</sup> The Human Rights Watch study (n 144 above) therefore addresses the roles of both the government and the oil TNCs.

<sup>173</sup> *SERAC* petition (n 157 above) para 3.

<sup>174</sup> The instance where the decision refers to the direct responsibility of non-state actors is the following sentence, "...The intervention of multinational corporations may be a potentially positive force for development *if the state and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities*", *SERAC* decision, para 69 [Emphasis added].

African Charter may in practise be interpreted as to impose direct responsibility of private actors.<sup>175</sup>

#### **4.5 Implications of the decision for the problems involved in host state responsibility in the African context**

The evolution of IHRL has been such that obligations are imposed indirectly on the TNC, through the agency of the state in which the TNC operate (“the host state”, as opposed to the “home state”, the latter being the state in which the parent corporation of the TNC is incorporated).

The decision demonstrates the importance of the host state responsibility (based on the territorial jurisdiction of the host state) in implementing the human rights obligations of non-state actors. It is through national government decisions of host states that there is the most scope to maximise the benefits of foreign direct investments (FDIs) by TNCs, which if guided well can play an important role in national economic development.<sup>176</sup>

A more nuanced aspect of the decision is however its implications regarding the efficacy of the host state responsibility approach. In the context of Nigeria’s oil production (indeed as with the case of other FDIs in the African context) where there is clash between the pursuit of profits and human rights standards, it becomes evident that the assertion of host responsibility would not of itself be effective in asserting responsibility of TNCs having extensive powers over third world states.<sup>177</sup>

Steiner and Alston<sup>178</sup> have enumerated five of the problems on the question of enforcing corporate responsibility by host states. Firstly, states are unwilling to take the necessary measures to ensure compliance by TNCs, especially in relation to labour matters.

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<sup>175</sup> See discussion in Chapter 3, Section 3.3.1.

<sup>176</sup> Woodroffe in Addo (n 10 above) 139.

<sup>177</sup> According to the Human Rights Watch Report (n 144 above), for the last two decades oil has transformed Nigeria’s political economy accounting for approximately 90 per cent of foreign exchange earnings, and 80 percent of federal revenue.

<sup>178</sup> Steiner & Alston (n 39 above) 1349.

Secondly, such measures are costly and perceived to be beyond the resource capabilities of governments in developing countries.

Thirdly, the attempts by individual states (mainly developing) to attract corporate investment through the offer of comparative advantages by the lowering of the cost of services, of social and labour standards and the provision of poor environmental standards (the so called “race to the bottom concept”). From the point of view of third world states, if the government’s regulatory policies become too stringent TNCs doing business in such states may relocate to a less restrictive market.<sup>179</sup>

Fourthly, the multinational complexity of the corporate transactions in an era of globalization, further “makes it increasingly difficult to identify who is responsible for what activities and where”.

Last but not least, there is the difficulty in ascertaining the minimum acceptable standards from one country to another, especially in the labour regime.

The above issues are all attenuated in the case of developing states of which African states are a part. This point is attested to in the so-called “race to the bottom concept” where African states, in a bid to attract the badly needed foreign direct investment would go for far-reaching compromises of core labour and social standards.<sup>180</sup> Illustrative in this context, is the case of the now increasing proliferation of economic processing zones

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<sup>179</sup> Lipman “Multinational Corporations and Human Rights” in R P Claude & H Burns (eds) (1992) 394.

<sup>180</sup> The fact that the majority of corporate investments are concentrated in the developed world as opposed to the developing countries go further to shows the little impact that world trade and investment have had in Africa. The *UNDP Human Development Report 2000* for example, noted that, in 1998, the least developed countries, with 10 percent of the world’s population, accounted for only 0.4 percent of global exports and received only \$3 billion of the total \$600 billion foreign direct investment flows. This further presents a paradox in the sense that inevitably, developing states would badly seek foreign direct investments, which may entail corporate investment and the subsequent issue of the inequality in the economic bargaining power between the host developing state, and the corporation comes into play. The fact of inequality in the economic bargaining power of TNCs is further explained in the point that in most instances, the annual global earnings of TNCs operating within such developing countries would usually outweigh the gross national product (GNP) of the host states. See Jochnick (n 4 above) 58 (pointing out this fact in respect of Texaco’s oil exploitation in Ecuador). See also, Anderson & Cavanagh (n 17 above) (pointing out that in 1995, 161 countries had GNPs less than the amount spent globally by the US multinational Wal-Mart).

