SECURING CORPORATE ACCOUNTABILITY FOR VIOLATION OF HUMAN RIGHTS: TOWARDS A LEGAL AND POLICY FRAMEWORK FOR KENYA

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BY

LYNETTE OSIEMO

0410640W

SUPERVISOR

PROF. GARTH ABRAHAM

DECLARATION

I, LYNETTE OSIEMO, declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

SIGNATURE: 

STUDENT NUMBER: **0410640w**

DATE: **January 31 2016**

DEDICATION

To Dad, who used to say even when I did not understand too much – *"All I wish is that you get your Honours…"* With God's grace, here's a little bit more than that;

To Mum, who convinced me I could be a lawyer when I thought the gift of the gab, which I seriously lack, was all it took to be one;

To Dennis, Felix and Regina - what would the world be without you!

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And to He who planted the seed without which I would never have dreamed of undertaking this daunting task, to Almighty God, *Deo Omnis Gloria.*

LIST OF ABBREVIATIONS

AG	Attorney General
BLIHR	Business Leaders Initiative on Human Rights
BRRU	Business Regulatory Reform Unit
CAMAC	Capital Markets Advisory Committee
CAT	Convention Against Torture
CAWG	Corporate Accountability Working Group
CBOs	Community Based Organisations
CDF	Constituency Development Fund
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CERD	Convention for the Elimination of Racial Discrimination
CIC	Commission for the Implementation of the Constitution (of Kenya)
CIPEV	Commission of Inquiry into the Post-Election Violence
CLP	Corporate Law Project
CLTP	Corporate Law Tools Project
CLTP	Corporate Law Tools Project
CORE	Corporate Responsibility
COSO	Committee of the Sponsoring Organizations
CRC	Convention on the Rights of the Child
CSR	Corporate Social Responsibility
DIHR	The Danish Institute for Human Rights
DoS	Department of State [US]
DTI	Department of Trade and Industry
ECOSOC	Economic, Social
EPZ	Export Processing Zone
EPZ-A	Export Processing Zone Authority
ESCR	Economic Social and Cultural Rights
GJLOS	Governance, Justice, Law and Order Sector
GPs	Guiding Principles
GRI	Global Reporting Initiative
HRC	Human Rights Council
HRCA	Human Rights Compliance Assessment
ICAR	International Corporate Accountability Roundtable
ICC	International Coordinating Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organization
ILSASR	International Law Commission Draft Articles on State Responsibility
IPAR	Institute of Policy Analysis and Research
IPFSD	Investment Policy Framework for Sustainable Development

IPPR	Institute for Public Policy Research
IREC	Independent Review Committee
ISA	International Studies Association
ISO	International Organization for Standardization
JTI	Judiciary Training Institute
KIA	Kenya Investment Authority
KIPs	Key performance indicators
KLR	Kenya Law Reports
KNCHR	Kenya National Commission on Human Rights
KPSD	Kenya Private Sector Development
LAPSSET	Lamu Port and South Sudan Ethiopia Transport
LASDAP	Lessons from Local Authority Service Delivery Action Plan
LRC	Law Reports of the Commonwealth
NALEAP	National Legal Awareness Program
NEMA	National Environmental Management Authority
NGOs	Non-Governmental Organisations
NHRI	National Human Rights Institute
OECD	Organisation for Economic Cooperation and Development
OEIWG	Open-ended Intergovernmental Working Group
OFR	Operating Financial Review
OHCHR	Office of the UN High Commissioner for Human Rights
SAIFAC	South African Institute for Advanced Constitutional, Public, Human Rights and International Law
SERAC	Social and Economic Rights Action Center
SEZ	Special Economic Zone
SEZ-A	Special Economic Zone Authority
SRSG	Special Representative of the Secretary-General
TNC	Trans National Corporation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNGPs	United Nations Guiding Principles Guiding Principles (on Business and Human Rights)
USA	United States of America
USCIB	United States Council for International Business
WAGs	Water Action Groups

TABLE OF CONTENTS

ABSTRACT

Over the last few decades, the debate on the topic of business and human rights has dominated the international scene. Initially, the debate focused on the question whether corporations have obligations beyond making profits. This is no longer contested, and the issue now at hand is the need to define what these obligations are and to determine how they can be enforced. In the history of the development of human rights, the duty to uphold human rights and secure their protection was considered a preserve of the state. However, with changing economic dynamics and increased globalization, it is undeniable that states are no longer the only or major threat to human rights; the modern corporation, much bigger in structure and complex in operations than before, has taken its place beside the state, having as much potential as the state to negatively impact human rights.

Kenya adopted a new Constitution in 2010, at the same time that John Ruggie, the Special Representative of the UN Secretary General on Business and Human Rights was finalizing his mandate and putting together his findings based on research he had conducted over a number of years. The business and human rights deliberations Ruggie steered at the international level were expected to culminate in the negotiation of an internationally binding instrument. This did not happen. This study shows that the failure to propose the negotiation of a treaty was not fatal to the Business and Human Rights agenda, but rather that the alternative approach taken presents a more ideal opportunity to prepare the ground for the future negotiation of a treaty. Ruggie developed the UN Guiding Principles on Business and Human Rights and proposed them as a common global platform for action, an authoritative focal point to direct efforts geared at understanding the corporate obligation for human rights.

Although both the Constitution of Kenya and Ruggie's findings underscore the role of the corporation in upholding human rights, the corporate obligation with regards to human rights is not clear. The main objective of the research was therefore to give human rights obligations of corporations in Kenya greater specificity so that both corporations and the State may more effectively implement them. The study undertook to investigate what the corporate obligation for human rights entails, building on the foundation established by the 2010 Constitution, which provides for horizontal application of the Bill of Rights to juristic persons, and the guidance offered for states and corporations and other business entities through the UN Protect, Respect and Remedy Framework and the UN Guiding Principles.

The study established what the obligations under the three pillars recommended in the UN Framework would mean for Kenya. The mistaken belief commonly held by corporations that corporate social responsibility is the same as human rights obligation was explored. The findings also show that the State Duty to Protect will mainly be exercised through the enactment of laws that offer guidance to corporations on what constitutes their duty and how it can be executed in practice. The study therefore recommends that amendments and additions be made to particular laws, the main one being the Companies Act of Kenya, to guide corporations in executing their human rights obligation. Furthermore, a recommendation is made that the Commission charged with implementing the Constitution include a specific section on Business and Human Rights in the National Policy and Action Plan drawn up to implement the 2010 Constitution. This will ensure that due attention is given to the subject, and a clear and comprehensive approach adopted to make corporate accountability for human rights violations a practical and realistic goal. The proposals made for the Action Plan include factors that will improve access to remedy for victims of human rights violations.

