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The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System

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EXECUTIVE SUMMARY

This report concerns the manner in which the African regional human rights system deals with the violation of fundamental rights by corporations. This includes a consideration of the rights and duties enshrined in the regional African human rights instruments and the mechanisms developed to give effect to them. The report is divided into five parts. Part I outlines the African human rights system and considers the specific features of the rights and duties contained in the African Charter on Human and People's Rights ('the Charter') and the protection they offer against corporate-related human rights violations. Part II considers the provisions of the Charter and decisions of the African Commission on Human and People's Rights (the Commission) in relation to the state duty to protect against violations committed by private parties, particularly corporations. Part III and IV explore the potential of the Charter with regard to direct human rights obligations for corporations and extraterritorial application of the rights and duties contained in the Charter. Part V considers other regional initiatives that may impact upon the state duty to protect and the responsibilities of corporations in relation to the realisation of human and people's rights as contained in the Charter. These include the relevant other work of the Commission apart from its decisions on complaints it received and the policy developments of the New Partnership for Africa's Development.

The findings of this report are that the African Charter itself enshrines various human and people's rights most of which can be violated by non-state actors, including corporations. A consideration of the provisions of the Charter itself reveals the potential for the African system to deal with corporate violation of human rights. We consider two primary methods of doing so.

Article 1 of the Charter and several other specific provisions impose duties on the state parties to respect, protect, promote and fulfil the rights in the Charter. This comprises both negative and positive duties on state parties. The state duty to protect against the violation of rights by non-state actors (which includes corporations) has been developed by the Commission in a few important decisions. The Commission's decisions show that states may be compelled to take legislative, administrative and judicial measures. Specific obligations which the Commission has found rest upon states include the undertaking to prosecute, investigate, regulate, provide relief, ensure participation by citizens, monitor, and establish independent oversight bodies. The state through its duty to protect would be compelled as part of fulfilling this responsibility to impose obligations upon corporations to play their part in realising fundamental rights.

An alternative way in which the Charter could impose duties upon corporations would be for the rights to apply in a direct horizontal manner to corporations. The African

Charter's express recognition that individuals have duties as well as rights and other features of the African context may well strengthen the argument that corporations ought to be held directly accountable for their human rights violations by regional enforcement mechanisms. We consider various arguments to bolster this view though this line of reasoning remains disputed and is yet to be considered by the Commission.

The report also includes a brief consideration of whether states have duties to protect rights in the Charter beyond their borders (what is referred to as extra-territorial application). There is nothing in the Charter that prevents such a reading; instead it is argued that the Charter's spirit of unity, collectivism and intensified co-operation in the continent gives merit to such an interpretation. A consideration of Chapter 2 of the Charter that deals with the duties of individuals, also reveals a compelling argument for extraterritorial application of the rights in the Charter. The Commission has not yet dealt with the question of extraterritoriality.

Consideration of the work of the Commission reveals little normative and practical work having been done in the field of corporate obligations for the realization of fundamental rights under the African Charter. Given the potential of the provisions in the Charter, it is hoped that this will shift in the near future as the Commission has begun a project involving a study of the liability of non-state actors.

We also consider the impact of the African Peer Review Mechanism (the APRM) that has been formed under the NEPAD Framework. The APRM is 'an instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism.' This mechanism provides guidelines on corporate governance, which include human rights standards, for participating states. It is enforced by a monitoring machinery which measures compliance and makes recommendations to participating states. Although voluntary, participation in the APRM creates the opportunity to enhance corporate governance based on human rights standards in participating states.

The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System

INTRODUCTION

This report concerns the manner in which the African regional human rights system can deal with the violation of fundamental rights by corporations, as well as the state duty to protect individuals and peoples against such violations. It is prepared by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (henceforth 'SAIFAC') to inform the mandate of the Special Representative of the UN Secretary-General (SRSG), Professor John Ruggie.¹ It is designed to add an African perspective to work that has been done or is being done to inform the SRSG on the way in which regional human rights mechanisms are dealing with business and human rights challenges.

The SRSG has developed a framework that seeks to capture the responsibilities of various parties in the field of business and human rights. The three pillars of the SRSG's framework are the following: first, the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; secondly, the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and thirdly, greater access by victims to effective remedy, judicial and non-judicial. . .² This report will primarily focus on the ambit of the state duty to protect, although aspects of the other two pillars will be referred to.

The African System itself has a number of peculiarities. Part I of this report will outline briefly certain features of the African human rights system. It also refers to the specific features of the rights and duties contained in the African Charter on Human and People's

¹ This report was prepared by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law to inform the Ruggie Mandate. It was primarily authored by Ngwako Raboshakga (Junior Researcher, SAIFAC) with input and reviewing by Prof David Bilchitz (Director, SAIFAC and Associate Professor, University of Johannesburg). It does not represent the views of the SRSG. The authors would like to thank Nana Kusi Appea Busia Jnr for the fruitful discussion of the initial version of this Report. The authors would also like to thank Vanessa Zimmerman, legal advisor to the SRSG, for her comments on this report.

² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/8/5, 7 April 2008 para 55 (the SRSG's 2008Report). Recently the SRSG published the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/11/13 22 April 2009 (the SRSG's 2009Report).

Rights (henceforth ‘the Charter’)³ and the protection they may offer against corporate-related human rights violations. The focus here will be on the specific rights themselves as well as the possibilities they can give rise to for recognising corporate obligations for the realisation of the rights in the Charter.

Part II will consider the state duty to protect against corporate-related human rights violations in the context of the Charter and the relevant decisions of the African Commission on Human and People’s Rights (henceforth, ‘the Commission’) in this regard. All the decisions of the Commission on complaints made to it in terms of chapter III (part II) of the Charter have been perused to determine the relevant decisions considered in this part of the Report.

Parts III and IV will consider the potential of the Charter with regard to direct human rights obligations for private parties and the extraterritorial application of the rights and duties contained in the Charter. These parts contain mainly the views of the authors on how the Charter should be interpreted because of the lack of jurisprudential development by the Commission in these areas.

Part V will consider other initiatives, including other work of the Commission relevant to corporate-related human rights abuses⁴ and the potential of the policies and obligations created under the New Partnership for Africa’s Development (NEPAD) in relation to the obligations of states to promote and protect human and people’s rights as contained in the Charter. Again, the NEPAD framework will be considered in relation to its potential to develop corporate obligations for the realisation of fundamental rights.

In large measure, our research has shown that the African Human Rights System has in some measure recognised and provided some content to the state duty to protect individuals against violations by third parties. However, much remains underdeveloped in the area of business and human rights and, in particular, there has been very little progress in clarifying the exact nature of corporate obligations despite this being a matter of particular importance to Africa.

PART I: THE AFRICAN CHARTER: RELEVANT PROVISIONS

(a) Outline of African Human Rights System

The primary source of human rights in the African regional system is the African Charter of Human and People’s Rights, which has now been ratified by all member states of the African Union.⁵ There are several other human rights instruments adopted before and after the coming into effect of the Charter which form part of the African human rights

³ Adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986.

⁴ The Activity Reports of the Commission dating from 1996 have been perused and relevant material has been extracted.

⁵ Christof Heyns (ed) *Human Rights in Africa* Vol 1 (2004) at 106.

system. Other human rights or human rights-related treaties in the African system include the African Convention on the Conservation of Nature and Natural Resources,⁶ the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,⁷ the Cultural Charter for Africa,⁸ the Convention for Elimination of Mercenarism in Africa,⁹ the African Charter on the Rights and Welfare of the Child¹⁰ and Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa.¹¹

There are other instruments relevant to the treaties mentioned above, including the Charter of the Organization of African Unity,¹² the Treaty Establishing the African Economic Community,¹³ the Constitutive Act of the African Union¹⁴ and The New Partnership for Africa's Development Framework Document.¹⁵ Several declarations by the AU (and some of its organs) which are also relevant include the Grand Bay (Mauritius) Declaration and Plan of Action by the First OAU Ministerial Conference on Human Rights¹⁶ and the Draft Kigali Declaration by the First African Union Ministerial Conference on Human Rights in Africa.¹⁷

Since human and people's rights are central to the formation of the African Union, the operation of all its constituent bodies are relevant to the promotion and protection of these rights.¹⁸ However, it is the African Commission on Human and People's Rights

⁶ Adopted on 15 September 1968 and entered into force on 16 June 1969.

⁷ Adopted on 10 September 1969 and entered into force on 20 June 1974.

⁸ Adopted on 5 July 1976 and entered into force on 19 September 1990.

⁹ Adopted on 3 July 1977 and entered into force on 22 April 1985.

¹⁰ Adopted in July 1990 and entered into force on 29 November 1999.

¹¹ Adopted in January 1991 and entered into force on 22 April 1998.

¹² Adopted on 25 May 1963 and entered into force on 13 September 1963. This treaty has been replaced by the Constitutive Act of the African Union. See note 14 below.

¹³ Adopted on 3 June 1991 and entered into force on 12 May 1994.

¹⁴ Adopted 11 July 2000 and entered into force on 26 May 2001.

¹⁵ Adopted on 23 October 2001.

¹⁶ Adopted on 16 April 1999.

¹⁷ Adopted by the Ministerial Conference on Human Rights in Africa on 8 May 2003. This declaration is currently in the process of being adopted by member states of the AU. Once signed by the required number of states, the Kigali Declaration will cease to be a draft and will thus qualify as soft law in Africa.

¹⁸ These bodies established in terms art 5 of the Constitutive Act of the AU and include the Assembly of the Union (It comprises the Heads of State and Government of member states of the AU, and is fully operational); the Executive Council (consists of foreign ministers of the AU member states of the AU and is fully operational); the Pan African Parliament (the Protocol establishing the Pan African Parliament is in force and the Parliament operational); Specialised Technical Committees; the Court of Justice; the Commission of the African Union; the Financial Institutions (not yet operational); the Permanent Representative Committee (comprising of permanent representatives of all the member states of the AU and mandated to prepare the work of the Executive Council of the AU); and the Economic, Social and Cultural Council. More organs may be established by the Assembly of the Union(See art 5 of the

which has the primary role of interpreting the Charter and considering complaints pertaining to violation of rights in the Charter. It may also make recommendations upon the consideration of such complaints. It is thus the body that currently has primary importance in relation to the Charter and this report consequently focuses upon decisions of the Commission.

There are also certain developing institutions which hold out the promise to enhance continental human rights compliance. These include the African Court on Human and People's Rights, and the bodies established under the New Partnership for Africa's Development (NEPAD).¹⁹ There has also been the growth of sub-regional instruments that have the potential to impact on human rights.²⁰ These instruments are not considered in detail in this report, except where they are mentioned in relation to the other instruments under consideration. As a result of the important role played by the Commission in understanding and giving effect to the Charter, it is vital to explain its mandate before embarking on a discussion of the substantive implications of the Charter for corporate human rights obligations.

(b) The role of the African Commission on Human and People's Rights

The Commission is established by part II of the Charter and its primary duty is to 'promote human and people's rights and ensure their protection in Africa' and to interpret all the provisions of the Charter as may be requested by recognised bodies.²¹ In a detailed manner, art 45 lists the Commission's functions as:

1. To promote human and peoples' rights and in particular:

a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions

Constitutive Act of the African Union). The Committee on the Rights and Welfare of the Child is established by chapter 2 of the African Charter on the Rights and Welfare of the Child.

¹⁹ The African Court on Human and People's Rights was established by the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, adopted in June 1998 and entered into force in July 2002. Judges of the Court have been appointed but it is yet to receive a case. NEPAD is discussed in part V below.