(EPZs)<sup>181</sup>, a growth, based partly on the suppression of core labour standards in a bid to attract direct foreign investments as the case of a number of African states shows.<sup>182</sup>

The role of the state in controlling powerful private actors such as TNCs is further put in question in the context of state collapse or failed states in Africa. In the worst scenario, one finds states such as Somalia characterised by a complete disintegration of state institutions and examples such as the Democratic Republic of Congo, Angola, Liberia and Sierra Leone where long periods of war have resulted into a breakdown of effective state control.

The foregoing reflects on the inability of such states to enforce private actor responsibilities for human rights.

On the other hand the activities of the oil producing TNCs in Nigeria show that greater attention is often paid to how profits can be maximized at the expense of the protection of the environment and the safety of lives and property.<sup>183</sup>

While the inability of the host state is one problem, the unwillingness to control private actors presents another difficulty. The substantive Nigerian environmental laws<sup>184</sup> in most respects compare to their international equivalents.<sup>185</sup>

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<sup>181</sup> An EPZ may be defined as "...a clearly demarcated industrial zone which constitutes a free trade enclave outside a country's normal customs and trading system where foreign enterprises produce principally for export and benefit from certain tax and financial incentives", see International Confederation of Trade Unions (ICFTU) (1996) " Behind the wire: Anti-union repression in the export processing zones" available at < <http://www.icftu.org/english/tncs/etnexpzo.html>> (accessed on 23/09/02).

<sup>182</sup> International Confederation of Free Trade Unions (ICFTU) "The Africa of EPZs and SAPs" available at < <http://www.icftu.org/>> (accessed 23/09/02). While the problem of the suppression of core labour standards in the EPZs certainly cannot be said to be uniquely 'African', the magnitude of the problem is heightened by the low economic and bargaining power of African states in this regard. For a report dealing generally with the subject of violation of core labour standards in the EPZs, see ICFTU (n 181 above) (discussing examples of suppression of core labour standards including, in some instances, the insistence by TNCs on the lowering of social and labour standards as preconditions for investment).

<sup>183</sup> This statement would certainly be qualified in the context of the noticeable development of social responsibility characterised by "ethical business standards" which aim at conducting business without solely focusing on the profit possibilities, but also taking ethical issues some of which incorporate human rights into account, see Skogly (n 47 above) 249. The problem of the non-binding nature of Codes of conduct was alluded to in chapter 3.

<sup>184</sup> Idowu (n 145 above) 172-176 (Discussing examples of legal regulations mainly providing sanctions for violations of standards or imposition of liabilities for damage caused by pollution).

<sup>185</sup> Human Rights Watch (n 144 above).

The failure to apply these laws has been linked to a number of reasons including the pervasive corruption in the oil industry.<sup>186</sup> At the judicial level of enforcement, it would even appear that some of the country's courts have developed a paternalistic attitude to the interpretation of some anti-pollution laws and instead, render decisions that weigh in favour of the position that nothing should be done to disturb the operations of the main trade (oil production) being the major source of the country's source of revenue.<sup>187</sup>

The above problems inherent in a host-state approach to the general issue of accountability of TNCs do not however imply that that host state responsibility would play no role in regard to the issue of implementing the responsibilities of TNCs. On the contrary, an effective approach to the issue requires the strengthening of the indirect responsibility of the state. However, the constraints in a host state approach invite the need to consider at a broader level (not necessarily in reference to the Nigerian example), the place of home state responsibility for human rights violations.

#### **4.6 The question of home state responsibility**

The character of TNCs as economic entities having links with a number of states, including the country of the parent corporation's incorporation (home state) invites the question whether state responsibility for private actors' violations of human rights can arise at the level of the TNC's home state. Unlike the host state responsibility approach that is well grounded on territorial jurisdiction<sup>188</sup> provided for in all the human rights instruments, a justification of the host state approach is not unambiguous for the reason that it entails the asserting of control by one state (the home state) over the territory of another state (the host state).

The answer to the question whether there exists obligations on home states to regulate the transnational conduct of TNCs under their jurisdiction therefore becomes an

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<sup>186</sup> Human Rights Watch (n 144 above).

<sup>187</sup> Idowu (n 145 above) 181 citing the case of *Allan Irou v Shell B P* (unreported) Suit No. W/89/9 1, Warri H C/26/11/73 where the Court refused to grant an injunction in favour of the plaintiff whose land, fish pond and creek had been polluted by the defendant's mining operations.