CHAPTER ONE

1 INTRODUCTION: AN EMERGING INTERNATIONAL PERSPECTIVE ON THE HUMAN RIGHTS OBLIGATIONS OF CORPORATIONS

1.1. Background to the study

Traditionally, corporate law and human rights have been considered very distinct and separate legal and policy spheres.[1] Much of what business entities do is dictated by their definition and status as profit making entities accountable to shareholders only. Business entities have consequently mainly been governed by corporate laws which hold them accountable to shareholders. When corporations moved beyond a pure shareholder-centric perception, they embraced corporate social responsibility, which in most cases is seen as a philanthropic duty to the communities and needy people in society. For its part, the concept of human rights is not clear or unambiguous; it has its own inherent assumptions and contextual considerations that colour its universal application. Human rights have for a long time been considered the concern of the state and treated as such. Introducing human rights to business thus presents a novel alliance, difficult to define.

In Kenya's most recent comprehensive development strategy, Vision 2030, the Government commits itself to respect the supremacy of the Constitution and the Bill of Rights and at the same time underscores its will to respect the property rights of investors, both local and foreign.[2] The government further pledges its commitment to 'the rule of law applicable in a modern market based economy in a human rights-respecting state'.[3] As a specific objective, the government aims to 'align the national policy and legal framework with the needs of a market-based economy and national human rights and gender equity commitments'.[4] In its objectives in the strategy, the Government however fails to say how it will execute this intention to incorporate a human rights theory for development into its agenda for business.

[1] Human Rights Council 'Business and human rights: Towards operationalising the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13 [Ruggie Report 2009].
[2] Government of the Republic of Kenya 'Kenya Vision 2030' [Popular Version] (2007) at 22.To meet this objective, the Government will have to ensure that there is a proper and adequate balance between protection of the individuals and their fundamental rights and protection of property.
[3] Ibid at 23.
[4] Ibid.

Kenya aims to be a newly industrialized middle-income country by 2030.[5] It is the biggest and most diversified economy in East Africa.[6] It has a market-friendly business environment and flourishing small and medium enterprises attributed to a constant effort by the government to improve the ease of doing business.[7] The Nairobi Securities Exchange is the largest in East and Central Africa, accounting for more than 60 per cent of the companies in East Africa.[8] With a sound economy and high aspirations, Kenya is seeing the beginning of what promises to be enormous investments in the country with potential for continued economic growth.

An unrestricted market economy, free from government restrictions and regulations, will undoubtedly facilitate the business environment and help to attract the needed investors. However, the unrestricted market economy is not the ideal one, as it cannot guarantee the protection of the poorest. For markets to operate optimally and result in both the economic prosperity and human development sought there is need for 'adequate institutional underpinnings'[9] where human rights are integrated in the values of the business and executed in its operations and enforced by the state. The role of the state in coordinating the economy through planning and policies is thus vital.[10] The state ought to ensure that a human rights approach to economic development is adopted and that any action taken in attracting investors and facilitating investments bears in mind the human rights consequences of the choices made.

Although not openly documented, a number of significant economic transactions have been reported in the Kenyan media between the Kenyan government and foreign corporations

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[5] Ibid at 1

[6] World Bank Group 'Country Partnership Strategy for Kenya' (2014-2018) available at *https://www.worldbank.org/en/country/kenya/publication/kenya-country-partnership-strategy-2014-2018,* accessed on 7 June 2015. The Country Partnership Strategy notes at para 30 that… "Kenya holds a distinctive position … in EastAfrica. The country is a leader and connector within the East African Community (EAC), not least through its facilitation of regional trade,investment, and flow of skills across borders."

[7] Walter O Odero et al, 'African Economic Outlook – Kenya' (2015) AfDB, OECD, UNDP, 9.

[8] See Land Matrix data on international land deals (as of April 2012) available at *https://docs.google.com/spreadsheet/ccc?key=0ApF51UgS889tdE1EblRCdUh2bUE0ZjRHM09XSlZtYmc#gid=0,* accessed on 1 February 2014. A government offering land for investment, currently approximated at more than 600,000 hectares, displacing local communities without proper consultation or consideration of their needs.

[9] Ruggie Report 2009 op cit note 1, 7. The UN Secretary General alluded to this when he observed that "Much has been done to devise, and enforce, rules that facilitate the expansion of global markets. But attempts to address equally urgent social objectives - such as eradicating poverty, protecting the environment and promoting human rights and labour standards - have lagged behind." Press Release SG/SM/7357 (12 April 2000) 'Secretary-General, in Havana on eve of first 'Group of 77' summit meeting, evokes promises and pitfalls of globalisation'.

[10] See P A Nyong'o 'Review and Critique of Current Development Strategies in Africa' in K Kibwana (ed) *Constitutional Law and Politics in Africa* (1998). Nyong'o notes the important distinction that led to the success of the East Asian economies even when they faced similar situations of poverty as the Sub-Saharan developing states. These markets while being oriented by the market forces were regulated by government.

and governments. The Government has reportedly signed a contract with a Chinese company for the construction of a Port on the Kenyan Coast and infrastructure connecting the neighbouring countries.[11] A project is underway to improve the railway and road connection within the country, and the infrastructure linking neighbouring countries (the South Sudan/Ethiopia road and rail network) with the aim of improving regional trade and opening up the neighbouring land locked economies.[12] The recent discovery of oil and gas in the country has also opened doors to numerous potential mining investors. While this sector presents potential for massive socio economic transformation in the country,[13] it also raises the possibility of human rights abuses. In a survey of human rights violations by corporations, the oil, gas and mining sector was underscored as dominating the reported abuses of human rights, accounting for two thirds of the total abuses.[14]

The current spate of influx of investors and potential investment opportunities presents a cause for worry. All these proposed and numerous other contemplated transactions will result in the disruption of livelihoods and the displacement of many from their homes, creating a possible negative human rights impact on them. The government appears more interested in the economic prospects these transactions offer, and not the potential harm they can cause to individuals and communities. Some of the reported business transactions that might have harmful human rights impact are outlined below.

A company entered a deal with the government for the mining of titanium in the Tana River Delta, but without consultations with the local communities, as prescribed by the Mining Act and the Environmental Management and Coordination Act.[15] A public-private joint venture was entered into for the conversion of land into plantations for agro fuel production; notices were given to the locals about the decision to lease out the land, as opposed to calling for consultations

[11] 'Kenya and China sign Sh 42bn Lamu port deal' Daily Nation August 4 2014 available at *http://mobile.nation.co.ke/counties/Kenya-and-China-Lamu-Port-deal/-/1950480/2405458/-/format/xhtml/-/c91t1a/-/index.html*, accessed on 6 September 2014. See also Lamu Port and South Sudan Ethiopia Transport (LAPSSET) Corridor Project, a flagship project of the Kenya Vision 2030 national strategy available at *http://www.vision2030.go.ke/index.php/pillars/project/macro_enablers/181*, accessed on 28 August 2014.

[12] Africa Economic Outlook op cit note 7 at 6 and World Bank Country Partnership Strategy for Kenya op cit note 6.

[13] Katiba Institute, Round table discussion on human rights and the extractive sector (oil, gas, and minerals) 21 May 2014.