²⁰ These include the Treaty Establishing the Arab Maghreb Union, adopted in Marrakech in 1989; the Treaty Establishing a Common African Market for Eastern and Southern Africa, signed in Kampala in 1993 and entered into force on 8 December 1994; the Treaty Establishing the East African Community, adopted in 1999 and entered into force in 2001; the Treaty Establishing the Economic Community of the Central African States (see also <http://www.ceeac-eccac.org.za>); the Treaty of the Economic Community of West African States (ECOWAS - the revised version of this treaty was accepted in July 1993 in Cotonou, Benin, and entered into force in 1993); and the Treaty of the Southern African Development Community, adopted in 1992 and entered into force in 1993 (See Heyns (ed) *supra* note 5 at 620, 623, 62, 640, 645, and 675).

²¹ Article 30 of the Charter. See also http://www.achpr.org/english/_info/mandate_en.html.

concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.

b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.

c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

The Commission consists of eleven members who must be African personalities of the highest reputation, high morality, integrity, impartiality and some legal competence.²² They are each elected into office for a six year term by the AU Assembly of Heads of State and Government.²³ The Commission is led by a chairman of the Commission and its administration is dealt with by the Secretariat of the Commission.²⁴

The mandate of the Commission includes receiving communications from state parties or any other person alleging violation of a right or rights in the Charter. Upon receiving such a communication the Commission is empowered to 'ensure the protection of [such rights] under the conditions laid down by the . . . Charter'. Rules of procedure may also be adopted by the Commission.²⁵ These include a consideration of the complaints contained in such communications if the majority of the members of the Commission decide to do so; and after having informed the state concerned of the complaint.²⁶ The Commission must publish the outcome of the consideration of communications made, including recommendations to governments concerned, as part of the report of activities of the Commission after such a report has been considered by the Assembly of Heads of State and Government.²⁷

²² Article 31 of the Charter.

²³ Articles 36 and 33 of the Charter.

²⁴ Articles 42 and 41.

²⁵ Article 45 and 47-59.

²⁶ Article 55 and 57. Note that if the communication is brought by a state party against another state, a slightly different procedure applies (see arts 47-54).

²⁷ Article 59.

In addition to the African Charter which is the primary source of human and people's rights in Africa, the Commission is required to 'draw [primary] inspiration' from various international human rights instruments including; the United Nations Charter, the Charter of the OAU, the Universal Declaration of Human Rights; other international instruments of the UN and its specialised agencies (to the extent that the African states concerned subscribe to such agencies); and other human rights instruments adopted by African countries.²⁸ On a 'subsidiary' level, the Commission is also required 'to take into consideration' other international conventions, African practices which are consistent with international human rights law, customs generally accepted as law, general principles of law recognised by African states, and legal precedents and doctrine.²⁹

The Commission has been receiving and considering complaints alleging violation of the human and people's rights contained in the Charter starting from 1988 to date. It has thus developed a body of decisions relating to such complaints and outlining its methods of dealing with these problems. However, until now only six of the communications considered by the Commission dealt with non-state actors. One of these communications was brought directly against a non-state actor. To date, no communication has been brought directly against a business corporation as a defendant: however, one communication did implicate a business corporation through the state duty to protect.³⁰ Some of these significant decisions are considered in the second part of this report.

(c) The nature of rights in the Charter

The Charter includes both *civil and political rights* and *social and economic rights*. The civil and political rights include, inter alia, equality (arts 2 and 3), liberty and security of the person (art 6), fair trial (art 7), freedom of conscience, and freedom of movement (art 12). The social and economic rights include, inter alia, employment rights (art 15), rights to physical and mental health (art 15), and education (art 17). It is also significant to note that the social and economic rights are not qualified by the notion that they are subject to the availability of resources and progressive realisation as is the case in the International Covenant on Economic, Social and Cultural Rights (ICESCR).³¹ The Charter also includes the so-called third generation rights which include the group rights to self-determination (art 20), development (art 22), national and international peace and security (art 23), and a satisfactory environment (art 24). The Charter is unequivocal in expressing that these rights are interconnected and must be approached with equal significance.³² The Charter also contains provisions peculiar to the African context.

²⁸ Article 60 of the Charter.

²⁹ Article 61.

³⁰ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* 155/96 (2001). (*SERAC v Nigeria*) This matter concerned the state duty to protect against corporate related violation of rights.

³¹ See art 2 of the ICESCR.

³² The preamble to the Charter states that 'it is essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural

These include the provisions relating to the family unit and its morals and traditional values (art 18), colonised and oppressed peoples (art 20(2) and (3)), disposal of people's wealth and natural resources (art 21(1), (2), (3) and (4)), and the elimination of foreign economic exploitation (art 21(5)). Furthermore, group rights in the Charter are emphasised more than in other instruments by the express reference to the terms 'people' or 'peoples' throughout the Charter.³³

Certain rights are defined in a significantly different manner to the way they are articulated in other international human rights instruments. For example, the right to political participation (art 13) and fair trial rights (art 7) lack the detail found in arts 14 and 25 of the International Covenant on Civil and Political Rights (ICCPR). Furthermore, important social and economic rights such as the rights to food, housing and social security contained in the ICESCR have not been expressly included in the African Charter.³⁴ Thus, in a number of instances, for the Charter to be able to protect the full range of individual interests, its provisions would necessarily have to be interpreted generously. Broad claw-back clauses are also contained in arts 6, 8, 10, 11, and 12 that limit the protections that these rights offer. For instance, art 6 provides for the right to liberty, but also qualifies this with a claw-back clause that says 'except for reasons and conditions previously laid down by law'; and art 10 guarantees the right to free association but 'provided that [one] abides by the law'.³⁵ These claw-back clauses may weaken these rights substantially and so reduce the prospect of their having significant bite.³⁶

Unlike many enforceable international human rights instruments, the Charter makes reference to and elaborates on the duties of individuals in relation to the rights in the Charter. In terms of chapter II (part I) of the Charter, duties of individuals, *inter alia*, include duties '[to exercise one's] rights and freedoms . . . with *due regard* to the rights of others, collective security, morality and common interest'; duties to respect and consider one's fellow beings without discrimination, and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; duties to preserve the harmonious development of the family . . .; and duties to contribute to the best of

rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment for civil and political rights.'

³³ They include the rights guaranteeing the equality of peoples (art 19), economic freedom and prosperity of peoples (art 21), development (art 22), national and international peace and security (art 23) and general satisfactory environment (art 24).

³⁴ Articles 9 and 11 of the ICESCR.

³⁵ See Henry J Steiner & Philip Alston 'International Human Rights in Context' 2^{ed} (2000) 355.

³⁶ Heyns argues that the Commission has been able to neutralise the claw-back clauses. He reads several decisions of the Commission as laying down the notion that domestic law may be used only to limit the rights in the Charter if it is 'necessary to protect an internationally recognized interest'. Thus the phrase 'subject to law' when used as a claw-back clause in the Charter refers not to domestic but to international law. Heyns submits that this approach is likely to be followed by the Commission in the future (Christof Heyns 'Civil and Political Rights in the Charter' in Evans & Murray (eds) *The African Charter on Human and People's Rights; The System in Practice, 1986-2000* (2002) 137 at 142-3).

one's abilities . . . to the promotion and achievement of African unity'.³⁷ It has not been settled whether the individuals' duties are enforceable against them or whether states may be compelled by regional mechanisms to enforce individuals' duties. Some critics have argued that 'this may lead to the "trumping" of individual rights' as unscrupulous leaders of states 'might capitalize on the duty concept to violate other guaranteed rights'.³⁸

Whilst attention has been drawn to some of the potential problematic features of the Charter, some academics argue that it has a number of strengths in promoting and protecting human rights in Africa. Oloka-Onyango, for instance, describes the African Charter as an instrument that 'was designed to both ensure that universal human rights standards are given expression within the regional context, and convey the uniqueness of the African experience to the rest of the world'.³⁹ Mukau Mutua argues that the Charter's duty concept reintroduces the values that Africa needs at this time, which include commitment, solidarity, respect and responsibility.⁴⁰ Steiner and Alston refer to the key theme of the African Charter as 'regional cultural distinctiveness'.⁴¹ While the debate about the unique features of the African Charter is a continuing one, it is clear from reading the Charter that it seeks to forge new ways of conceptualising and addressing rights in an African context. Some of these features are explored further below in the particular context of the state duty to protect and corporate responsibilities concerning fundamental rights.

(d) Non-state actors and the Violation of Charter Rights

Nearly all of the rights in the Charter can be directly violated by non-state actors, including corporations, particularly articles 2, 4, 5, 8, 10, 14, 15, 19, 21(1) & (3), 22 (1) and 24. For instance, the growing oil extraction industry operated by multinational corporations in various parts of Africa poses potential danger for the maintenance of a satisfactory environment which, in terms of art 24 of the Charter, must be enjoyed by

³⁷ See art 45.

³⁸ See Mukau Mutua 'The Banjul Charter and the African Cultural Fingerprint; An Evaluation of the Language of Duties' (1995) Va. J. Int. L. 339, found in part in Steiner & Alston supra note 35 at 360. See also Vincent O. Orlu Nmehielle 'The African Human Rights System, Its Laws, Practice & Institutions' (2001) 162.

Pityana argues that the said duties should not be seen as creating an environment for a gratuitous invasion of rights but as reinforcing rights, especially as the key performers in the modern global environment are non-state actors (Barney Pityana 'The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context' in Evans & Murray (eds) supra note 36 at 230).

Commentators also argue that these duties are necessary to reinforce the relationship between an individual and the community in line with the African values of commitment, solidarity, respect and responsibility (Mutua in Steiner and Alston at 360 and Nmehielle at 163).

³⁹ J Oloka-Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and The Struggle for People's Rights in Africa' (2003) *American University International Law Review* 852 at 912.

⁴⁰ See Mutua in Steiner and Alston supra note **Error! Bookmark not defined.**at 360.

⁴¹ Ibid.

peoples living in African communities. Similarly, it is logical that violations of the rights in the Charter may also occur through the complicity of corporations in violations perpetrated by others.⁴² This is most likely in cases where the business activity is operated by joint ventures between private corporations and the state. The Commission has at the very least suggested that corporations can violate the Charter rights even if it has not confirmed that they can be directly held legally accountable for doing so.⁴³

Recognition that companies can abuse all types of rights is in line with the SRSG's view, who has said that as companies are capable of abusing all rights, they have at a minimum, a responsibility to respect all internationally recognized human rights.⁴⁴ As the authors will argue, it appears the African system may even go further in its expectations of companies. This Report will now go on to explore further the possibilities – (both direct and indirect) – through which the African Charter may impose accountability upon corporations for the violation of rights in the Charter. In the next section, we turn to consider the obligations of states in relation to violations of rights committed by third parties (and in particular corporations) and the way in which the state duty to protect has been conceptualised by the African Commission.

PART II: STATE DUTIES UNDER THE CHARTER: THE STATE DUTY TO PROTECT

As has been mentioned, the African Charter enshrines a number of fundamental rights and duties for the individuals and peoples of Africa. These rights and duties further inform the role of the African Union and its organs, and the responsibilities of all member states of the African Union. The Constitutive Act of the African Union states that one of the AU's objectives is to 'promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments'.⁴⁵ It also has as one of the central principles that it is to function in accordance with, 'the respect for democratic principles, human rights, the rule of law and good governance'.⁴⁶

In terms of art 1 of the Charter, member states of the OAU (now the AU) are expressly charged by the Charter with the duty to 'recognise the rights . . . and freedoms enshrined

⁴² See *SERAC v Nigeria* supra note 30 paras 73-81. The concept of complicity has recently been developed in a report by the International Commission of Jurists (Report of the Expert Legal Panel on Corporate Complicity in International Crimes published by International Commission of Jurists on 16 September 2002. It can be found at [http://www.business-humanrights.org/Updates/Archive/ICJPanelon complicity](http://www.business-humanrights.org/Updates/Archive/ICJPanelon%20complicity)).