<sup>188</sup> The discussion of the human rights instruments in Chapter 3 shows that the State has the duty/jurisdiction under the various human treaties to exercise control over private actors within its territory.

important one. The home state, usually, a developed state should have the power and resources to act against a TNC that is violating human rights.<sup>189</sup>

The theoretical legal basis for home state responsibility can at the very general level be discerned from the reason that the principles of IHRL mean that the rights of humans must be placed above the interests of states.<sup>190</sup> Human rights now operate beyond all borders with states acknowledging in principle at least that, “the promotion of all human rights is a legitimate concern of the international community”<sup>191</sup>.

Specifically in the context of a human rights treaty, the ICCPR, the UN Human Rights Committee<sup>192</sup> has interpreted the provision in Article 2(1) of the ICCPR guaranteeing the rights under the ICCPR for individuals within the state’s territory not to imply that the state party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state whether with the acquiescence of the government of that state or in opposition to it. Although this decision refers to acts committed by the state’s agents, it is argued here that it applies within the context of private actions based on the accepted horizontal applicability of the ICCPR as was highlighted in chapter 3.

Further, the *Nicaragua Case*<sup>193</sup> is authority for the position that non-state actions can nevertheless attract state responsibility even outside the territory of the state where the state has control over the non-state actors.

The foregoing analysis however points to the constraint in asserting home state responsibility because the jurisdiction of the home state would be based on the nationality of the parent corporation, implying a disregard for the nationality of the subsidiaries. This then runs into the problem that the nationality of the subsidiaries would be that of the host state and not the home state. However such an objection would not

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<sup>189</sup> McCorquodale (n 108 above) 28.

<sup>190</sup> McCorquodale (n 108 above) 28.

<sup>191</sup> Vienna Declaration and Programme of Action (n 3 above) Para 4.

<sup>192</sup> In *Lilian Celiberti de Casariego v Uruguay* Communication No. 56/1979 (29/07/1981), UN Doc.CCPR/C/OP/1 (1984), para. 10.3.

<sup>193</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgment, ICJ Reports 1986 14.

be based on sound legal principle in light of the exceptions to both the “territorial” (in the case of the host state) and “national” (in the case of the home state) bases for asserting jurisdiction in international law.<sup>194</sup> For example, the “protective” basis for exercising jurisdiction allows the state to assert jurisdiction to protect its vital interests.<sup>195</sup> Although the vital interests of the state undoubtedly runs into the political problems of subjectivity in the determination of what may amount to be in the vital interest of individual states, it may be safely concluded that a number of human rights norms now constitute such vital interests in line with the formal rhetoric on the universality of human rights.<sup>196</sup>

The theoretical conclusion on the existence of a legal basis for asserting home state responsibility has however largely been ignored in practise. Home states (usually developed states) have in most instances failed to take responsibility for the operations of their corporations overseas.<sup>197</sup> The argument by home states has been mainly hinged on the assertion that to exercise control over the territory of another state would be tantamount to violating the sovereignty of the host state whose duty it is to control TNCs.<sup>198</sup> This refusal by home states is certainly not backed by the position in general international law and IHRL as discussed in the foregoing.

#### 4.7 Conclusion

The *SERAC* decision demonstrates the practical problems that are inherent in a host state approach to the question of responsibility of the TNC particularly in an African

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<sup>194</sup> There are examples of other bases for the exercise of state (criminal) jurisdiction in international law which may be termed as exceptions to the territorial and nationality bases for asserting jurisdiction for host state’s and home state’s jurisdiction respectively. These include the protective principle and the objective territorial principle which are however limited; for the protective principle, to instances involving the vital interests of a state, and for the objective territorial principle to instances where an offence whose commission had commenced in one state is completed in a second state. The universality principle however disregards the issue of control as jurisdiction is based on *erga omnes* obligations owed to the whole human kind. At the very minimum, universal jurisdiction can be said to cover international crimes that have entered the realm of customary law such as genocide, war crimes and crimes against humanity. See Shaw (1991) 393-423.

<sup>195</sup> Shaw (n 194 above) 410.

<sup>196</sup> Vienna Declaration and Programme of Action (n 3 above) para 4.

<sup>197</sup> Woodroffe (n 176 above) 137.

<sup>198</sup> McCorquodale (n 108 above) 28. In practical terms, home states would be unwilling to regulate TNCs having their parent corporations within their jurisdiction on the ground that such regulation would competitively put these corporations at a disadvantaged position compared to corporations based in other countries without such regulatory frameworks.

context. On the other hand, the home state approach while no doubt of significant potential to the same question runs into a number of political and practical constraints.