[14] Human Rights Council 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) E/CN.4/2006/97 [Ruggie Report 2006], para 25.

[15] Abdirizak Arale Nunow 'The Dynamics of Land Deals in the Tana Delta, Kenya' (2011) 16. See also general investment concerns available at *http://ejatlas.org/country/kenya*, accessed on 6 September 2014.

about the intended transaction.[16] This venture will result in the displacement of thousands of people from their ancestral land which has already been given over to the development agency running the project.[17] Another multinational seeks to acquire a huge tract of land through a 45-year lease to grow crops for agro-fuel production.[18] Foreign governments have also shown a keen interest to acquire land in Kenya. One contemplated transaction involves the Emirate of Qatar, which is said to have offered a loan for the building of a second port on the Kenyan Coast in exchange for 40,000 hectares of land for growth of food crops for export to Qatar. The government plans to relocate the locals on grounds that they are few and did not use the land effectively.[19]

As these examples show, the desire of the government to increase private sector investment is usually not balanced by reciprocal demands on investors, oftentimes resulting in a one-sided endeavor to secure investments at whatever cost.[20] The quest for investments and the economic benefits they promise must be balanced against the wellbeing of the individuals. The state ought to be concerned about the needs and welfare of individuals, shown by an equally aggressive effort to demand that businesses undertake to uphold human rights as they make the effort to increase trade and investments and as they undertake to secure the property rights, security and a conducive business environment for investors.

Globalisation was envisioned as a phenomenon that would open the world to opportunities and the benefits of limitless trade across borders to parties on all sides. On the one hand, globalization provides the platform for aligning local conditions with international standards and expectations. This would bring sanity to what would otherwise be the typical tyranny of the powerful in a domestic context where rules either do not exist or are not respected.

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[16] Ibid at 16-7. See also Environmental Justice Atlas 'Environmental Conflicts in Kenya' available at *http://ejatlas.org/conflict/exploration-of-oil-in-block-10bb-and-block-13t-turkana-kenya*, accessed on 6 September 2014.

[17] Ibid at 16. Deal between the Tana and Athi River Development Authority and the Mumias Sugar Company. See also Environmental Conflicts in Kenya ibid. A similar bid for acquisition of land for sugar cane growing by another multinational has been more successful because of engaging the communities in the area and offering them benefits of part of the acquired land as out growers (Ibid at 17).

[18] Bedford Biofuels, see Ibid. See also Environmental Conflicts in Kenya ibid. GA Industries; see Abdirizak op cit note 15. See also Environmental Conflicts in Kenya ibid. A UK-based company seeks to acquire land for growing of oil seed, but the deal is more acceptable because the company has conducted an Environmental and Social Impact Assessment, and has solicited and received feedback from the local communities.

[19] Ibid at 18.

[20] Mayer Brown *Mining in Kenya – the start of a new era*? (April 2013) 3. "Kenya, as with its East African neighbours, is showing signs of a mining industry with enormous potential. The challenge for the Government is to ensure that the legal and regulatory regime strikes the correct balance between optimising its national interest whilst encouraging large-scale foreign investments."

However, if markets are left to rule, they will determine labour conditions; corporations will favour locations with cheaper sources of labour, making labour a source of competition among states,[21] resulting in disregard for the condition of workers and the pursuit of investments as an end in itself. If the desire for economic progress and growth is pursued as a purely profit making concern, it almost always results in disregard for the person, his dignity and human rights.

With the recognition of the growth in size and power of the modern corporation, efforts have been made at the international level over the last few decades to develop codes of conduct that could be applied to curb excessive corporate power and ensure its activities did not have a negative impact on society. The study revisits the attempts at the international level to regulate the conduct of corporations.

1.2. History of attempts at regulation of corporate human rights conduct

1.2.1. Pre-Ruggie developments

The general impression and view for a long part of human rights history had been that non state actors do not have human rights obligations.[22] Concern for the respect and promotion of human rights was seen largely as a task of states which were assumed to have monopoly over human rights violations.[23] At the very beginning of the history of corporations, they were formed for a limited purpose, for a limited time and therefore with no foreseen capability to inflict harm on individuals in the scale that the state could.[24] In the 1960s-1970s, political involvement by transnational corporations in state affairs roused debate about the need to devise ways of curbing

[21] Daniel Adler & Michael Woolcock 'Justice without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia' 2009 2(2) *Justice & Development Working Paper Series*

[22] See Lindsay Moir *The Law of Internal Armed Conflict* (2002) 194 (The author says that "Human rights obligations are binding on governments only.."); see also Liesbeth Zegveld *Accountability of Armed Opposition Groups in International Law* (2002) 53 (The author argues that "The main feature of human rights is that these are rights that people hold against the state only")

[23] Gilles Giacca *Economic, Social, and Cultural Rights in Armed Conflict* (2014) 243. See also Hitoshi Nasu & Ben Saul *Human Rights in the Asia-Pacific Region: Towards Institution Building* (2011) 235

[24] Charlie Cray and Lee Drutman 'Corporations and the Public Purpose: Restoring the Balance' (2005) 4(1) *Seattle Journal for Social Justice*, 305. See also Lee Drutman 'The History of the Corporation' available at *http://citizenworks.org/corp/dg/s2r1.pdf* where he says that "[c]orporations could only exist for a limited time, could not make any political contributions, and could not own stock in other companies. Their owners were responsible for criminal acts committed by the corporation and the doctrine of limited liability (shielding investors from responsibility for harm and loss caused by the corporation) did not yet exist" cited in 'The Rise of the Modern Corporation' available at *http://sanepolitics2012.blogspot.com/2011/10/rise-of-modern-corporation.html*, accessed on 22 July 2014.

the growing influence of these private actors on the international scene.[25] Attempts were made since then to create standards for human rights obligations for business both internally at the level of the corporations and also at the international level. These attempts led to inconsistent and incoherent efforts[26]as none of the codes imposed obligatory, universally acceptable and sanctionable requirements on corporations.[27]In these voluntary initiatives, businesses were expected to take on proposed guidelines or create guidelines specific for their entities and incorporate them in their activities. Internal codes of conduct could be company-specific, designed specifically for a company in its particular context; alternatively, they could be industry initiatives promulgated to offer guidance to corporations in particular sectors.[28]

In 1972, the United Nations Economic and Social Council (the Council), requested the UN Secretary General to appoint a group of Eminent Persons to study the effect of transnational corporations on the world economy.[29] The Council was inspired in their decision by the esteem in which multinational corporations were held because of their size and power, which sometimes surpassed entire host country economies.[30] The Council sought to put in place a set of 'institutions and devises to guide the multinational corporations' exercise of power and introduce some form of accountability to the international community into their activities.'[31] A Draft Code was completed in 1990 addressing a number of issues and making reference to the obligation of corporations to respect human rights and fundamental freedoms in the countries in which they

[25] John Kline 'TNC codes and national sovereignty: deciding when TNCs should engage in political activity' (2005) 14(3) *Transnational Corporations* 31.