⁴³ The African Commission in the matter of *SERAC v Nigeria* has asserted that non-state actors are capable of violating the rights in the Charter and that an oil consortium had done so in that matter (ibid paras 9, 55, 58 and 61). This matter is discussed comprehensively below.

⁴⁴ The SRSG's 2008 Report supra note 2 para 55.

⁴⁵ Article 3(h) of the Constitutive Act of the African Union supra note 14.

⁴⁶ Ibid art 4(m).

in [the] Charter and [to] undertake to adopt legislative and other measures to give effect to them'. The negative duty to respect rights seems to be embedded in the express obligation to 'recognise the rights . . . and freedoms enshrined in the Charter', while the positive duty to take steps to promote, protect and fulfil the rights in the Charter is embedded in the express obligation to 'undertake to adopt legislative and other measures to give effect to [the rights in the Charter]'.⁴⁷ These duties envisage the protection of both 'civil and political rights' and 'economic, social and cultural rights' by states across the board. Like art 1, arts 25⁴⁸ and 26⁴⁹ are general provisions which indicate that states have the duty to promote and protect all the rights in the Charter.⁵⁰ Various provisions in the Charter articulate in more detail the duties of states in relation to particular rights. For instance, article 21(5) requires state parties to '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 natural resources;' and art 22(2) declares that 'states shall have the duty, individually or collectively, to ensure the exercise of the right to development.'⁵¹ The AU Ministerial Conference on Human Rights in Africa has declared that 'the primary responsibility for *promotion and protection* rests with Member States.'⁵²

An important feature of the state duties under the Charter is that they are widely defined as including 'legislative and other measures'.⁵³ Article 26 of the Charter further requires states to ensure that their judicial arm of government functions independently and to establish and improve appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.⁵⁴ Thus, conceivably, measures which states may be required to adopt may broadly include legislative measures; judicial mechanisms to adjudicate complaints and disputes; administrative mechanisms which provide regulation or oversight roles; the promotion of company-

⁴⁷ Article 1 of the Charter.

⁴⁸ In terms of art 25, '[s]tate parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.'

⁴⁹ Article 26 declares: 'State parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by present Charter.'

⁵⁰ Articles 3(h) and 4(m) of the Constitutive Act of the African Union supra note 14 may be read in a similar manner.

⁵¹ See also arts 17(3), 16(2), 18(2) and (3), 21(4), 25 and 26.

⁵² Supra note 17 at art 27. Emphasis added.

⁵³ Article 1 of the Charter.

⁵⁴ Article 4 of the Draft Kigali Declaration urges member states to apply, at all levels, 'a rights-based approach to policy, programme planning, implementation and evaluation'; and art 27 reiterates the importance of the independence of institutions designed to protect human rights and further emphasises that the proper functioning these institutions depends on them being supported by the government with 'adequate financial and other resources'.

based, industry-based and multi-stakeholder initiatives; and the establishment of national human rights institutions.⁵⁵

State duties under the Charter have been considered by the Commission and they include duties to respect, protect, promote and fulfil the rights in the Charter. The duty to protect element involves a consideration of the state's obligations to ensure that third parties, including corporations, do not violate or assist in the violation of the rights in the Charter. We now turn to consider in more detail the way in which the Commission has developed the duties of states with a particular focus on the state duty to protect and its implications for corporations through the key decisions of the African Commission.

(a) Commission Nationale des Droits de l'Homme et des Libertes v Chad

The first complaint considered on the merits by the Commission implicating a non-state actor was *Commission Nationale des Droits de l'Homme et des Libertes v Chad*.⁵⁶ This matter concerned allegations of the widespread abuse of civil and political rights including the harassment of journalists, the arbitrary arrests of civilians and individuals belonging to opposition parties, and the killings, abductions and torture of a significant number of targeted individuals by unidentified individuals. The Government denied any responsibility for these human rights violations. The complainants argued that the individuals who were perpetrating these violations were government security service agents and further that 'the state failed to protect the rights in the Charter from violation by other parties'.⁵⁷ On the allegation regarding the failure to protect, the state claimed that 'it had no control over violations committed by others'.⁵⁸

The Commission pointed to art 1 of the Charter as the first point of reference and held this to include the meaning that 'if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of violation'.⁵⁹ In contrast with various other international human rights instruments, the Commission confirmed that the African Charter does not allow for states to derogate from any of their treaty obligations during emergency situations.⁶⁰ It further said '[the] civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter'.⁶¹ The Commission found that the conduct of the government of Chad was in contravention of its obligations under the

⁵⁵ See chapter IV of the SRSR's 2008 Report, supra note 2. Some of these initiatives are considered below in the discussion of the work of the Commission and NEPAD.

⁵⁶ No. 74/92 (1995).

⁵⁷ Ibid para 18.

⁵⁸ Ibid para 19.

⁵⁹ Ibid para 20.

⁶⁰ Ibid para 21. Other conventions such as the European Convention on Human Rights, the Inter-American Convention on Human Rights and the International Covenant on Civil and Political permit for derogation from treaty obligations with regard to certain rights during situations of emergency.

⁶¹ Ibid.

Charter and thus arts 4, 5, 6 and 7 were violated. It described the violations as ‘serious and massive’. It held as follows:

‘In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.’⁶²

In summary, the Commission indicated that the government of Chad fell short of its duties under the Charter because of its failure to ‘*intervene to prevent*’ the violations and to ‘*secure the safety and the liberty of its citizens*’ and to ‘*conduct investigations into*’ the violations. This decision thus provided some guidance as to the nature of the state duty to protect under the African Charter. This was the first time the Commission had to consider the violation of rights by non-state actors and the responsibilities of the state in that regard. Having regard to this fact, the generality and extent of protection afforded is commendable though not particularly expansive. Considering the close proximity between the Government and government agents, the Commission could have restricted its holding to the state duty to protect against human rights violations by members of its agencies. Instead the Commission emphasized that neither the state nor its agents need be the ‘immediate cause of violation’.⁶³

(b) Amnesty International and Others v Sudan

This matter consisted of a range of complaints brought by various non-governmental organizations. The complaints included arbitrary arrests and detention without trial of hundreds of people; arrests, detention and torture of members of opposition groups, lawyers and human rights activists; and extra-judicial killings. As part of its defense, the government attributed some of the complaints raised to the existence of a rebellion where the Sudanese People’s Liberation Army was fighting the government forces and claimed that over 90 per cent of the alleged violations took place in areas controlled by the rebels.⁶⁴ The Commission found that the conduct of the government of Sudan had led to the violation of arts 2, 4, 5, 6, 7.1(a), (c), (d), 8, 9, 10 and 26 of the Charter.

Echoing the principle laid down in *Nationale des Droits de l’Homme et des Libertes v Chad*, the Commission in *Amnesty International and Others v Sudan*⁶⁵ held that ‘even if [thousands of other executions in Sudan] are not the work of forces of the government,

⁶² Ibid para 25. Emphasis added.

⁶³ Ibid para 20.

⁶⁴ Ibid para 22-3.

⁶⁵ No. 48/90, 50/91, 52/91, 89/93 (1999).

*the government has a responsibility to protect all people residing under its jurisdiction.*⁶⁶

(c) S.O.S. - *Esclaves v Mauritania* before the Commission

In the matter of *S.O.S. - Esclaves v Mauritania* before the Commission,⁶⁷ it was ‘alleged that that slavery remains a common practice in Mauritania, regardless of its prohibition under the law.’ The complainant argued that the Mauritanian government had to do more in terms of the African Charter. The Commission declared the communication inadmissible due to non-exhaustion of internal remedies. However the Commission emphasized that the complainant still enjoyed the opportunity to seize the Commission again once local remedies had been exhausted. This seemed to suggest that the Commission would consider such a complaint even though the state was not the party committing acts of slavery, since it had the obligation to protect its people against slavery.

(d) Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria⁶⁸ (SERAC)

The Commission’s most comprehensive decision concerning the abuse of human rights by a non-state actor and the only one involving the violation of human rights by a business corporation is the *SERAC* matter. This matter concerned allegations by the complainants that in the process of oil production in Ogoniland (Nigeria), a consortium formed of the Nigerian National Petroleum Company (NNPC, owned by the government of Nigeria) and Shell Petroleum Development Corporation (Shell) conducted itself in a manner that caused environmental degradation and health problems for the people of Ogoniland in Nigeria. It was argued that the oil mining activities in question violated several rights in the Charter including articles 2, 4, 14, 16, 18(1), 21, and 24. It was alleged that the Consortium disposed toxic wastes into the environment and local waterways and that it ‘neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages’,⁶⁹ and thus contaminating the water, soil and air. The pollution caused by the oil production was alleged to have threatened and destroyed food sources in Ogoniland such that much of the farming and fishing was no longer possible. Furthermore the consortium’s negligent conduct was said to have resulted in ‘serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems’.⁷⁰

⁶⁶ Ibid para 50. Emphasis added.

⁶⁸ Supra note 30.

⁶⁹ Ibid para 2.

⁷⁰ Ibid. See generally paras 1-9.

The direct role of the Nigerian government included ‘placing the legal and military powers of the State at the disposal of the oil companies’ in the violation of the said rights. This included attacks on and destroying of homes belonging to the Ogoni people. Many Ogoni people became displaced as a result. The military and the police are alleged to have used violence against members of a movement opposing these human rights violations (the Movement of the Survival of Ogoni People (MOSOP)) even though their campaigns were non-violent in nature. The state also failed to monitor the operations of the oil companies and to ensure that there were standard safety measures that had to be met in the oil industry.⁷¹

Information about the dangers that were created by the extraction of oil was alleged to have been withheld from Ogoni communities and there were no measures requiring that oil companies consult the people affected. Moreover, the government did not investigate and prosecute the acts.⁷²

In deciding on admissibility of this matter for consideration the Commission held that the requirement of exhaustion of domestic remedies before a communication is considered does not have to be followed ‘where a right is not well provided for in domestic law such that no case is likely to be heard’.⁷³ The reason for this is because ‘there cannot be effective remedies, or any remedies at all’ in such situations.⁷⁴ Upon having sought a response from the government of Nigeria several times but to no avail, the Commission held that the said rights were not well provided for in Nigerian law and thus the alleged violations could not be effectively remedied.⁷⁵ This was because Nigeria’s military government had enacted various sweeping decrees ousting jurisdiction of civilian courts.⁷⁶

In interpreting the Charter, the Commission said that, as in other international human rights instruments,⁷⁷ the obligations engendered on states included the duties to ‘respect, protect, promote, and fulfil these rights’. It held that ‘these obligations universally apply to all rights [including civil and political; and social and economic rights] and entail a

⁷¹ Ibid paras 7-9. It is alleged that:

‘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.’

⁷² Ibid paras 6 and 7.

⁷³ Ibid para 37.

⁷⁴ Ibid.

⁷⁵ Ibid para 41.

⁷⁶ Ibid.