Further, the home/host state approach to the question of state responsibility for TNC accountability for human rights violations may be of little relevance in view of the fact that the TNC as a single entity (comprising of both the parent and subsidiary corporations) is not subject to the jurisdiction of any one state. This implies the existence of a deficit in the accountability of TNCs as expressed by a UN study thus:

The fact is that though each TNC subsidiary is, in principle, subject to its host country's regulations, the TNC as a whole is not fully accountable to any single country. The same is true for responsibilities they fail to assume for activities of their subsidiaries and affiliates. The global reach of TNCs is not matched by a coherent global system of accountability.<sup>199</sup>

In this regard therefore it becomes apparent that "...within the framework of state responsibility for human rights violations, IHRL is unable to deal fully with the changes to state sovereignty by the process of globalisation, for example, when the violator is a TNC"<sup>200</sup>. This is more highlighted in the context of developing countries.

Significantly, therefore, the *SERAC* decision is also a call to the international community to come up with international legal binding standards to cater for the accountability deficit echoed by the UN study cited above<sup>201</sup> and to complement the state responsibility approach in asserting responsibility for private actor violations for human rights including ESCRs.

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<sup>199</sup> El Hadji Guisse "The Realisation of Economic, Social and Cultural Rights: The Impact of the Activities and Working Methods of Transnational corporations" UN Doc.E/CN.4/Sub.2/1996/12 para 48 (GUISSE REPORT).

<sup>200</sup> McCorquodale & FairBrother (n 14 above) 763-4.

<sup>201</sup> GUISSE REPORT (n 199 above).

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Conclusions

The reduction in the capacity of the modern individual state to ensure and protect human rights particularly ESCRs, as a result of the changes occasioned by globalisation is matched with an increase in the number of non-state actors having power akin to those of the state. The example of TNCs, arguably the principal non-state actors within the globalised world, demonstrates the challenges and threats to the guarantee of human rights.

With the nation State losing the monopoly on global power, it thus becomes clear that an exclusive focus on the state-centric paradigm in regard to human rights violations can no longer hold sway. In vindication of this premise, the jurisprudence of the treaty monitoring bodies and the trends in municipal courts as reviewed in this study show that while traditional human rights instruments were aimed at a vertical application between the state and the individual, human rights norms have now “irrevocably entered the private domain”<sup>202</sup>. The private/public law distinction in IHRL is now blurred, including in the protection of ESCRs where it has been acknowledged that private actors have obligations to discharge these rights.

While private actors (including TNCs) can be said to have direct obligations to discharge ESCRs, the precise nature of these obligations remains to be fleshed out. It is however clear from the discussion in chapter 3 that at the very minimum, these actors bear the duty to respect ESCRs.

Despite the expansion in the application of human rights law to include private actors, IHRL (with the exception of the nominal procedure in individual criminal responsibility) is yet to develop mechanisms for enforcing these direct obligations. On the other hand, any discussion on the question of private actor responsibility for human rights must inevitably fall for consideration within the framework of state responsibility for human rights

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<sup>202</sup> Clapham (n 4 above) 89.

violations. At the treaty level, this is amenable to monitoring through the state reporting procedure and where applicable, the complaints mechanism. The duty of the state at the municipal level is to act in due diligence in ensuring protection of human rights through the adoption and application of constitutional, legislative and administrative measures to this effect. However, caught within this framework, IHRL is not able to deal fully with the increased non-state actors, particularly TNCs.

The questions on the inability and unwillingness of TNC host states, particularly weak states in the African context, to enforce the indirect obligations of these actors is demonstrated by the case of oil TNCs operating in Nigeria. On the other hand, this study has argued that at a conceptual level, IHRL places an obligation on states in which TNCs are based (home states) to regulate TNCs (in relation to human rights obligations) under their control but operating overseas.<sup>203</sup>

The possibility of a home state approach to the issue of TNC responsibility is undoubtedly often ignored in practice. It was also noted that the home/host state approaches to the issue of TNC responsibility might be rendered irrelevant in light of the fact that the TNC a single entity may not be subject to the jurisdiction of any one state.

The foregoing thus calls for a stricter framework for the accountability of TNCs so as to complement the state responsibility mechanism on the question of TNC responsibility for human rights violations.

## **5.2 Recommendations**

While not undermining the place of other mechanisms such as the significant self-regulation mechanisms and codes of conduct, this study shows that top in the hierarchy on the question of the accountability of TNCs for human rights obligations should be the consideration of direct legal binding standards that are amenable to enforcement. Such a proposal is not novel as evidenced by the UN efforts in this regard.<sup>204</sup>

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<sup>203</sup> The question of the precise scope of this obligation warrants further inquiry.