[26] International Council on Human Rights Policy *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (February 2002) 4

[27] Some of these instruments are: The OECD Guidelines for Multinational Enterprises which primarily regulate commercial matters but also include provisions on workers' rights and environmental issues; ILO Tripartite Declaration on Multinational Enterprises and Social Policy - more detailed on workers' rights issues and contains provisions on the right to organise and form trade unions, on the principle of non-discrimination in the workplace; Making voluntary provisions of corporate responsibility (similar to "human rights clauses") binding by integrating them into civil contracts or international conventions; International Criminal Court (ICC): the Rome Statute recognises the human rights responsibility of non-state actors for grave human rights violations. However, no such direct responsibility is recognised for violations that cannot be defined as grave.

[28] Some of these private initiatives include the Sullivan Principles and the MacBride Principles.

[29] ECOSOC, Official records of the 53rd Session 3-28 July 1972 Resolutions, Supplement No. 1 E/5209, 3. The resolution in part read "The Economic and Social Council… requests the Secretary General, in consultation with governments, to appoint from the public and private sectors… a study group of eminent persons… to study the role of multinational corporations and their impact on the process of development especially in developing countries… to formulate conclusions which may possibly be used by governments in making sovereign decisions regarding national policy in this respect…"

[30] Ibid.

[31] United Nations Department of Economic Affairs 'Multinational Corporations in World Development' (1973) ST/ECA/190 at 2; Report prepared to facilitate the deliberations of the group of Eminent Persons appointed by the Secretary General to look into the issue of multinational corporations and their effect on the world economy.

operated.[32] However, the process leading up to the Code was viewed by some as an unnecessary attempt by the UN to meddle in the operations of business[33] and the deliberations were not taken further due to disagreements between developing and developed countries.[34] The UN General Assembly did not formally adopt the Draft Code.[35]

The Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises is an international instrument for the promotion of responsible business conduct. Developed in 1976, it offers voluntary recommendations to multinational enterprises in the major areas of business, including human rights, for multinational companies operating in OECD member states together with a few other non-member signatories. National Contact Points are charged with the task of promoting and implementing the guidelines. The OECD Guidelines is addressed to all the entities within the multinational enterprise (parent companies and/or local entities) which are expected to assist each other to observe the Guidelines. The Guidelines may be applicable to smaller entities, but the emphasis is on multinationals.[36]

In its first form, the OECD Guidelines did not have explicit reference to human rights but they have since been re-written to include clear reference to human rights.[37] Since their formulation, they have been revised five times, most recently updated in 2011 on the 50th anniversary of the OECD. One of the notable features of the updated Guidelines is that it has an entirely new chapter on human rights, stating that all enterprises should 'respect the internationally recognised human rights of those affected by their activities.'[38] The Guidelines require companies to conduct 'risk-based due diligence' to identify, prevent and mitigate actual and potential adverse impacts, and they give specific indications for human rights due

[32] UN 'Code of conduct on transnational corporations' (21 December 1990) A/RES/45/186 available at *http://www.un.org/documents/ga/res/45/a45r186.htm*, accessed on 16 February 2015.
[33] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva & David Bilchitz (eds) *Human Rights Obligation of Business: Beyond the Corporate Responsibility to Respect?* (2013) 138-147.
[34] Surya Deva 'Guiding Principles on Business and Human Rights: Implications for Companies' *European Company Law* 102 (April 2012) 9(2).
[35] John Christopher Anderson 'Respecting Human Rights: Multinational Corporations Strike Out' (2000) 2(3) *University of Pennsylvania Journal of Labour and Employment Law* 463 at 474-75.
[36] It is noted that a precise definition of multinational enterprises is not required for purposes of the Guidelines - See OECD Guidelines, Concepts and Principles No. 4.
[37] Another sign of support for the UN Framework and the Guiding Principles. The UN initiative on the rights of the Child were also re-written in this light.
[38] OECD Guidelines for Multinational Enterprises (2011), 17. This requirement was informed by the international debate on business and human rights at the time, which culminated in the Protect, Respect, Remedy Framework, also known as the UN Framework on Business and Human Rights.

diligence.[39] It is comprehensive and offers useful directives for companies on how to strengthen the international and legal policy framework in which business is conducted, including the implications of exercising a corporate responsibility to respect human rights.[40] Chapter Four of the Guidelines defines the duty of corporations; the commentary to the chapter, following the release of the UN Framework and Guiding Principles, elaborates the scope of the duty and proposes measures which companies can put in place to express their commitment to respect human rights and offer remedies when they have been violated. Despite the existence of the mechanism, there are still no procedures for legally enforcing findings that may arise out of it against corporations.[41]

The international law regime has recognised the human rights obligations of business in the area of workers' rights.[42] Consequently, labour rights are generally well addressed by domestic labour laws and sanctions imposed for infringement - thereby giving more direction to companies in their quest to understand and respect human rights relating to labour issues. The International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy was developed in 1977. The Tripartite Declaration provides guidelines on workers' rights to governments, multinational enterprises, employers and workers organisations in detail and makes voluntary provisions of corporate responsibility binding by integrating them into civil contracts and international conventions. The Declaration makes direct reference to human rights, requiring all the parties concerned to 'respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations.'[43]

Another initiative, the United Nations Global Compact, was developed in 2000[44] as a 'strategic policy initiative for businesses that want to align their operations to universally acceptable principles in areas of human rights, labour, environment and anti-corruption.'[45] The

[39] See Chapter IV.
[40] OECD Guidelines (2011 Edition) para 8 read together with Chapter 4 of the Guidelines.
[41] Andrew Clapham *Human Rights Obligations of Non State Actors* (2006) 202
[42] Ibid at 215.
[43] International Labour Organisation 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2006) para 8
[44] See Surya Deva's critique on this in Surya Deva, 'Treating Human Rights Lightly: A Critique of the Guiding Principles' Complicity in Undermining the Human Rights Obligations of Companies' in Deva & Bilchitz op cit note 33 at 78-104.
[45] UN Global Compact website available at *http://www.unglobalcompact.org/*, accessed on 14 May 2012. With over 8700 corporate participants and other stakeholders from over 130 countries, it is the largest voluntary corporate responsibility initiative in the world.

first two principles are derived from the Universal Declaration of Human Rights and are aimed at offering guidance to businesses on how to avoid complicity in human rights violations, helping them to ascertain where the boundaries of their human rights responsibility lie.[46] Unlike the Draft Code and OECD Guidelines which made reference to multinational enterprises more specifically and seemed to leave the other business entities outside their purview, the Global Compact addressed itself to businesses generally. However, being voluntary in nature, the Global Compact has been criticised in the same manner as the others, that it is soft law, not quite worth the name law.[47]

Following years of voluntary initiatives aimed at regulating the corporate social responsibility of companies through corporate or industry level codes of conduct and international attempts as highlighted above, the UN Norms on the Responsibilities of Transnational Business and Other Business Enterprises with Regard to Human Rights[48] (the Norms) were drafted in 1999. The Norms aimed to remedy the piecemeal approach hitherto adopted and to bring the Corporate Social Responsibility obligations in one place.[49] As opposed to the regulation of corporate conduct through the medium of the state, the Norms proposed to regulate the action of corporations directly, crystalising social responsibility obligations into hard law.[50] The Norms attempted to attribute the obligation of promoting the rights set forth in the UDHR directly to business entities as organs of society,[51] enjoining corporations to have regard for human rights in much the same way as states.[52] The Norms directed corporations and other

[46] Global Compact Principle One "Businesses should support and respect the protection of internationally proclaimed human right." Principle Two "Businesses should make sure they are not complicit in human rights abuses."