⁷⁷ See art 2(1) of the ICCPR which stipulates that states ‘*undertake to take steps...by all appropriate means, including particularly the adoption of legislative measures*’. Emphasis added.

combination of negative and positive duties.⁷⁸ The Commission went on to elaborate on the meaning of these four duties, summarily as follows:

- (a) *The duty to respect* is a negative duty requiring the state to refrain from interfering in the enjoyment of all fundamental rights and freedoms. In regard to socio-economic rights, 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 . . . for the purpose of rights-related needs.'⁷⁹
- (b) *The duty to protect* entails the state bringing into place legislative, regulatory and other measures to ensure that rights-holders are protected against violations by others. Interferences with rights could be political, economic and social in nature. This was also described as including 'the creation and maintenance of an atmosphere or framework [such that] individuals will be able freely to realize their rights and freedoms.'⁸⁰
- (c) *The duty to promote* requires the state to ensure that 'individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.'⁸¹
- (d) *The duty to fulfill* is more of a positive obligation where the state is required to fulfill the enjoyment of rights and freedoms. This includes the state moving 'its machinery towards the actual realisation of the rights'. It may also entail the duty to provide directly the 'basic needs such as food or resources that can be used for food (direct food aid or social security)'.⁸²

These duties are wide and clearly encompass the protection of all categories of rights in the Charter. The Commission reasoned that in ratifying the Charter, state parties committed themselves to achieving these four duties.⁸³ While emphasising the equal importance of each of the obligations, the Commission held that depending on the type of rights under consideration, the level of emphasis in the application of these duties may vary; and that sometimes a concerted action will be required from the state including satisfying more than one of the said duties.⁸⁴

The Commission considered the violations regarding sections 16⁸⁵ and 24⁸⁶ together.⁸⁷ This was because it was the environmental degradation that caused the health risks and

⁷⁸ *SERAC v Nigeria* supra note 30 para 44.

⁷⁹ Ibid para 45.

⁸⁰ Ibid para 46.

⁸¹ Ibid.

⁸² Ibid para 47.

⁸³ Ibid para 48.

⁸⁴ Ibid.

⁸⁵ Article 16 provides:

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

consequences for the Ogoni people.⁸⁸ The environmental degradation was caused by the consortium's negligent production of oil; the Nigerian government's deployment of the military to exacerbate the said negligent oil production; and the government's failure to take steps to ensure the protection of the environment.⁸⁹ The Commission held that the two rights, when considered together, placed an obligation on the Nigerian government '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.'⁹⁰ According to the Commission reasonable measures would have included:

[O]rdering 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.⁹¹

The Commission held that the Nigerian government failed to respect the rights in the Charter as its security forces committed various violations against the Ogoni people.⁹² Furthermore, it found that the government failed to protect the environmental and health rights in not taking steps to ensure the above-mentioned actions.⁹³

The Commission also dealt with the specific rights and state duties which implicate the exploitation of natural resources as contained in art 21 of the Charter.⁹⁴ It found that art

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

⁸⁶ Article 24 provides:

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

⁸⁷ *SERAC v Nigeria* supra note 30 para 50-4.

⁸⁸ *Ibid.*

⁸⁹ *Ibid* para 50.

⁹⁰ *Ibid* para 52.

⁹¹ *Ibid* para 53. This was the Commission's interpretation of articles 16(1) and 24 of the Charter, read with art 12 of the ICESCR.

⁹² *Ibid* para 54.

⁹³ *Ibid.*

⁹⁴ Art 21 states:

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.

21 seeks to address the exploitation of resources in Africa by foreigners in the pursuit of wealth in a manner that excludes Africans and deprives them of their land and other benefits from the continent's natural resources.⁹⁵ The Commission held that in facilitating the destruction of the Ogoniland and giving a green light to oil companies to conduct oil production in a manner that affected the well-being of the Ogoni people, the Nigerian government's conduct fell short of the minimum obligations on a state as required by art 21 of the Charter.⁹⁶

The Commission was also of the view that social and economic rights including the rights to adequate housing or shelter and food were violated in the process of oil production. Although the right to housing is not expressly included in the Charter, the Commission broadly interpreted arts 14, 16 and 18(1) of the Charter (the right to property, health and protection of the family unit, respectively) to imply the protection of the right to adequate housing or shelter.⁹⁷ The Commission found that the Nigerian government failed to respect this right by forcefully evicting some of its Ogoni citizens from their homes, destroying their houses and obstructing them from rebuilding their homes.⁹⁸ It held that the state had the obligation 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.'⁹⁹ Further that where such infringements occur, the state should take steps to preclude further deprivations and also ensure access to legal remedies.¹⁰⁰

The Commission held that the right to food was implicit in art 4 (the right to life), art 16 (the right to health) and art 22 (the right to economic, social and cultural development). It held that the 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';¹⁰¹ and that at a minimum Nigeria should not have destroyed or contaminated the food sources or allowed private parties to do so. It thus held that Nigerian government fell

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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 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.

⁹⁵ *SERAC v Nigeria* case supra note 30 para 56.

⁹⁶ *Ibid.* para 58.

⁹⁷ *Ibid.* para 62.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* para 61.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* para 65.

short of what was expected of it under the provisions of the Charter and international human rights standards.¹⁰²

The Commission also emphasised that the violence inflicted on the whole of the Ogoni people violated their rights to life and integrity of the person.¹⁰³

In giving the opinions reflected above, the Commission had regard to its previous decision in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*.¹⁰⁴ It also sought direction from the practice of other international tribunals including the Inter-American Court of Human Rights and the European Court of Human Rights.¹⁰⁵ The Commission concurred with the holding in *Velázquez Rodríguez v. Honduras*¹⁰⁶ 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.'¹⁰⁷ Similarly, the Commission agreed with the European Court of Human Rights in *X and Y v. Netherlands* where it held 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.'¹⁰⁸

As a concluding remark the Commission said:

'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.'¹⁰⁹

The Commission held that the various Charter rights referred to above were violated by the Federal Republic of Nigeria and appealed to it 'to ensure the protection of environment, health and livelihood of the people of Ogoniland' by:

¹⁰² Ibid para 64-6.

¹⁰³ Ibid para 67.

¹⁰⁴ Supra note 56.

¹⁰⁵ *SERAC v Nigeria* supra note 30 **Error! Bookmark not defined.** para 57.

¹⁰⁶ 1988, Series C. No. 4. The decision of the Inter-American Court.

¹⁰⁷ *SERAC v Nigeria* supra note 30 para 57.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid para 68.

- (a) ‘Stopping all attacks on Ogoni communities and leaders by [its security personnel] and permitting citizens and independent investigators free access to the territory’;
- (b) ‘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’;
- (c) ‘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 clean-up of lands and rivers damaged by oil operations’;
- (d) ‘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
- (e) ‘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.’¹¹⁰

The Commission also urged the Nigerian government to keep the Commission informed of the outcome of the efforts it had begun to make in order to address the violations in question, including the work of the Federal Ministry of Environment, the Niger Delta Development Commission and the Judicial Commission of Inquiry charged with the investigation of the said human rights violations.

Commentary on the *SERAC* decision

This decision builds on the Commission’s previous decisions discussed above and thoroughly highlights a state’s duty to protect in a business-related context. The Commission found that several rights in the Charter were violated by the government and private actors, either together or individually. It elected to concentrate on the duties of the state as a remedial tool in this particular case. It interpreted the Charter to impose four broad duties (to respect, protect, promote and fulfill) which must be met by states despite these not being expressly included in art 1 of the Charter. The Commission based its decision in the present matter on the state duty to respect rights through ensuring that its organs do not directly violate rights in the Charter and the state duty to protect against the violation of the Charter rights by private parties. In giving content to these duties, the Commission made reference to some specific and general state duties in the circumstances of the present case which can help identify some of the components that are included within these broad obligations:

Preventative measures

- Ensuring that government sources refrain from attacking the Ogoni communities.
- Adopting *legislative, regulatory and other measures* for the protection of rights;

¹¹⁰ Emphasis added.

- Creating and maintaining an *atmosphere* or *framework* such that individuals will be able to freely realize their rights and freedoms;
- Ensuring that appropriate *environmental and impact assessments* are prepared for any future oil development; and
- Providing meaningful opportunities to be *heard* and to *participate* in decisions affecting one's community.

Monitoring measures

- Undertaking appropriate *monitoring*; and
- Creating *regulatory and decision-making bodies*, and effective and independent *oversight bodies* for the petroleum industry, including ensuring appropriate *access* to them by affected communities.

Remedial measures

- Conducting an *investigation* into human rights violations;
- Guaranteeing access to *legal remedies*;
- *Prosecuting* government and private officials for their involvement in human rights violations;
- *Providing relief* and *resettlement assistance* to victims by government;
- *Cleaning* the land and rivers affected;
- Ensuring *adequate compensation* to victims for the violation of human rights; and
- Providing *information* to exposed communities;

The *SERAC* decision thus reveals an attempt by the Commission to set high and effective standards for sustainable economic development in Africa as well as an indication of the state's regulatory role in this regard. The Commission also took the opportunity to use other international law instruments and jurisprudence developed over time to give broad interpretations to the Charter. Daniel Aguirre has described the Commission's approach in *SERAC* as recognising that 'human rights-based development' is a requirement of the African Charter (hence the broad interpretation of the Charter's requirements in regard to the duties of the state).¹¹¹

The Commission expressly referred to 'the uniqueness of the African situation and the special qualities of the African Charter' which make it imperative that the protection of every right be made effective.¹¹² This seems to provide a contextual approach for the interpretation and enforcement of international law. The decision exposes the urgency of the African situation and makes the point that solutions for these challenges are directly contemplated in the Charter. The special qualities of the African Charter are referred to and developed in this decision. They include reference to the need to combat 'foreign

¹¹¹ Daniel Aguirre 'Corporate Social Responsibility and Human Rights Law in Africa' *African Human Rights Law Journal* at 263.

¹¹² *SERAC v Nigeria* supra note 30 para 68.

economic exploitation’ as practised by international monopolies; the right of local peoples to benefit from economic activities where their natural resources are used; and the need for collective African effort and unity in protecting the rights and interests of people of Africa.¹¹³ The Commission also took the opportunity to give efficacy to the notion of group rights, providing a framework for the protection of marginalised communities.

Oloka-Onyango criticizes the Commission’s omission to consider the direct accountability of non-state actors, especially where the ‘law or the regulatory mechanisms of a host state are inadequate to tackle the problem’.¹¹⁴ He argues that while the focus of international human rights law has traditionally been on accountability by states, ‘globalization has sharply brought to the forefront the issue of the lack of accountability of non-state actors’; especially multinational corporations as a result of their increased power in states with weak human rights protection.¹¹⁵ In the present case the Nigerian military government gave the ‘green light’ to oil companies to conduct oil production in a manner that would ‘devastatingly affect the well-being of the Ogonis’.¹¹⁶ It also ousted jurisdiction of courts, thus making it impossible for citizens to seek redress for the violations which were taking place.¹¹⁷ There is also evidence that the oil companies were aware that their business ventures ‘were involved in state sponsored violations’.¹¹⁸ Oloka-onyango finds it surprising that, in these circumstances, the Commission did not invoke the duties he believes are well-articulated in the Charter as binding corporations.¹¹⁹

Despite some shortcomings observed above, the Commission’s decision in the SERAC matter is of significant precedential value which other bodies may draw upon.¹²⁰ The Commission articulated the state duties such that if the decision is respected and adhered to, it has a huge potential effect for future oil production in Nigeria as well as for any other industry that may impact on the Charter rights, whether in Nigeria or elsewhere.