<sup>204</sup> UN Draft Code of Conduct on TNCs (n 102 above).

The Code should take the form of a treaty that is ratified by states and places specific direct obligations on TNCs with regard to human rights obligations (including ESCRs obligations). The institutional framework for the implementation of such a treaty should be placed within the mandate of an independent body such as the now abolished UN Centre on TNCs. Alternatively, there could be created a new organ within the UN or another international forum. Further, the task of implementation could be left to the existing bodies such as the UN Commission on Human Rights or the Sub-Commission for the Promotion and Protection of Human Rights. Regulation should also be encouraged at the national level by governmental and non-governmental bodies. TNCs would also be required to adopt internal regulations in line with such an international code.

Certainly, the need for such a legally binding code cannot serve to exclude the importance of state responsibility in controlling private actors. This has indeed been recognized by similar initiatives such as the UN Draft Code, which emphasizes that “nothing in this [Draft Code] shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law. Nor shall they be construed as diminishing, or adversely affecting more protective human rights norms”<sup>205</sup>.

Within the framework of the UN Human Rights Treaty monitoring bodies, the Committee on Economic, Social and Cultural Rights should, in line with its practise, adopt a general comment defining the nature and scope of the obligations of TNCs under the ICESCR. The Committee should also extend its role in this regard by requesting information from governments and NGOs (through the state reporting procedure) on how TNCs and other businesses affect the rights protected under the ICESCR. The Human Rights Committee should exercise similar functions under the ICCPR apart from the need for it to encourage and accept complaints concerning states’ inability or unwillingness to control violations of human rights by private actors, including TNCs.

In specific relation to the African human rights system, the African Commission should through its State reporting procedure accord further attention to the question of private actors, particularly TNCs and their impact on the rights under the Charter. Within its

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<sup>205</sup> UN Draft Code of Conduct on TNCs (n 102 above) para 18.

promotional mandate under Article 45 of the Charter, the Commission should pursue the question of private actor responsibility through the raising of awareness in its seminars and functions.

Significantly, the *SERAC* case shows the importance of the complaints procedure under the Charter in highlighting the effects of the activities of TNCs on human rights, including ESCRs. This is particularly relevant in view of the uniqueness of the Charter in its inclusion of ESCRs along with other rights and subjecting all the rights to the same means of enforcement under the Charter. Thus individuals and NGOs must be encouraged to take advantage of the wide latitude that exists under the Charter in so far as “standing” to bring petitions is concerned.

Further, the Commission and the proposed African Court on Human Rights (when it comes into force) should utilise the inclusion of the concept of duties under the Charter to develop a jurisprudence that imposes direct duties on private actors. At a more general level, the jurisprudence in the European and the Inter-American human rights systems that have now moved to entrench the horizontal applicability human rights norms is commended to the Commission and the proposed Court.<sup>206</sup>

That the effective control of private actors (including TNCs) can only occur at the national level cannot be gainsaid. In the African context, therefore, states must act in due diligence to ensure and protect human rights (including ESCRs) from private actor violations. This entails the adoption and enforcement of constitutional, legislative, administrative and other measures. The control of private actors (including TNCs) would more often than not fall within a State’s criminal and civil laws.

Further, the possibility of civil suits against private actors based directly on municipal Constitutions should be envisaged. The examples of the 1990 Constitution of Cape Verde<sup>207</sup>, 1992 Constitution of Ghana<sup>208</sup>, 1994 Constitution of Malawi<sup>209</sup> and the 1996

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<sup>206</sup> It is noteworthy that in the *SERAC Case* the Commission referred to the jurisprudence of these regional human rights systems albeit in the context of the duty of the state to protect human rights from violation by private actors, see discussion in Chapter 4, section 4.3.

<sup>207</sup> Art 17.

<sup>208</sup> Art 12.

South African Constitution<sup>210</sup>, all of which admit the horizontal application of the respective Bills of Rights are recommended to other African States in this regard.

### **Word Count**

17 100 (including footnotes)

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<sup>209</sup> Art 15(1).

<sup>210</sup> Art 8.