[47] Nolan op cit note 32 at 159. She says despite its support by the UN Secretary General, it is difficult to find a softer or less binding version of soft law than the Compact.

[48] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[49] D Kinley, J Nolan & N Zerial 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Companies and Securities Law Journal* 30, 33.

[50] Ibid at 41.

[51] Giovanni Mantilla 'Emerging human rights norms for non-state actors: the case for transnational corporations' (2009) 15 *Global Governance* 279-298, paper presented at the annual meeting of International Studies Association's (ISA) 50th Annual Convention 'Exploring the Past, Anticipating the Future'. Mantilla says the state has a duty to protect the human rights of everyone from abuse, including from abuse by third parties (such as corporations). The obligation was interpreted to include a duty to ensure that third parties within its territory respect the human rights of others.

[52] Article 1 of the Norms reads: "Within their respective spheres of activity and influence, transnational corporations and other business enterprises *have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law*…" (Emphasis added).

business enterprises to align their internal rules of operation to operationalise the Norms.[53] In its preamble, the Norms state that transnational corporations and other business enterprises are obligated to 'promote, secure fulfillment of, respect, ensure respect of and protect' human rights contained in the United Nations treaties and other human rights instruments. The Norms then proceed to list the human rights corporations should abide by.[54]

The defunct United Nations Human Rights Sub-Commission adopted the draft Norms in 2003, but the Human Rights Commission did not endorse them. One of the strongest arguments against it was that it attempted to make human rights obligations binding without differentiating between states' and corporations' obligations.[55] The Commission also argued that the Norms were a re-statement of existing law and had no legal standing[56] and were thus unacceptable as they were.[57]Some have interpreted the approach of the Norms as an attempt to privatize human rights, making companies the enforcing agents.[58] This interpretation raised the question how private and undemocratic institutions could be expected to bear the burden of delegated state obligations.[59]

Others however were of the view that the Norms should not have been rejected. In criticizing the premature dismissal of the Norms, David Bilchitz argues that the Norms ought not to have been deemed fatal; they were, in his view, a work in progress and yet were judged as the

[53] Article 15 of the Draft UN Human Rights Norms for Transnational Corporations and Other Business Enterprises.
[54] Section A of the Norms on General Obligations. Article 12 of the UN Norms required corporations and other business enterprises to respect human rights and contribute to their realisation.
[55] Pini Pavel Miretski and Sascha-Dominik Bachmann 'Global Business and Human Rights - The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" - A Requiem' (2012) 17(1) *Deakin Law Review* 5, 33
[56] D Weissbrodt & M Kruger 'Norms on the responsibilities of Transnational Corporations and other Businesses enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901, 913. See also Commission on Human Rights, 60th Session, Agenda Item 16, E/CN.4/2004/L.73/Rev.1 (16 Apr. 2004), para. (c) and Carlos Lopez 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' in Deva & Bilchitz op cit note 33 at 62-63 where he notes that Ruggie's critique of the Norms included the fact that they were a re-statement of international law which bound only states and not corporations.
[57] Carolin F Hillemanns 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 4(10) *German Law Journal* 1069.
[58] See *http://www.coc-runder-tisch.de/inhalte/texte_grundlagen/tk_news_TALKING_POINTS.htm*. Article 15 of the Draft Norms requires all companies and business enterprises to adopt and implement internal rules in compliance with the Norms, and to 'incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement.'
[59] Larry Cata Backer 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law Review* 287, 294

final output.[60] He argues that the Norms acknowledged that corporations have existing human rights responsibilities although the nature of these responsibilities in international law was in the process of being developed.[61] In his view, the Norms were in the process of negotiation and more concrete responsibilities for corporations would emerge in due course.[62] Other critics of the rejection of the Norms noted that the rejected version was in draft form, and had been intended to be in such form so that it could be debated and amended before any consideration was made for its adoption.[63]

Though criticised widely and eventually not adopted, the Norms were seen at the time by some as the most comprehensive endeavour to deal with human rights obligations of business.[64] By providing the possibility of codifying human rights obligations of business, the Norms presented a laudable departure from previous international instruments, which limited themselves to proposing regulation of labour and environmental rights.[65] Whereas business organisations expressed a general hesitation towards the Norms and the idea of acknowledging business responsibility for human rights, civil society seemed to be in favour of them.[66] The rejection of the Norms did not put an end to the desire to see corporations bound by human rights. A number of states and interested parties felt that the issue of business and human rights did require 'serious attention'[67] and the search for acceptable guidelines continued.

[60] David Bilchitz 'A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles' in Deva & Bilchitz, op cit note 33 at 107-137. See also Penelope Simons International law's invisible hand and the future of corporate accountability for violations of human rights (2012) 3(1) *Journal of Human Rights and the Environment* 5, 7.

[61] Bilchitz, ibid.

[62] Bilchitz, ibid at 114-15.

[63] Kinley et al, op cit note 49 at 31.

[64] See D Kinley ibid at 30; Bilchitz op cit note 58 at 40. See also Public Statement by Amnesty International '2005 UN Commission on Human Rights: Amnesty International welcomes new UN mechanism on Business and Human Rights' IOR 41/044/2005 (Public) News Service No: 104 (21 April 2005) available at *http://www.amnesty.org/en/library/asset/IOR41/044/2005/en/693c2f6e-d4f9-11dd-8a23-d58a49c0d652/ior410442005en.html*, accessed on 6 June 2012.

[65] Surya Deva 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?' (2004) *bePress Legal Series* Paper 112, 6.

[66] Karin Buhmann 'Navigating from 'train wreck' to being 'welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework*'* in Deva & Bilchitz op cit note 33 at 29.

[67] John G Ruggie 'Business and Human Rights: The Evolving International Agenda' Working Paper for the Corporate Social Responsibility Initiative June 2007, Working Paper No. 38.