(e) Zimbabwe Human Rights NGO Forum v Zimbabwe¹²¹

In this matter the complainant alleged that political violence was carried out by government agencies against dozens of people suspected of supporting the Movement for Democratic Change (the MDC), an opposition political party in Zimbabwe. The MDC

¹¹³ See the Preamble to Charter and art 21 of the same.

¹¹⁴ Oloka-Onyango supra note 39 at 903.

¹¹⁵ Ibid at 895-7 and 892.

¹¹⁶ *SERAC v Nigeria* supra note 30 para 58.

¹¹⁷ Ibid para 41.

¹¹⁸ Oloka-Onyango supra note 39 at 903.

¹¹⁹ Ibid at 909.

¹²⁰ Ibid at 871.

¹²¹ No. 145/02 (2006).

opposed constitutional amendments proposed by the ruling party (ZANU (PF)) which had called for a national referendum on the adoption of the amendments. The people of Zimbabwe finally voted against the proposed amendments. It was also alleged that some 82 deaths were reported as a result of the organised violence between March 2000 and 22 November 2001.¹²²

The complainant also alleged that extra-judicial killings; abductions, assaults and kidnappings which caused severe mental and physical suffering; and other atrocities were committed by the ZANU (PF) supporters and war veterans.¹²³ The complainant submitted that under the political arrangement at the time, ZANU (PF) was the government and the government was made up of ZANU (PF) representatives; and that the government had control over the war veterans.¹²⁴ It was also alleged that the police failed to investigate or arrest some of the perpetrators after reports were made to them.¹²⁵ Furthermore the president of Zimbabwe exercised his prerogative to issue Clemency Order 1 of the 2000, which 'granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between 1 January 2000 and July 2000'.¹²⁶

Relying on a decision of the American Court of Human Rights in *Velazquez v Rodriguez*,¹²⁷ the complainant submitted that 'the state is required under article 1, to take all reasonable measures to ensure that people *within its jurisdiction* were treated in accordance with international human rights norms and standards'.¹²⁸ The complainant emphasised that it was irrelevant that the violations were outside the sphere of the agent's authority or that Zimbabwean law was not violated by the perpetrators.¹²⁹ The complainant alleged that arts 1, 2, 3, 4, 5, 6, 9, 10, 11 and 13 of the African Charter were violated.¹³⁰

The government of Zimbabwe disputed much of the factual allegations made. However, it admitted that it had a duty to protect individuals against rights violations: an illegal act may be imputable to a state party to the Charter if there is lack of diligence to prevent or respond to the violation as required by the Charter and the act was carried out in an official capacity.¹³¹ It argued that it had taken diligent measures to deal with *most* of the

¹²² Ibid paras 1-14.

¹²³ Ibid paras 88, 94 and 98. Some victims were forced to attend political re-education meetings by Zanu (PF) supporters.

¹²⁴ Ibid para 137.

¹²⁵ Ibid see para 95.

¹²⁶ Ibid para 50. However the Clemency Order did not operate in relation to murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

¹²⁷ Supra note 106 paras 170, 177 and 183.

¹²⁸ *Zimbabwe NGO Forum* supra note 121 para 89.

¹²⁹ Ibid.

¹³⁰ Ibid para 15.

¹³¹ Ibid para 114.

allegations brought to its attention, including deploying police in areas where violence was reported, arresting and prosecuting some of the alleged perpetrators, and payment of compensation to some victims.¹³² It argued that the police were not able to investigate all cases because some victims could not identify their perpetrators.¹³³

The government, however, denied that its duty to respect rights would be violated where the illegal actions committed by government agents were not undertaken by such agents in their official capacity.¹³⁴ It argued that the actions of ZANU (PF) and war veterans cannot in any way be attributed to the state as there is a clear distinction between the three organisations; and that the two organisations were not part of the state machinery.¹³⁵ It did not matter that the head of government was a patron of the war veterans.¹³⁶ The government argued that the Clemency Order was a prerogative of the head of state which was reasonably exercised and warned that tempering with it would undermine the ‘whole notion of the clemency prerogative worldwide’.¹³⁷

The Commission found the complaint to be admissible and proceeded to deal with the merits of the allegation that the government failed to protect against the violation of rights committed by non-state actors. The Commission widely defined non-state actors as ‘the very many different kinds of individuals, groups or institutions whose behaviour, actions or policies have an effect on the enjoyment of human rights, and who can either be directly called to answer by the international system or for whom the government will be called to answer.’¹³⁸ The Commission also emphasised that non-state actors ‘are not limited to individuals since some perpetrators of human rights abuses are organisations, *corporations* or other structures of business and finance, as the research on human rights impacts of oil production or development of power facilities demonstrates.’¹³⁹ The Commission agreed with the government that ZANU (PF) and the war veterans were distinct from the state and thus could not be seen as part of the structure of government.¹⁴⁰

In giving meaning to art 1 of the Charter, the Commission held that human rights standards under international law ‘impose positive obligations on states to *prevent and sanction private violations* of human rights’ or ‘to protect citizens or individuals under their jurisdiction from the harmful acts of others’.¹⁴¹ Responsibility is placed upon the

¹³² Ibid para 161 and 154.

¹³³ Ibid para 154.

¹³⁴ Ibid.

¹³⁵ Ibid paras 116 and 117.

¹³⁶ Ibid para 116.

¹³⁷ Ibid para 131.

¹³⁸ Ibid para 135.

¹³⁹ Ibid para 136.

¹⁴⁰ Ibid paras 139 and 140.

¹⁴¹ Ibid para 143.

state because of the lack of ‘due diligence’ on its part to prevent the violation or not taking the necessary steps to provide the victims with reparations.¹⁴² The Commission found the decision of *Velasquez Rodriguez v Honduras*¹⁴³ to represent ‘an authoritative interpretation of international standard on state duty’ and to provide ‘a way to measure whether a state has acted with sufficient effort and political will to fulfil its human rights obligations’.¹⁴⁴

The Commission held that in order to determine whether the state conducted its duties with due diligence, it was necessary to know ‘who is responsible and to what degree, where that responsibility arises from, towards whom such responsibility exists, and how such responsibility is asserted’.¹⁴⁵ These questions help determine whether the state has breached its legal obligation under international law.¹⁴⁶ States’ obligations can be ‘negative or positive, and can give rise to direct and indirect responsibilities’ and cover both civil and political rights and social and economic rights.¹⁴⁷ The breach to be determined is related to the ‘duty to respect, protect, promote or fulfil the rights of persons *under its jurisdiction*’.¹⁴⁸

¹⁴² Ibid.

¹⁴³ Supra note **Error! Bookmark not defined..**

¹⁴⁴ *Zimbabwean Human Rights NGO Forum* supra note 121 paras 144 and 146. The Inter-American Court of Human Rights had held that a state ‘has failed to comply with [its] duty . . . when the state allows “private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention”.’ The same court had also held that states are ‘obliged to investigate every situation involving a violation of the rights protected by [international law]’ and that states should ‘take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure the victim adequate compensation.’ It had held further that states are required to ‘organize the governmental apparatus, and in general, all structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights’ (*Velasquez Rodriguez* *ibid* at paras 176, 174, 172 and 166).

¹⁴⁵ *Zimbabwean Human Rights NGO Forum* *ibid* para 149. Emphasis added.

¹⁴⁶ *Ibid* para 150.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*. Emphasis added. The state duty to respect is a primary one and 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’ (para 152).

The duty to protect entails ‘the state’s [secondary] obligation to protect rights-holders against other subjects by legislation and provision of effective remedies.’ This extends to protection against ‘political, economic and social interferences’ (para 152).

The state duty to promote is a ‘tertiary obligation . . . to promote the enjoyment of all rights.’ This includes promoting ‘tolerance, raising awareness, and even building infrastructures’ (para 152).

The state duty to fulfil is ‘the last layer’ of the state obligations and entails a ‘positive expectation on the part of the state to move its machinery towards the actual realization of rights’ (para 152).

The Commission found that the basis of the present communication concerned the *state duty to protect* against abuse perpetrated by third parties.¹⁴⁹ It emphasised that the state's duty is determined according to the merits of a particular case and not in the abstract.¹⁵⁰ The feasibility of effective state action must be analysed to guard against denial of responsibility by states.¹⁵¹ Some leeway will be given to government in considering which means to use to protect rights in a particular case: however, the Commission will always seek to ensure that minimum requirements, set in line with the standards recognised in this decision, are met.¹⁵² The Commission held that foreseeability of the harm alleged by the state needs to be considered. If the harm could be foreseen, a state would have to take measures to prevent such harm.¹⁵³ The question to be addressed is 'whether . . . the state took the necessary measures to prevent the violations from happening at all, or having realised violations had taken place, took steps to ensure the protection of the rights of the victims.'¹⁵⁴ In determining whether the actions of the state meet the due diligence requirement the Commission would also consider the *seriousness* with which the state undertakes its efforts to protect rights.¹⁵⁵ The state's efforts must encompass the existence and effective implementation of legal rules and the enforcement of sufficient remedies for victims.¹⁵⁶ Another requirement is the demonstration that the state does not condone 'a pattern of abuse through pervasive non-action'.¹⁵⁷

The Commission accepted the representations of government that it took measures 'to deal with the alleged human rights violations, including amendment of legislation, arrest and prosecution of alleged perpetrators, payment of compensation to some victims and ensuring that it investigated most of the allegations brought to its attention.'¹⁵⁸ The complainant did not dispute this claim as its claim was that the efforts of the government 'were not sufficient and were not taken early enough to be diligent'.¹⁵⁹ The Commission found that the complaint did not show that the state either *aided or abetted* the non-state actors in committing the violence and that it had not been shown that the government *remained indifferent* to the violence that took place. Further that the Commission's fact-finding mission to Zimbabwe 'was not able to find definitively that [the political violence] was part of an orchestrated policy of the government . . .'.¹⁶⁰ The Commission

¹⁴⁹ Ibid para 154.

¹⁵⁰ Ibid para 155.

¹⁵¹ Ibid para 156.

¹⁵² Ibid para 155.

¹⁵³ Ibid para 157.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid para 158.

¹⁵⁶ Ibid para 159.

¹⁵⁷ Ibid para 160.

¹⁵⁸ Ibid para 161.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid para 165.

held that these were appropriate actions in dealing with the violence committed by the non-state actors.¹⁶¹

However, the Commission found that more was required from the government in order to demonstrate that its measures were proportionate to deal with the situation. It recognised the legality of the act of clemency as an established practice worldwide.¹⁶² However its interpretation of international law, from which it drew inspiration, is that clemency may not be exercised in cases of grave violation of human rights such that it results in impunity and victims become defenceless with no alternative avenues to seek redress.¹⁶³ The Commission asserted that its authority to monitor and ensure protection of the rights in the Charter entitles it, inter alia, to ‘make sure that policies and legislation (even in cases where the president is given absolute discretion) adopted by state parties . . . do not contravene the provisions of the African Charter’. It emphasised that in cases of conflict of laws, an international treaty prevails over a national constitution and domestic legislation.¹⁶⁴

Thus, the Commission held that in passing the Clemency Order, the government prohibited prosecution and set free perpetrators of politically motivated crimes, such as ‘abductions, forced imprisonment, arson, destruction of property, kidnappings and other human rights violations’.¹⁶⁵ According to the Commission this ‘did not only encourage impunity but effectively foreclosed any available avenue for alleged abuses to be investigated’.¹⁶⁶ Therefore the right of victims to judicial protection and to have their cause heard as protected by art 7(1) of the African Charter, was violated.¹⁶⁷ The Commission called on the government of Zimbabwe to establish a commission of inquiry to investigate the violence that had occurred and take measures to bring perpetrators to book and provide just and adequate compensation to victims. The government was also requested to report back to the Commission on the implementation of this recommendation.