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## ANNEX

### 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria\*

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**Rapporteur:** 20<sup>th</sup> Session: Commissioner Dankwa  
21<sup>st</sup> Session: Commissioner Dankwa  
22<sup>nd</sup> Session: Commissioner Dankwa  
23<sup>rd</sup> Session: Commissioner Dankwa  
24<sup>th</sup> Session: Commissioner Dankwa  
25<sup>th</sup> Session: Commissioner Dankwa  
26<sup>th</sup> Session: Commissioner Dankwa  
27<sup>th</sup> Session: Commissioner Dankwa  
28<sup>th</sup> Session: Commissioner Dankwa  
29<sup>th</sup> Session: Commissioner Dankwa  
30<sup>th</sup> Session: Commissioner Dankwa

#### **Summary of Facts:**

1. The Communication alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.
2. The Communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.
3. The Communication alleges that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. The Communication contains a memo from the Rivers State Internal Security Task Force, calling for "ruthless military operations".
4. The Communication alleges that the Government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The Government has withheld from Ogoni Communities information on

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\* SERAC decision. Downloaded from < <http://www.cesr.org> > (accessed 15/10/02).

the dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland.

5. The Government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni Communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.
6. The Communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.
7. The Communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.
8. The Nigerian Army has admitted its role in the ruthless operations, which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for "ruthless military operations" and "wasting operations coupled with psychological tactics of displacement". At a public meeting recorded on video, Major Okuntimo, head of the Task Force, described the repeated invasion of Ogoni villages by his troops, how unarmed villagers running from the troops were shot from behind, and the homes of suspected MOSOP activists were ransacked and destroyed. He stated his commitment to rid the communities of members and supporters of MOSOP.
9. The Communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.

## **Complaint:**

10. The communication alleges violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter.

## **Procedure**

11. The communication was received by the Commission on 14<sup>th</sup> March 1996. The documents were sent with a video.
12. On 13<sup>th</sup> August 1996 letters acknowledging receipt of the Communication were sent to both Complainants.
13. On 13<sup>th</sup> August 1996, a copy of the Communication was sent to the Government of Nigeria.
14. At the 20<sup>th</sup> Ordinary Session held in Grand Bay, Mauritius in October 1996, the Commission declared the Communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.
15. On 10<sup>th</sup> December 1996, the Secretariat sent a Note Verbale and letters to this effect to the government and the Complainants respectively.
16. At its 21<sup>st</sup> Ordinary Session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the receipt of written submissions from the Complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.
17. On 22<sup>nd</sup> May 1997, the Complainants were informed of the Commission's decision, while the State was informed on 28<sup>th</sup> May 1997.
18. At the 22<sup>nd</sup> Ordinary Session, the Commission postponed taking a decision on the case pending the discussion of the Nigerian Mission report.
19. At the 23<sup>rd</sup> Ordinary Session held in Banjul, The Gambia the Commission postponed consideration of the case to the next session due to lack of time.
20. On 25<sup>th</sup> June 1998, the Secretariat of the Commission sent letters to all parties concerned informing them of the status of the Communication.
21. At the 24<sup>th</sup> Ordinary Session, the Commission postponed consideration of the above Communication to the next session.
22. On 26<sup>th</sup> November 1998, the parties were informed of the Commission's decision.
23. At the 25<sup>th</sup> Ordinary Session of the Commission held in Bujumbura, Burundi, the Commission further postponed consideration of this communication to the 26<sup>th</sup> Ordinary Session.

24. The above decision was conveyed through separate letters of 11<sup>th</sup> May 1999 to the parties.
25. At its 26<sup>th</sup> Ordinary Session held in Kigali, Rwanda, the Commission deferred taking a decision on the merits of the case to the next session.
26. This decision was communicated to the parties on 24<sup>th</sup> January 2000.
27. Following the request of the Nigerian authorities through a Note Verbale of 16<sup>th</sup> February 2000 on the status of pending communications, the Secretariat, among other things, informed the government that this communication was set down for a decision on the merits at the next session.
28. At the 27<sup>th</sup> Ordinary Session of the Commission held in Algeria from 27<sup>th</sup> April to 11<sup>th</sup> May 2000, the Commission deferred further consideration of the case to the 28<sup>th</sup> Ordinary Session.
29. The above decision was communicated to the parties on 12<sup>th</sup> July 2000.
30. At the 28<sup>th</sup> Ordinary Session of the Commission held in Cotonou, Benin from 26<sup>th</sup> October to 6<sup>th</sup> November 2000, the Commission deferred further consideration of the case to the next session. During that session, the Respondent State submitted a Note Verbale stating the actions taken by the Government of the Federal Republic of Nigeria in respect of all the communications filed against it, including the present one. In respect of the instant communication, the note verbale admitted the gravamen of the complaints but went on to state the remedial measures being taken by the new civilian administration and they included -:
  - Establishing for the first time in the history of Nigeria, a Federal Ministry of Environment with adequate resources to address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger delta area
  - Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social related problems of the Niger delta area and other oil producing areas of Nigeria
  - Inaugurating the Judicial Commission of Inquiry to investigate the issues of human rights violations. In addition, the representatives of the Ogoni people have submitted petitions to the Commission of Inquiry on these issues and these are presently being reviewed in Nigeria as a top priority matter
31. The above decision was communicated to the parties on 14<sup>th</sup> November 2000.
32. At the 29<sup>th</sup> Ordinary Session held in Tripoli, Libya from 23<sup>rd</sup> April to 7<sup>th</sup> May 2001, the Commission decided to defer the final consideration of the case to the next session to be held in Banjul, the Gambia in October 2001.
33. The above decision was communicated to the parties on 6<sup>th</sup> June 2001.
34. At its 30<sup>th</sup> session held in Banjul, the Gambia from 13<sup>th</sup> to 27<sup>th</sup> October 2001, the African Commission reached a decision on the merits of this communication.