1.2.2. Ruggie's mandate

In a bid to take the UN Norms a step further and hopefully secure their binding nature, the UN Secretary General appointed a Special Representative, John Ruggie, in 2005. The Special Representative was given a mandate to identify and provide clarity regarding the expectations of business and to identify a clear role of government in regulating transnational corporations and other business in the area of human rights.[68] At the commencement of his initial two-year mandate, Ruggie set out to 'identify and clarify standards' of corporate responsibility and accountability for business enterprises in human rights and elaborate on the role of states in effectively regulating and adjudicating corporate conduct in this regard.[69] The Special Representative was mandated to develop materials and methodologies for undertaking human rights impact assessments and to compile a compendium of best practices of states and transnational corporations and other business enterprises.[70]

At the beginning of his task, Ruggie reviewed the Norms, hoping to find a way of moving beyond the stalemate they had created and clarifying the roles and responsibilities of states, companies and other social actors in the business and human rights sphere.[71] However, he categorically rejected the Norms citing their exaggerated legal claims – that human rights law applied to corporations directly – and their conceptual ambiguities and doctrinal excesses.[72] He opted to leave them aside, considering them a distraction from, as opposed to a basis for, advancing his mandate.

In 2007, he submitted a report in which he highlighted the existing gap between economic forces and the capacity of governments to manage the effects of gobalization.[73] Whereas numerous soft law initiatives had arisen to deal with the question of human rights, he noted that the only area in which hard law existed governing business conduct in the area of

[68] Office of the United Nations High Commissioner for Human Rights, Resolution 2005/69 on Ruggie Mandate approved by the Economic and Social Council on 25 July 2005.
[69] Ibid, Resolution 2005/69 approving the appointment of a special representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years.
[70] Ibid.
[71] Ruggie Interim Report 2006 op cit note 14 para 55
[72] Ibid para 59
[73] Implementation of General Assembly Resolution 60/251 of 15 March 2006 'Human Rights Council "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises (9 February 2007) A/HRC/4/035

human rights was the 'gradual extension' of liability for international crimes to companies under domestic jurisdiction.[74] In his conclusion, Ruggie opined that no single 'silver bullet' could resolve the business and human rights challenge and a wide array of measures was needed.[75] He requested a one-year extension to submit his views and recommendations.

In April 2008, Ruggie submitted what he called the *Protect, Respect Remedy Framework*, which gave a detailed account of the role states had to play in effectively regulating and adjudicating human rights obligations of transnational corporations and other business enterprises.[76] The Framework refers to three Pillars: the State Duty to Protect, the Corporate Responsibility to Respect and Access to Remedy. The state duty to protect against third party abuse commits states to refrain from violating human rights, and at the same time requires them to ensure that the rights are not violated by anyone, including business enterprises. The corporate responsibility to respect is defined as a 'well institutionalised' social rather than legal norm, but one which in Ruggie's view has acquired near-universal recognition by all stakeholders, thus legitimising it. The access to remedy pillar is defined as part of the state's obligation, to be effected through judicial, legislative or administrative means.

In this report, the Special Representative noted that there was still need for further refinement of the legal understanding of the state duty to protect by authoritative bodies at national and international levels. He observed that even within existing legal principles, the policy dimensions of the duty to protect required increased attention and more imaginative approaches from states.[77] Ruggie's approach to the question of corporate standards for human rights commanded general support and the Protect, Respect, Remedy Framework was unanimously adopted by the Human Rights Council in June 2008.[78]

His mandate was further extended for another three years to 'operationalise' the Framework: to propose concrete and practical recommendations to strengthen the duty of states to protect, to elaborate on corporate responsibility to respect, and to explore options for

[74] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie "Business and human rights: mapping international standards of responsibility and accountability for corporate acts"' (19 February 2007) A/HRC/4/35 [Ruggie Report 2007] para 84.
[75] Human Rights Council 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (7 April 2008) A/HRC/8/5 [Ruggie Report 2008] 4 (7).
[76] Ibid.
[77] Ibid para 8(21).
[78] UN Human Rights Council Resolution 8/7, adopted without a vote.

enhancing access to effective remedies.[79] In June 2011, Ruggie submitted Guiding Principles which sought to provide a 'common platform of action'[80] for states and corporations in their effort to implement his earlier proposed Framework. The Guiding Principles would, in his view, help to frame business obligations in human rights terms and make human rights an issue of strategy that businesses could consider in evaluating the other more traditional risks they usually factor in their operations and thus devise ways of mitigating them.

While it may be argued that Ruggie did not deliver what was expected by many, it may also be said that he did what was realistic in the circumstances he was faced with.[81] Discussion on the need for corporate accountability at the international level could be rational, but will be subject to the rigours of treaty-making, necessarily lengthy deliberations, and the numerous compromises that are a natural consequence of the economic and cultural differences in states. Yet, process aside, agreement is possible on the practical outcome desired; in the present case the desired outcome is that human rights be respected and not violated in any case whatsoever.[82] Whereas there may not be consensus on the exact nature of business obligation for human rights, it is possible to come up with common practical notions about action, about the need for businesses to make their contribution to the safeguarding of, and respect for, inviolability of human rights. the UN Framework and Guiding Principles provides this common basis for action.

In presenting the Framework and the Guiding Principles and securing their unanimous adoption by the Council, Ruggie succeeded in building a consensus among corporations and governments around his approach. It is commendable that where all other previous efforts had failed to yield a final acceptable output, Ruggie succeeded.[83] It will be noted, however, that whereas the previous efforts tried to impose human rights obligations on the corporation at the

[79] HRC Resolution 8/7 'Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' para 4.
[80] UN Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 [UN Guiding Principles] 5(13).
[81] Buhmann op cit note 66.
[82] As J Maritain opines, 'rational justifications are powerless to create agreement among men because they (the justifications) are different and perhaps even opposed to each other.' See J. Maritain, *Man and the State* (1951) 77. Maritain, an academic and philosopher who played a role in shaping the development of an understanding on human dignity during the post war period proposed that to get an agreement on any universal declaration, the aim should be to agree on what was prohibited, or what was accepted, without getting into the reasons for agreeing as such because such a discussion would lead to disagreements, delays and ultimate failure. See also Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *The European Journal of International Law* 655, 678.
[83] The rejected 1990 UN Code on Transnational Corporations and the UN Norms in 2003.

international level, Ruggie opted not to follow this approach and offered guidelines instead,[84] to be used by states and corporations in attaining a better understanding of their role, to see where gaps exist and take the appropriate steps to fill them. Unlike the previous attempts – where the Draft Code of 1990 and the Draft Norms sought to prescribe regulatory conduct for business – Ruggie adopted a 'principled pragmatism' approach to achieve greater consensus.[85] It could be that this difference of approach led to the acceptance of his work.

The UN Framework together with the UN Guiding Principles reflect the most recent findings and conclusions of the human rights and business debate at the international level. Contrary to the approach taken by the Norms, the Framework that Ruggie came up with was consistent with the law as it is, rather than as it ought to be, or would be at some future date.[86] The Protect, Respect, Remedy Framework defined the three pillars of corporate accountability; the UN Guiding Principles offer guidance to states on how the Business and Human Rights Framework may be operationalised. Ruggie points out that because of the varied sizes and circumstances of corporations and business entities across the globe, the aim of the Guiding Principles was not to be applied as a toolkit.[87] Each state and each business entity is thus required to take on the Guiding Principles and apply them to their particular circumstances thus devising human rights respecting cultures founded on its particular context and existing circumstances.