Commentary on Zimbabwe Human Rights NGO Forum v Zimbabwe

The most significant contribution of this decision is the detail it offers with regard to the standard which must be applied in order to determine whether a state has met its duty to protect in terms of art 1 of the Charter. The Commission, for the first time, clearly held that the duty applies to protecting against abuse by all non-state actors, including corporations. The Commission attempted to establish a threshold of ‘due diligence’ on the part of state parties. The ultimate test for due diligence appears to involve a range of

¹⁶¹ Ibid paras 163-4.

¹⁶² Ibid para 197.

¹⁶³ Ibid paras 201-14. See in particular para 206.

¹⁶⁴ Ibid para 190.

¹⁶⁵ Ibid para 211.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid para 212 and 215.

factors including the extent of government's efforts or lack thereof and the extent of the violation of rights by non-state actors.

Due diligence is determined according to circumstances of each particular case and it must be taken into consideration: 'who is responsible and to what degree, where that responsibility arises from, towards whom such responsibility exists, and how such responsibility is asserted'. The choices of government in protecting the rights of its citizens must be respected but minimum standards may be set by the Commission. Where the government is accused of not *preventing* violations, it must be shown that the government could have foreseen the harm. If government shows seriousness in fulfilling its duties, it is likely to pass the due diligence test. Due diligence encompasses also the provision of legal remedies.

Some of the elements of the threshold proposed in this case are difficult to establish, placing government at an advantage over those trying to demonstrate violations. Indeed, given subsequent events in Zimbabwe and the widespread nature of abuses that have been widely recognised as emanating from the state, it is concerning that the Commission did not reach stronger findings as to the complicity and involvement of the state in this regard. The decision is thus disturbing for the disjunction between its relatively extensive development of the state duty to protect in theory and its failure adequately to hold the Zimbabwean government to account in its holding. The decision itself suggests the importance of thinking through ways in which abstract standards relating to the state duty to protect can be developed effectively to enable governments who are in violation thereof to be held accountable.

It is clear from the above that art 1 of the Charter bears a broad meaning that undoubtedly encompasses the state duty to protect against human rights violations threatened or caused by private parties, including corporations. The Commission in *SERAC* illustrated well that corporations may be bound to realise fundamental rights through the state imposing such a duty upon them in fulfilment of its own duty to protect individuals against human rights violations of any kind. In *Zimbabwe Human Rights NGO Forum v Zimbabwe* the Commission went further by attempting to develop a test to measure states' compliance with the duty to protect, but more needs to be done to develop the required threshold. However, the Commission has slowly but systematically sought to develop the notion of the state duty to protect in line with the global and other regional developments. We now turn to consider other potential interpretations of the Charter which have not been considered by the Commission and are relevant to the topic of corporate-related human rights violations in Africa.

PART III: DIRECT DUTIES OF NON-STATE ACTORS UNDER THE AFRICAN CHARTER

As mentioned above, many of the rights enshrined in the Charter are capable of being violated by non-state actors, including corporations. What then about the obligations of corporations in relation to the realisation of rights in the Charter? A nuanced

interpretation of the Charter may indicate that non-state actors have legal duties which they are required to fulfil. These duties may, in our view, be negative or positive, in the sense that corporations are required to refrain from violating rights as well as, in some circumstances, to take positive steps to meet human rights standards envisaged in the Charter.

It may be argued that the African Charter has scope to be interpreted such that corporations may be bound directly to fulfil their human rights responsibilities, using regional mechanisms. This horizontal application of the Charter by regional instruments is controversial because of the lack of an express statement in the Charter to the effect that it may be applied directly against non-state parties. International human rights law has traditionally been viewed as only binding states in their relations with individuals.¹⁶⁸ It is debatable, however, whether the latter view is supported by the text of the African Charter. Rachel Murray argues that since the concept of ‘private/public’ divide is not entrenched in the pre-colonial African societal structure, the Charter should not be seen to imply it.¹⁶⁹

Oloka-Onyango submits that the view against the ‘private/public’ dichotomy in Africa extends to modern African states in the context of globalisation.¹⁷⁰ Oloka-Onyango agrees with Duruigbo’s sentiments that some developing countries lack the ‘technical expertise and legal development necessary to monitor or regulate’ complex human rights violations by multinational corporations; and that companies are more likely to show a preference for those countries in order to scramble for their investments.¹⁷¹ He argues that such instances of imbalance of power between multinational corporations and some developing states in Africa justify holding powerful multinational corporations directly accountable through regional mechanisms.¹⁷² He argues further that this is especially so where a multinational corporation is directly involved in a harmful business activity with the host state, as was the case in the *SERAC* matter.¹⁷³

The view developed in the above paragraph is strengthened by the Charter’s express inclusion of the duties of individuals in regard to the realisation of human and people’s rights. The duties of individuals in the Charter are imposed on ‘every individual’ without qualification. The question arises as to whether corporations with separate legal personality fall within the ambit of an ‘individual’ for purposes of the Charter. Given that

¹⁶⁸ Rachel Murray *The African Commission on Human and People’s Rights and International Law* (2000) 37-8.

¹⁶⁹ Ibid. Murray argues that the traditional African societal structure ‘emphasis[es] the community rather than the individual’ and ‘as a result the division between the public and the private is less apparent’; while the traditional international human rights conception seeks to ‘provide a form of protection from abuses of the state, and in this sense falls into the “public” rather than the private “sphere”’.

¹⁷⁰ J Oloka-Onyango *supra* note 39 at 895-6.

¹⁷¹ Ibid at 903. See Emeka Druigbo ‘Multinational Corporations and Compliance with International Regulations Relating to Petroleum Industry’ (2001) *Annual Survey of Int’l & Comp.L.* 101 at 139.

¹⁷² Oloka-Onyango *ibid* at 904.

¹⁷³ Ibid.

the Charter sought to express the responsibilities of people for the realisation of rights (not just their entitlements), it would be contrary to this purpose to allow individuals to be shielded behind the separate legal personality of corporations. It would also make no sense in light of this purpose to shield them from bearing their own responsibility for the violations of rights they cause. Accordingly, it does not appear that the Charter could have envisaged that states and human beings must respect rights but corporations – simply because of their separate personality – could not be held accountable. Thus, in our view, the term ‘individuals’ ought to be interpreted to include corporations.¹⁷⁴

It remains controversial whether the individuals’ duties in the Charter may be enforced against them. In answering this question it is helpful first to analyse the text of the Charter that imposes duties on states and individuals. In terms of the Charter, states are required to ‘recognise rights, duties and freedoms’ and ‘undertake to adopt legislative or other measures to give effect to them’, whilst individuals are required *inter alia* to have ‘due regard to the rights of others’ and ‘respect and consider his fellow beings without discrimination, and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance’. The first aspect of the duties of states has been established above to be the duty to respect human and people’s rights and is enforceable through regional mechanisms. There is no indication from the substantive provisions of the Charter that an individual’s express duty to ‘have due regard to the rights of others’ cannot similarly be considered to be enforceable through regional mechanisms.

The content of the duties of individuals include the duty ‘[to exercise one’s] rights and freedoms . . . with *due regard* to the rights of others, collective security, morality and common interest’.¹⁷⁵ The duty to have ‘*due regard*’ to the rights of others suggests the existence of an applicable threshold that must be met by individuals when the exercise of their rights and freedoms has the potential to impair the rights of others. In a corporate environment, this could mean that when the freedom to trade is exercised anywhere the threshold of ‘*due regard* to the rights of others’ must be met.¹⁷⁶ In terms of art 28, ‘every individual shall have the duty to respect and consider his fellow beings without discrimination.’ These duties are imposed on every individual ‘towards his [or her] family and society, the state and other legally recognised communities and the international community’.¹⁷⁷

The term ‘due regard’ seems to be comparable to the ‘due diligence’ concept developed in the SRSG’s ‘protect, respect, remedy’ framework.¹⁷⁸ In terms of the SRSG’s framework, corporations have a responsibility to respect rights and this requires ‘due

¹⁷⁴ See Oloka-Onyango supra note 39 at 910.

¹⁷⁵ Article 27(2) of the Charter.

¹⁷⁶ Article 21 of the Charter may be interpreted to provide for the right or freedom to trade.

¹⁷⁷ Article 27(1) of the Charter.

¹⁷⁸ The SRSG’s 2008 Report supra note **Error! Bookmark not defined.** para 56. The dictionary meaning of diligence is ‘a degree of care and caution required by circumstances of a person’; while ‘regard’ means ‘to have or show respect or concern’. www.dictionary.com.

diligence' on their part.¹⁷⁹ However, according to the SRSB the responsibility to respect is not legally binding against corporations but is based in social norms.¹⁸⁰ The Charter's elaborate inclusion of duties of individuals is significant in this regard as it provides a strong case for arguing that, under the African Charter, such an obligation is a legally binding one. While the basis of the responsibility to respect in the SRSB's framework is social norms; the source of 'due regard' in the Charter is the firm expression of this duty in a legally enforceable human rights instrument. Consequently, if corporations are included in the category of 'individuals' and the said duties are enforceable, then it would seem that the Charter would not uphold the classic 'public/private' dichotomy – allowing for regional mechanisms to hold non-state actors directly accountable for human rights violations.

The provisions establishing the procedure of the African Commission may also provide support for this argument. It distinguishes between two types of communications (complaints): (a) those brought by a state party against another state party; and (b) 'the communications other than those of state parties'.¹⁸¹ In the authors' view, 'the communications other than those of state parties' may be so broad as to permit both the complaints made by individuals against a state and against non-state actors. However, it must be acknowledged that the structure and text of chapter III (part II) of the Charter does not sanction communications made to the Commission by state parties against private parties. This omission, however, should not deprive individuals from being able to lodge complaints against other non-state actors. It may be argued that the requirement in art 57 that 'all communications . . . be brought to the knowledge of the state concerned' indicates that complaints may be made only against states. However, this very provision can be better interpreted to require that, even in the case of a horizontal complaint, states where the alleged violation occurred must be notified of the communication made to the Commission.

Only one communication considered by the Commission was brought against a non-state actor. In the case of *Mohamed El-Nekheily v OAU*,¹⁸² the applicant complained *inter alia* against wrongful dismissal and non-payment of salaries directed solely at the OAU. The Commission held that the communication brought against the OAU was inadmissible because the OAU was not a party to the African Charter. This decision could be seen to suggest that the Commission was of the view that it was only empowered to consider communications brought against states which are parties to the African Charter.¹⁸³ However, detailed reasons were not given by the Commission in arriving at this decision. It could be that the Commission was of the view that the OAU's status (its superiority over the Commission) meant that the Commission could not call it into question. Thus it

¹⁷⁹ Ibid. The SRSB states that due diligence refers to the 'steps a company must take to become aware of, prevent and address adverse human rights impacts.'

¹⁸⁰ Ibid para 54.

¹⁸¹ Articles 47-59 of the Charter. Chapter III of part II.

¹⁸² No 12/88 (1988).

¹⁸³ Several communications brought against states which were not parties to the African Charter were also held to be inadmissible. See Heyns (ed) *supra* note 5 at 441.

remains possible for the Commission to interpret the Charter so as to hold certain non-state actors accountable directly.