## LAW

### Admissibility

35. Article 56 of the African Charter governs admissibility. All of the conditions of this Article are met by the present communication. Only the exhaustion of local remedies requires close scrutiny.
36. Article 56(5) requires that local remedies, if any, be exhausted, unless these are unduly prolonged.
37. One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise. Similarly, if the right is not well provided for, there cannot be effective remedies, or any remedies at all.
38. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. **(See the Commission's decision on Communications 25/89, 47/90, 56/91 and 100/93 World Organisation Against Torture et al./Zaire: 53)**. The exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants complain. It is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies.
39. Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists.
40. The present communication does not contain any information on domestic court actions brought by the Complainants to halt the violations alleged. However, the Commission on numerous occasions brought this complaint to the attention of the government at the time but no response was made to the Commission's requests. In such cases the Commission has held that in the absence of a substantive response from the Respondent State it must decide on the facts provided by the Complainants and treat them as given. **(See Communications 25/89, 47/90, 56/91, 100/93, World Organisation Against Torture et al. /Zaire, Communication 60/91 Constitutional Right Project/Nigeria and Communication 101/93 Civil Liberties Organisation/Nigeria)**.
41. The Commission takes cognisance of the fact that the Federal Republic of Nigeria has incorporated the African Charter on Human and Peoples' Rights into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the Complainants. However, the Commission is aware that at the time of submitting this communication, the then Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the

courts for acts of government that violate their fundamental human rights<sup>211</sup>. In such instances, and as in the instant communication, the Commission is of the view that no adequate domestic remedies are existent (**See Communication 129/94 Civil Liberties Organisation/Nigeria**).

42. It should also be noted that the new government in their Note Verbale referenced 127/2000 submitted at the 28<sup>th</sup> session of the Commission held in Cotonou, Benin, admitted to the violations committed then by stating, "there is no denying the fact 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".

**The Commission therefore declared the communication admissible.**

### **Merits**

43. The present Communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples' Rights. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the Complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to **respect, protect, promote, and fulfil these rights**. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.<sup>212</sup>

45. At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.<sup>213</sup> With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

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<sup>211</sup> See The Constitution (Suspension and Modification) Decree 1993

<sup>212</sup> See generally, Asbjørn Eide, "Economic, Social and Cultural Rights As Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (Eds.) *Economic, Social, and Cultural Right: A Textbook* (1995) PP. 21-40

<sup>213</sup> Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Raija Hanski and Markku Suksi (Eds.), Second Revised Edition, *An Introduction to the International Protection of Human Rights: A Textbook* (1999), p. 31.

46. At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and provision of effective remedies.<sup>214</sup> This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.
47. The last layer of obligation requires the State to **fulfil** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).<sup>215</sup>
48. Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States “*undertake to take steps...by all appropriate means, including particularly the adoption of legislative measures.*” Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the Complainants is examined here below.
49. In accordance with Articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and the relevant international and regional human rights instruments and principles. The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter. It is a matter of regret that the only written response from the government of Nigeria is an admission of the gravamen of the complaints which is contained in a note verbale and which we have reproduced above at paragraph 30. In the circumstances, the Commission is compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the Complainants, which are consequently accepted by the Commission.