1.3. The 2010 Constitution

Kenya adopted a new Constitution in 2010, markedly advanced and a great improvement on its Independence Constitution, joining modern constitutions such as those of South Africa, which defy the traditional model of constitutions that have only a vertical application. Both the Kenyan and South African constitutions provide for a horizontal application of the Bill of Rights to

[84] Ruggie notes that 'The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.' UN Guiding Principles op cit note 80 at 5(14).

[85] In his 2010 Report, Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' A/HRC/14/27 (9 April 2010) [Ruggie Report 2010] para 15, Ruggie notes that "Principled pragmatism has helped turn a previously divisive debate into constructive dialogues and practical action paths."

[86] John H Knox 'The Ruggie Rules: Applying Human Rights Law to Corporations' (August 16, 2011) *Wake Forest Univ. Legal Studies Paper*, also available in In Radu Mares (ed) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2011) 51-83.

[87] UN Guiding Principles op cit note 80 at 5(15).

juristic persons, recognising the reality that corporations can violate human rights.[88] The provisions of the 2010 Constitution were deliberated at the same time when international debate on business and human rights was unfolding. The successive drafts of the constitution produced during the Constitutional Review Process reflect the clamour at the international level for corporations to be held accountable for violation of human rights.[89] The Constitutional Review Process began in the early 2000s, and the new Constitution was adopted in 2010. The 2010 Constitution of Kenya, like that of South Africa, binds 'all persons', including juristic persons.[90] Because of this provision, the Constitution of Kenya will have an impact on business and human rights deliberations.

The traditional role of constitutions has been seen as regulating relations between individuals and the state. The constitution is deemed necessary for this on grounds of the unequal power relations between the state and the individual, which puts the individual at a disadvantage and thus in need of protection of a supreme law.[91] The constraining effects of constitutions was limited to 'governments and legislatures' because these institutions were seen to enjoy coercive power of governance.[92] Unlike private actors, they exercise a power of compulsion which they can misuse and therefore need to be subjected to the authority of constitutions to keep them in check.[93] However, this argument ignores the reality that corporations can exert immense power and consequently are capable of causing as much harm as governments and both should be subjected to equally effective taming powers.

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[88] See the decisions of Kenyan Courts on this point: 2013] eKLR para 47. The Court made a similar decision in the cases *Law Society of Kenya v Betty Sungura Nyabuto & Another* Petition No. 21 of 2010, *B A O & Another v The Standard Group Limited & 2 Others* Petition No. 48 of 2011 and *Amy Kagendo Mate v Prime Bank Limited Credit Reference Bureau & Another* [2013] eKLR para 23.

[89] Various drafts were produced during the Constitutional Review Process. The "Bomas" draft of Constitution (2005), the "Wako" draft Constitution which reflected amendments on the Bomas, and the "Committee of Experts" (CoE) draft of the constitution (2010) which was compiled by a Committee of Experts appointed and harmonised the drafts, producing a CoE draft which was adopted as the 2010 Constitution. In all these drafts, the Bill of Rights applies to all laws and binds all State organs and all persons, where person is defined to include a "company, association or other body of persons whether incorporated or unincorporated".

[90] It also entrenches socio-economic rights, and in so doing has proved wrong those who doubted that a time like this would come. See Mark Tushnet (ed) *Constitutional law* (1992) 13.

[91] Aharon Barak 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez, (eds) *Human Rights in Private Law* (2003) at 1-9.

[92] Gerry Stoker 'Governance as theory: five propositions' 1998 50 (155) *International Social Science Journal* 17; Joachim Ahrens *Governance and Economic Development: A Comparative Institutional Approach* (2002), 81; Michael Moran *Politics and Governance in the UK* (2011), 63. See also Edward W Younkins 'Corporate Governance Does Not Mean Corporate Government' (13 May 2000) 62 *Capitalism & Commerce* available at http://www.quebecoislibre.org/000513-11.htm, accessed on 11 June 2015.

[93] Gavin Anderson 'The Limits of Constitutional Law: The Canadian Charter of Rights and Freedoms and the Public-Private Divide' in Conor Gearty and Adam Tomkins (eds) *Understanding Human Rights* (1996) 536.

The Constitution of Kenya is the supreme law of the land. International Law forms part of the law of the country, but any law, including international law, that is inconsistent with the Constitution will be invalid to the extent of the inconsistency.[94] International Law will undoubtedly now have a bigger role to play in the decision of matters touching on human rights. However, it is not clear what place exactly, or what priority will be given to international law, owing to the different decisions arrived at by the Kenyan courts on the matter.[95] The text of the Constitution is ambiguous regarding the place of International Law in relation to the other legal norms, thus leaving it to the courts to determine what value they will give it in deciding cases before them.[96] The interpretation given so far has tended to underplay the role of international law, and if this view persists the place of International Law will effectively be relegated to a lower, rather than higher, position in the hierarchy of laws, as would have been imagined to be the intention of the drafters of the 'new' (2010) Constitution.[97] A few cases decided on the question of applicability of International Law domestically will be reviewed to illustrate the hurdles to be overcome in applying International Law and the different possible conclusions that may be arrived at.

Kenya prides itself in having one of the most advanced constitutions, having been drawn up recently and therefore with the advantage of drawing from the lessons of other jurisdictions.[98] As such, it should be able to define itself as a state which values the undeniable rights of the human person and one that "sees in the people in authority the 'vicars of the multitude'"[99] who seek not only to want, but do whatever is necessary to bring about the common good. A desire for the well-being of the people will translate into concrete actions that make it possible for this good to be achieved. Kenya is a signatory of the major human rights documents: the ICESCR, and the ICCPR among others. To meet its obligations under both covenants,[100] the government is required to submit periodic reports detailing the efforts it is making towards providing for the

[94] Article 2(4) of the Constitution.
[95] Section 3.2.2 below.
[96] See discussions in Chapter 3 at 3.2.
[97] See Maurice Oduor 'The Status of International Law in Kenya' (2014) 2(2) *Africa Nazarene University Law Journal* 114.
[98] Kenya's constitution draws heavily from the South African Constitution, considered to be progressive especially for its Bill of Rights.
[99] Thomas Aquinas cited in Jacques Maritain *The Twilight of Civilization* (1946) at 42.
[100] Article 40 ICCPR and Article 16 ICESCR.

human rights of individuals. In its 3rd periodic report under the ICESCR,[101] the Kenya National Commission on Human Rights notes that whereas there was an incorporation of all the human rights obligations provided for in the ICCPR in the new Constitution of 2010, conflicting laws, challenges in implementation and a general lack of understanding of the implications of the provisions of the Covenant were likely to hinder application of the Covenant in the national context.[102]

The courts will play an important role in interpreting the Constitution and bringing about its understanding in the development of the business and human rights jurisprudence. The effectiveness of the Constitution in ensuring that corporations respect the Bill of Rights will ultimately depend on the meaning given by the courts in interpreting the horizontality provisions. In the cases that come before them, judges will be called upon to interpret the novel horizontality provisions of the Constitution, to give meaning to them; to supply from their own thinking what the framers of the constitution meant, what they may or may not have said.[103] This study will attempt to situate the Constitution of Kenya within the possible frameworks of horizontal models, and propose interpretations that may be adopted in applying the Constitution to non-state actors such as business entities.