The African context, within which the Charter ought to be interpreted, as has been elaborated by Murray and Oloka-Onyago, combined with the express inclusion of duties of individuals in the Charter in our view militate in favour of the horizontal application of the Charter by African regional enforcement mechanisms, and particularly the African Commission.

PART IV: EXTRATERRITORIAL APPLICATION OF THE CHARTER

A further question concerns whether a state's duty to protect under the African Charter extends to those that lie outside its territory. Article 1 of the Charter which provides general obligations of member states does not express any territorial limitation with regard to the state's duties. Article 2 entitles every individual 'to the enjoyment of all the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind', including 'national and social origin'. The Commission has, however, not provided any guidance on extraterritorial application of the rights in the Charter. The Commission has only made general references with regard to states' duties, for example the state's duty towards its 'citizens' or 'people residing under its jurisdiction'.¹⁸⁴

In terms of international law the question of the exercise of power extraterritorially remains unsettled, largely for fear of encroaching on states' sovereignty.¹⁸⁵ In his latest report, the SRSG submits that 'current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met.'¹⁸⁶ In the context of the Charter, it seems that there would be a need to balance adherence to the principle of the sovereignty of states and the Charter's aspirations of African unity, intensified co-operation and collectivism among African states to achieve a better life in Africa.¹⁸⁷ The latter seems to motivate for extraterritorial jurisdiction if it increased human rights protection for African people.

¹⁸⁴ See *Nationale des Droits de l'Homme et des Libertes v Chad* supra note 56 para 22 and *Amnesty International and Others v Sudan* supra note 65 para 50.

¹⁸⁵ See SRSG's 2009 Report supra note 2 para 15. See also *The Case of the S.S. Lotus (France v Turkey)* (1927) PCIJ Series A, No. 10.

¹⁸⁶ SRSG's 2009 Report *ibid* para 15.

¹⁸⁷ See the Preamble to the African Charter. See also art 21(4), which provides that 'state parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with the view of strengthening African unity and solidarity.'

Chapter II of the Charter provides some guidance which may indicate the existence of extraterritorial jurisdiction. Article 27(1) of the Charter provides that ‘every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community’; and art 27(2) states that ‘the rights and freedoms of each individual shall be exercised with due regard to the rights of others’ The terms ‘other legally recognised communities’ and ‘international community’ are indiscriminate with regard to whom the said duties are owed. Put simply, this suggests that individuals, which may include corporations, ought to exercise their rights with due regard to the rights of other individuals and peoples wherever they may be. Accordingly, in the event that the duties of individuals in Charter are enforceable, as suggested above, African multinational corporations which fail to have *due regard* to the rights of members of communities in other countries where they conduct business, may be held accountable by their home states, as part of the home state’s duty to protect. One way in which states may exercise their duty in this regard is by putting in place appropriate judicial mechanisms to hold such corporations to account for violating human rights abroad.¹⁸⁸ This model would be very similar to the way in which the Alien Tort Claims Act (ATCA)¹⁸⁹ in the United States is applied. In terms of the ATCA, victims of international human rights violations who are from outside the US may seek relief in US federal courts against multinational corporations (sometimes with only a tenuous link to the US) for violations committed in such victims’ home states. Such mechanisms, particularly if seen as required or encouraged by the Charter, may ensure that multinational corporations domiciled in states like South Africa are compliant with human rights standards when they operate in other African countries where human rights protection may be weak.¹⁹⁰

We now turn to consider other regional initiatives relevant to the topic of business and human rights, including the work of the Commission other than its decisions on complaints under chapter III of the Charter, and the potential of the policies and obligations created under the NEPAD.

¹⁸⁸ A country’s judicial mechanisms would be appropriate and effective in this regard if its courts are provided with jurisdiction to apply rights and duties contained in the Charter directly against such country’s nationals.

¹⁸⁹ 28 USC § 1350. The ATCA regime was introduced in the United States in 1789 as part of the Judiciary Act of 1789 and it provides that ‘the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. See *Filartiga v Pena-Irala* 630 F.d 876 (1980) at 878.

¹⁹⁰ The panel of eminent persons established under the NEPAD regime recently recommended to the South African government that it ‘take steps to oversee and enforce adherence to the King II Report [on corporate governance] by South African companies operating elsewhere on the continent in all aspects of their operations’. The King II Report has many human rights implications. This is discussed in more detail below.

The SRSB has also noted that some treaty bodies have come to encourage home states to take steps to prevent abuse abroad by corporations within their jurisdiction. See ICESCR general comment 19 (2008) para 54 and the Committee on the Elimination of Racial Discrimination’s consideration of reports submitted by states parties under art 9 of the Convention, CERD/C/USA/CO/6 (2008) para 30 (SRSB’s 2009 Report *supra* note 2 para 15).

PART V: OTHER INITIATIVES

(a) Other work of the Commission

It has been pointed out that the mandate of the Commission is a broad one, generally aimed at promoting and ensuring the protection of human and people's rights in Africa.¹⁹¹ Some creative approaches have evolved in the work of the Commission including:

- The commissioning of research and other activities on specific issues usually overseen by commissioners;¹⁹²
- The establishment of working groups on issues related to the Charter which may consist of commissioners and other people with expertise;¹⁹³
- The appointment of special rapporteurs to support the Commission in the promotion and protection of specific rights in the Charter;¹⁹⁴
- Various country missions (promotional/protection and fact-finding) undertaken by commissioners on behalf of the Commission and those undertaken by special rapporteurs and working groups. Commissioners are assigned different countries to visit for promotional and protection missions. During these missions, meetings are held with different stake holders on key human rights issues. In this way the Commission is able to get its message across to relevant persons or bodies and it is also able to learn about human rights progress in different parts of the continent. The Commission has conducted many such missions and published ten reports on the missions.¹⁹⁵ The Commission has also conducted fact-finding missions in different countries and published two reports.¹⁹⁶ Special rapporteurs also conduct country missions when the need arises and three special rapporteurs' reports are available on the Commission's website.¹⁹⁷

¹⁹¹ Article 45 of the Charter.

¹⁹² See art 45(1) of the Charter which provides the mandate of the Commission includes 'to collect documents, undertake studies and research on African problems in the field of human and people's rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and people's rights, and, should the case arise, give its views and make recommendations to governments.'

¹⁹³ Existing working groups are in regard to, 'specific issues related to the work of the African Commission'; 'indigenous populations/communities in Africa'; 'economic, social and cultural rights in Africa'; 'Robben Island guidelines'; and 'death in Africa'.

¹⁹⁴ Existing special rapporteurs are in regard to 'the rights of women in Africa'; 'prisons and conditions of detention in Africa'; 'freedom of expression in Africa'; 'human rights defenders in Africa'; 'refugees, asylum seekers, migrants and internally displaced persons in Africa'; and 'summary, arbitrary and extra-judicial executions in Africa'.

¹⁹⁵ See: http://www.achpr.org/english/info/reports_en.html.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

- State reporting on ‘legislative and other measures taken with a view to give effect to the rights and freedoms recognised and guaranteed by the present Charter’;¹⁹⁸
- Declarations and different types of resolutions related to human and peoples’ rights in Africa are made from time to time. Over eighty resolutions have been adopted by the Commission since its establishment.¹⁹⁹

Most of the work of all these mechanisms is reported in the activity reports of the Commission. The Commission has thus far produced and published twenty-four activity reports.²⁰⁰

The authors have studied some of this other work of the Commission with the aim of identifying key elements with a bearing on the state duty to protect against corporate-related abuse or the broader topic of business and human rights. Our search does not claim to be entirely comprehensive. The study of the country mission reports, perhaps worryingly, did not reveal any issues related to corporate violations of human rights. Most of them concentrate on the respect of human rights by states in relation to the rights in the Charter. They also show a tendency to focus on civil and political rights and have less focus on social, economic and environmental rights. This perhaps demonstrates that the issue of corporate obligations for the realisation of rights has not strongly been on the agenda of the Commission. It also may suggest the fact that both states and civil society groups have failed to place these matters on the agenda of the Commission and that there is a general lack of information in this regard which has led to limited consideration of these issues.

The work of the working groups and special rapporteurs relevant to the subject of this report includes those regarding ‘indigenous populations/communities in Africa’, ‘economic, social and cultural rights in Africa’, and ‘the rights of women in Africa’. However, the perusal of the work of these bodies or individuals again does not reveal any significant attention being paid to business and human rights challenges.

Most significant about the other work of the Commission in relation to this report is the ongoing project concerning abuse of human rights by non-state actors, led by Commissioner Musa Ngary Bitaye.²⁰¹ During its 40th ordinary session, the Commission authorized the undertaking of a study on ‘violation of human and people’s rights in Africa by non-state actors in the context of the African Charter on Human and People’s Rights’. Commissioner Bitaye requested a scholar, Nana Kusi Appea Busia Jr, to undertake such a study and prepare a report. A preliminary report by Busia Jr was submitted to the Commission in its 43rd ordinary session.²⁰² This development prompted

¹⁹⁸ See art 62 of the Charter. About 44 of the 53 state parties to the Charter have submitted one or more such reports.

¹⁹⁹ http://www.achpr.org/english/info/resolutions_en.html.

²⁰⁰ See the Commission’s website which can be found at www.achpr.org.

²⁰¹ See the 20th and 24th Activity Report of the Commission at 41. See http://www.achpr.org/english/info/index_activity_en.html.

²⁰² Unfortunately, Nana Kusi Appea Busia Jr’s study and report have not been made available to the public.

Commissioner Bitaye to propose that the Commission adopt a resolution to establish a working group on the subject. The Commission is still to decide on the proposed resolution. After investigations were made by SAIFAC, the Commission claimed that the said study was a working document and as such will not make it public. The establishment of such a working group could bolster the Commission's work on this subject and hopefully help in answering outstanding questions related to non-state actors under the Charter, including corporations. Special promotional/protection missions taken by such a working group could help expose the complicity and direct abuse of human rights by multi-national corporations where they occur and prompt further development in the understanding of the obligations of non-state actors in relation to human rights. It could also help develop the understanding of the state duty to protect. Inevitably, this would lead to more tangible results as it would be a more focused effort.

Even though the Commission's decisions discussed above are admirable for having set some important precedents in such a few cases, there remain many outstanding issues which have not been adequately entertained by the Commission. Outstanding issues include the Commission's application of the Charter directly against non-state actors; the application and enforcement of the Charter by states against private actors beyond their borders; the nature and extent of corporate obligations under the charter in relation to the realisation of fundamental rights; and the role of duties of individuals recognised in chapter II of part I of the Charter (all of which have not been developed by the Commission). We now turn to consider the work of another important regional initiative: NEPAD.

(b) THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT (NEPAD)

We have undertaken some research on this instrument and its relevance to the subject of this report, and we find that it is the second most relevant existing regional mechanism after the Commission in regard to the subject of state duty to protect against violation of rights by non-state actors. NEPAD is defined as 'a vision and strategic framework for Africa's Renewal.' The relevant organ of NEPAD for the purposes of this report is the African Peer Review Mechanism.

The NEPAD Framework Document was adopted by the OAU in Abuja, Nigeria, in October 2001, with its main aim being sustainable development in Africa.²⁰³ This includes the expedition of the 'protection of human rights and people-centred development'.²⁰⁴ NEPAD's programme of action contains the strategy for achieving sustainable development for Africa in the 21st century, and states that it is envisaged as 'a long-term vision of an African-owned and African-led development programme'.²⁰⁵ One of the conditions for the envisioned sustainable development is the achievement of 'true democracy, respect for human rights, peace and good governance . . . transparency,

²⁰³ Para 1 and chapter V of the NEPAD Framework Document. See <http://www.nepad.org/2005/files/documents/inbrief.pdf>.