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<sup>214</sup> Drzewicki, *ibid.*

<sup>215</sup> See Eide, in Eide, Krause and Rosas, *op cit.*, p. 38

50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by -:

- Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,
- Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage
- Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations

Article 16 of the African Charter reads:

*"(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.*

*(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."*

Article 24 of the African Charter reads:

*"All peoples shall have the right to a general satisfactory environment favourable to their development."*

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.<sup>216</sup> As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."<sup>217</sup>

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect

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<sup>216</sup> See also General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural rights

<sup>217</sup> Human Rights in the Twenty first Century: A Global Challenge Edited by Kathleen E. Mahoney and Paul Mahoney. Article by Alexander Kiss " Concept and Possible Implications of the Right to Environment at page 553

the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual<sup>218</sup>.

53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.
54. We now examine the conduct of the government of Nigeria in relation to Articles 16 and 24 of the African Charter. Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.
55. The Complainants also allege a violation of Article 21 of the African Charter by the government of Nigeria. The Complainants allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population<sup>219</sup>, may well be said to constitute a violation of Article 21.

Article 21 provides

1. *All peoples 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 lawful recovery of its property as well as to an 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 principles of international law.*
4. *States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and*

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<sup>218</sup> See Scott Leckie " the Right to Housing " in Economic, social and cultural rights (ed) Eide, Krause and Rosas, Martinus Nijhoff Publishers 1995

<sup>219</sup> See a report by the Industry and Energy Operations Division West Central Africa Department "Defining an Environmental Development Strategy for the Niger Delta" Volume 1 - Paragraph B(1.6 - 1.7) at Page 2-3

*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 the advantages derived from their national resources.*

56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (***See Union des Jeunes Avocats /Chad***<sup>220</sup>). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case ***Velásquez Rodríguez v. Honduras***<sup>221</sup>. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in ***X and Y v. Netherlands***<sup>222</sup>. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

59. The Complainants also assert that the Military government of Nigeria massively and systematically violated the right to adequate housing of members of the Ogoni community under Article 14 and implicitly recognised by Articles 16 and 18(1) of the African Charter.

Article 14 of the Charter reads:

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<sup>220</sup> Communication 74/92

<sup>221</sup> See, Inter-American Court of Human Rights, *Velásquez Rodríguez* Case, Judgment of July 19, 1988, Series C, No. 4

<sup>222</sup> 91 ECHR (1985) (Ser. A) at 32.

*"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."*

Article 18(1) provides:

*"The family shall be the natural unit and basis of society. It shall be protected by the State..."*

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.
61. At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.<sup>223</sup> Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.<sup>224</sup> The right to shelter even goes further than a roof over ones head. It extends to embody the individual's right to be let alone and to live in peace- whether under a roof or not.
62. The protection of the rights guaranteed in Articles 14, 16 and 18 (1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni People, the Government of Nigeria has failed to fulfil these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.
63. The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social

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<sup>223</sup> Scott Leckie, "The Right to Housing" in Eide, Krause and Rosas, op cit., 107-123, at p. 113

<sup>224</sup> Ibid. pp. 113-114

and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection"<sup>225</sup>. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths.... Evictions break up families and increase existing levels of homelessness.<sup>226</sup> In this regard, **General Comment No. 4 (1991)** of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats" (E/1992/23, annex III. Paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

64. The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.
65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.
66. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.
67. The Complainants also allege that the Nigerian Government has violated Article 4 of the Charter which guarantees the inviolability of human beings and everyone's right to life and integrity of the person respected. Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has

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<sup>225</sup> See General Comment No.7 (1997) on the right to adequate housing (Article 11.1): Forced Evictions

<sup>226</sup> Ibid. p. 113

made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole. The Commission conducted a mission to Nigeria from the 7<sup>th</sup> – 14<sup>th</sup> March 1997 and witnessed first hand the deplorable situation in Ogoni land including the environmental degradation.

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter.

69. The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the Commission, a reconsideration of the Government's attitude to the allegations contained in the instant communication. The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities. The Commission however takes note of the efforts of the present civilian administration to redress the atrocities that were committed by the previous military administration as illustrated in the Note Verbale referred to in paragraph 30 of this decision.

**For the above reasons, the Commission,**

**Finds** the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights;

**Appeals to** the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;
- Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and

undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;

- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

**Urges** the government of the Federal Republic of Nigeria to keep the African Commission informed of the out come of the work of -:

- The Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land;
- The Niger Delta Development Commission (NDDC) enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria; and
- The Judicial Commission of Inquiry inaugurated to investigate the issues of human rights violations.

***Done at the 30<sup>th</sup> Ordinary Session, held in Banjul, The Gambia  
from 13<sup>th</sup> to 27<sup>th</sup> October 2001***