²⁰⁴ Ibid para 7.

²⁰⁵ Ibid at chap V and para 60.

accountability, integrity and the rule of law, in Africa'.²⁰⁶ These may be achieved in various ways, including institutional reforms focusing on:²⁰⁷

- administrative and civil services
- strengthening parliamentary oversight
- promoting participatory decision-making
- adopting effective measures to combat corruption and embezzlement
- undertaking judicial reforms

It is further stated that countries participating under this programme 'will take the lead [and dedicate their efforts] in supporting and building institutions and initiatives that protect these commitments'.²⁰⁸ The NEPAD Framework Document commits that the participating countries' (member states of the AU) efforts and progress in regard to the said commitments will be periodically monitored and assessed by the leadership of NEPAD.²⁰⁹ This process is also envisaged to result in sharing of experiences between countries 'with a view to fostering good governance and democratic practices'.²¹⁰ The mechanism developed to achieve this vision of NEPAD is the African Peer Review Mechanism (APRM).

The APRM was first envisioned in the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance.²¹¹ This Declaration was adopted by the Heads of State and Government of the AU in June 2002. The AU re-affirmed the need for sustainable development in Africa and further stated that grave challenges that face Africa are the eradication of poverty and the fostering of socio-economic development.²¹² These are human rights goals and must in particular be achieved through democracy and good governance (both political governance and corporate governance).²¹³ Some of the objectives contained in the Declaration are:²¹⁴

- The promotion of democracy and its core values, including rule of law, equality of all citizens and of opportunity, freedom, liberty, political participation, respect for the notion of separation of powers, independence of the judiciary and effective parliaments.
- Ensuring the respect for human rights and ensuring that there is protection for each individual citizen and for the vulnerable and disadvantaged groups.

²⁰⁶ Ibid paras 79 and 80.

²⁰⁷ Ibid para 83.

²⁰⁸ Ibid para 84.

²⁰⁹ Ibid para 85.

²¹⁰ Ibid.

²¹¹ AHG/235 (XXXVIII). See para 28.

²¹² Ibid para 5.

²¹³ Ibid.

²¹⁴ Ibid para 7.

The Declaration also requires the achievement of good economic and corporate governance which it proposes may be achieved through the observance of ‘prioritized and approved codes and standards’ including corporate governance codes.²¹⁵

The APRM was formally established by NEPAD in terms of the APRM Base Document. This document defines the APRM as ‘an instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism.’²¹⁶ Its mandate is ‘to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.’²¹⁷ This gives a clear indication that participation in the mechanism is voluntary and that the mechanism is limited to monitoring as a form of protection against violation of human rights. However, it is envisaged that ‘[participating] countries will encourage and support each other and exercise constructive peer dialogue and persuasion where necessary to ensure that all countries achieve full compliance by a mutually agreed date.’²¹⁸ It is also contemplated that the monitoring and assessments will lead the participating countries to develop or to strengthen their programmes of action to improve their governance.²¹⁹

The APRM is implemented by a panel of between five and seven people who are appointed by Heads of States and Government of participating states. The panel is responsible for the periodical review of policies and practices of participating states.²²⁰ It is contemplated that the review for each participating state will take place every two to four years; when a member country so requires one; or if the participating Heads of State and Government are of the view that there is an impending political or economic crisis in a particular state.²²¹ Each review must be undertaken within six months and the panel is required to produce a report and submit it to the participating Heads of State and Government of participating states for approval.²²²

NEPAD has adopted a document containing the objectives, standards, criteria and indicators for the APRM (the OSCI Guidelines Document).²²³ This covers the four substantive areas identified in the NEPAD Framework Document and the Declaration adopted refers to such issues as democracy and political governance, economic

²¹⁵ Ibid para 16-7.

²¹⁶ APRM Base Document para 1. The APRM Base Document can be found at <http://www.dfa.gov.za/au.nepad/nepad49.pdf>.

²¹⁷ Ibid para 2.

²¹⁸ Para 1.4 of the Objectives, Standards, Criteria and Indicators for the APRM NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI.

²¹⁹ Ibid Para 6.1.

²²⁰ APRM Base Document supra note 216 para 1-12.

²²¹ Ibid para 14.

²²² Ibid para 23.

²²³ Supra note 218.

governance and management, *corporate governance*, and socio-economic development.²²⁴ Of interest to this report is the role of states in regard to corporate governance. The OSCI Guidelines Document describes corporate governance as being ‘concerned with the ethical principles, values and practices that facilitate holding the balance between social goals and between individuals and communal goals’.²²⁵ The corporate governance measures contemplated by NEPAD include states taking action to:²²⁶

- Provide an enabling environment and effective regulatory framework for economic activity;
- Ensure that corporations act as good corporate citizens with regard to *human rights*, social responsibility and environmental sustainability;
- Promote the adoption of codes of good business ethics, such as Cadbury and King Codes;
- Ensure that corporations treat all their stakeholders (shareholders, employees, communities, suppliers and customers) in a fair and just manner.
- Provide for accountability of corporations and directors. The objectives of this include ensuring that corporations act as good corporate citizens.

Various standards that may be observed by states in achieving the above objectives include the African Charter on Human and Peoples’ Rights, OECD and Commonwealth principles of corporate governance, the labour codes of the ILO, and other codes and standards created for specific industries.²²⁷ The APRM Panel would assess the measures (and the extent thereof) taken by governments and corporations in compliance with the said standards. This includes assessing whether the state under review has produced a legal and regulatory framework to govern corporate activities effectively and whether states have adopted national codes of corporate governance.²²⁸

It appears that these guidelines call for the effective regulation of the private sector in order to meet the NEPAD goals, which include the respect and protection of human rights contained in the Charter and other relevant instruments. It also promotes the adoption and observance of codes of conduct, which may either be voluntary and mandatory. What is clear is that human rights *due diligence* by corporations is a principle envisaged by NEPAD and a goal sought to be achieved through the APRM.

The APRM is fully operational with twenty-seven African countries participating and with seven eminent persons presiding over its work. It is administered by a secretariat based in Midrand, South Africa. It has launched reviews in fourteen countries and has finalised the reviews in Ghana, Kenya, Rwanda, South Africa and Algeria and produced

²²⁴ Ibid para 1.8.

²²⁵ Ibid para 4.1.

²²⁶ Ibid para 4.1 A.

²²⁷ Ibid para 4.2.

²²⁸ Ibid paras 4.3 and 4.4.

reports with considerable detail and critique. Whilst we have not studied these reports for this study, a perusal of South Africa's 404-page report reveals a concern noted by the panel of eminent persons that some South African companies operating elsewhere in Africa were not adhering to the King II code.²²⁹ The King II code establishes certain standards of corporate governance which takes into account the notion that a company should be measured against a triple bottom line: economic, social and environmental achievements. The code provides that companies should report on matters such as social transformation, ethics, environment and socially responsible investment.²³⁰ It thus can have a strong impact on corporate social responsibility. The panel recommended that the South African government 'take steps to oversee and enforce adherence to the King II Report . . . by South African companies operating elsewhere on the continent in all aspects of their operations'.²³¹ This demonstrates a potential willingness in the continent to apply human rights standards extra-territorially. It is also worth mentioning that the emphasis on codes of good corporate governance in the APRM resonates with mechanisms proposed by the SRSG for corporations to meet their corporate responsibility to respect human rights.²³²

CONCLUSION

In Part I of this report we outlined the African human rights system and nature of rights in the Charter. In Part II we sought to consider the actual provisions of the African Charter and their possible interpretation in relation to the state duty to protect against violations committed by private parties, particularly corporations. In so doing, we considered several decisions of the Commission in relation to complaints lodged with it in terms of chapter III of the Charter. In Part III and IV of the report we considered the potential of the Charter with regard to direct human rights obligations for corporations and extraterritorial application of the rights and duties contained in the Charter. In Part V we looked at the work of the Commission apart from its decisions on complaints made to it and the policy developments of the NEPAD mechanism.

In the analysis, we found that most of the rights enshrined in the Charter could be violated by corporations. Our interpretation of the Charter revealed the potential for the African system to deal with corporate violation of human rights in various ways. Article 1 of the Charter and several other specific provisions impose duties on the state parties to respect, protect and promote the rights in the Charter. The state duty to protect against corporate related violation of rights has now been more fully developed by the Commission. Despite the strong statements by the Commission in this regard, the problem remains that the Commission has only considered one case dealing with abuse by a corporation.

²²⁹ SA Country Review Report APRM para 431.

²³⁰ *Ibid* para 419.

²³¹ *Ibid* para 457.

²³² SRSG's 2008 Report *supra* note **Error! Bookmark not defined.** paras 96-101.

We considered the possibility that the Charter applies in a direct horizontal manner to corporations. We argued that the ‘public/private’ dichotomy, traditionally considered vital in international human rights law, is ‘less apparent’ in the African Charter and that the express inclusion of duties of individuals in the Charter supports the horizontal application of the Charter through regional mechanisms. However, this line of reasoning is yet to be considered meaningfully by the Commission.

We also considered the extra-territorial application of the Charter by state parties. There is nothing in the Charter that prevents such a reading; instead we have argued that the Charter’s spirit of unity, collectivism and intensified co-operation in the continent and the Charter’s individual duty concept may encourage such an interpretation. Should individual duties be enforceable under the Charter, states could be required to enforce the duty of its corporate citizens doing business in other countries in Africa. It remains, however, to be seen how the Commission will address the question of individual duties. Extraterritorial enforcement of corporate governance codes (which are based on human rights standards) in South Africa was recommended by the process of the African Peer Review Mechanism.

The consideration of the other work of the Commission revealed that very little has been done with regards to violation of rights by corporations.

The overall picture is thus that of very limited normative and practical work having been done in the field of corporate obligations for the realization of fundamental rights under the African Charter. It is hoped, however, that this will shift in the near future. The Commission has initiated a project on the violation of rights in Africa by non-state actors led by one of its commissioners which is yet to crystallize into any formal document. However it is a very important project which could lead to national and continental dialogues on the subject and adoption of appropriate measures to develop ways of dealing with violation of rights by corporations and other non-state actors. It would thus be advantageous if the draft report before the Commission is finalized and published soon and that a working group on the subject is established without delay.

The shortcomings of the Commission have perhaps affected its work in this area. It has strong capacity constraints to conduct a speedy process and thus there can be long delays in decisions being made on communications. For instance, the Commission’s decision in the SERAC matter took over 5 years. This deficiency could be a deterrent for non-governmental organisations that may be weary to bring communications before the Commission because of the delays. It is well known that the Commission is underfunded and this is clearly contributing to the said delays and also not being able to pursue its other work effectively. Another shortcoming of the Commission regards the enforcement of its decisions. Although the Commission makes wide-ranging decisions, they are merely recommendations and thus are not always respected by state parties. It is hoped that the newly established African Court on Human and Peoples’ Rights will lead to the

greater progression of the law on the subject at hand. Knowing that the Court may make enforceable orders, states may take steps to improve the protection of human rights.²³³

Many of the Commission's statements suggest the possibility of strengthening human rights protection under the African regional systems against corporations. This is a particularly crucial area which requires more engagement and development. We hope that this report will provide an understanding of the current status quo and provide a catalyst for a number of discussions and workshops as to the way forward in this regard.

²³³ See art 27 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, adopted in June 1998 and came into force on 25 January 2004.