1.4. Research Problem and Objectives

The opening up of national economies through globalisation led to public debate on the role of corporations in promoting human rights.[104] Initially, the business and human rights debate focused on the question whether corporations have obligations for human rights. This is no longer contested, and the issue at hand now is the need to define what these obligations are and to determine how they can be enforced. The negative impact of human rights conduct on corporations cannot be denied; the difficulty lies in translating this realisation into workable legal standards.[105] Proceeding from this view, the research problem this study seeks to address is the need to give human rights obligations of corporations greater specificity so that they may be

[101] KNCHR, Report to the Human Rights Committee to inform its Review of Kenya's Third Periodic Report on implementation of the Provisions of the International Covenant on Civil and Political Rights (April 2012).
[102] Ibid at 2.
[103] K C Wheare Modern Constitutions (1960/1966) 105.
[104] Florian Wettstein & Sandra Waddock 'Voluntary or Mandatory: That is (Not) the Question - Linking Corporate Citizenship to Human Rights Obligations for Business' (2005) 6(3) *Zeitschriftfür Wirtschafts- und Unternehmensethik* 304, 305.
[105] Knox op cit note 81.

more effectively implemented by both corporations and the state.[106] The research gap addressed in this research is the lack of clarity on the subject of corporate obligation for human rights, and the lack of concrete means to make corporations accountable for human rights violations in the context of Kenya.

With Ruggie's *Protect, Respect Remedy Framework* and the *UN Guiding Principles on Business and Human Rights* as a foundation, the corporate obligation for human rights could develop in many ways.[107]In implementing the Guiding Principles, each state is expected to consider its particular circumstances and to determine how best to give meaning to the corporate obligation for human rights:[108] this is what this study attempts to do. The 2010 Kenyan Constitution which provides for horizontal application of the Bill of Rights to juristic persons makes the role of the government in ensuring corporate compliance with human rights even more concrete. The study therefore seeks to propose amendments to the corporate law to subject corporations to human rights obligations; a further proposal is made that the proposed changes be facilitated as part of the requirements needed to implement the 2010 Constitution and particularly its horizontality provision.

The present study applies the general findings and guidelines offered in the Framework on Business and Human Rights to the context of Kenya, agreeing with Ruggie's proposal for a state-centered solution as opposed to drafting or proposing an international treaty as some had expected. The option for a domestic framework for corporate accountability for human rights violation is preferred because it offers a more immediate practical application than a theory of international accountability. Any international mechanism designed for the resolution of human rights violations is normally applied as an option of last recourse. It is therefore to be presumed that a domestic framework exists as an option of first recourse. The research focuses on making the case for corporate accountability and enforcement of human rights at the national level, thus availing a domestic avenue to be resorted to first, before resorting to the international mechanisms. Although proceeding on this basis, the study notes the need for internationally

[106] See John Knox 'The Horizontal Human Rights Law' (2008) 102(1) *The American Journal of International Law* 45. See also Durwood Zaelke et al eds, *Making Law Work: Environmental Compliance and Sustainable Development* (2005) 225 "If citizens and companies are to have an understanding of their rights and obligations in the legal order, more precise guidelines will need to be developed regarding the substance of the right."
[107] Knox op cit note 81.
[108] Ibid.

binding obligations to cater for cases where the domestic mechanisms do not exist, or are too weak to offer efficient remedies to victims of corporate human rights abuses.

In the absence of internationally binding human rights obligations, this research sets out to establish how corporate accountability for human rights in Kenya can be promoted. Implementation of the UN Guiding Principles will align the corporate obligation to existing law as opposed to changing human rights law as it is; corporations will still not be bound directly by human rights obligations.[109] To achieve its goal, the study seeks: a) to demonstrate that Ruggie's failure to adopt or propose internationally binding corporate human rights obligations is not fatal in the effort to advance the human rights and business deliberations; b) to determine whether corporate social responsibility is sufficient to underpin the corporate obligation for human rights; c) to evaluate whether the Constitutional provision binding juristic and incorporated persons in Kenya to respect the Bill of Rights envisions a new form of corporation and what ought to be done to give meaning to this provision; and d) to outline amendments to corporate law that will give effect to the corporate obligation for human rights envisioned in the Constitution and in the UN Guiding Principles.

Addressing the research problem set out in this Chapter, the research findings and recommendations will be presented in the final Chapter. In summary, this research makes the following recommendations. First, to amend the Companies Act to expand directors' duties to stakeholders; to include in the proposed Business Review a specific reference to the company's human rights obligations towards stakeholders. It is also recommended that the Kenya Law Reform Commission include amendment of provisions of the Companies' Act in the list of legal amendments necessary to implement the Constitution. Second, a recommendation is made for the Government through the Ministry of Justice and the Kenya National Commission for Human Rights to conduct a human rights audit for all national strategies developed by the government for trade and private sector growth.[110]The audit will establish whether they incorporate relevant human rights requirements, and thus contribute to executing the human rights agenda of the Government in line with the Constitution. It is also proposed that the specific term 'human rights' be used in Government strategies and corporate policies and plans to denote the particular obligation expected of corporations. Third, it is recommended that the plan for the

[109] Ibid.
[110] Such as the Ministry of Industrialisation's Private Sector Strategy.

implementation of the 2010 Constitution include a specific section on business and human rights. The action plan should express the intention of Government to implement Article 20(1) of the Constitution, which binds juristic persons to the Bill of Rights. Fourth, a recommendation is made to ensure access to remedy for victims by providing legal aid for those who cannot afford to pay. The victims of corporate violation of human rights are likely to be the most vulnerable and unable to match the corporations' resources in seeking redress for violation of their rights. Finally, with a view to creating the specific capacity needed to deal with the emerging field of business and human rights, and noting the challenges that have been faced so far in interpreting the provisions of the Constitution, specific training for judicial officers on Kenya's human rights obligations under International Law is recommended. Together with the training of judicial officers, it is further recommended that the Government provide sufficient funding for the running of the KNCHR and the development of skills and capacity of its officers to ensure effective implementation of the proposed action plan on business and human rights.

While it is true that larger companies, which are most often the transnational corporations, cause more negative impact, it is also true that Kenya's private sector is relatively closed and mainly dominated by domestic firms.[111] Additionally, the country attracts less foreign investment in comparison to its neighbours despite the fact that it has a larger and more robust private sector than they have.[112] Owing to the difference in sizes of corporations operating in the country, no one-size-fit-all solution to the question of corporate obligation for human rights will work. It is therefore considered justified to focus the thrust of this study on the domestic corporations, although the findings and recommendations will apply to all corporations operating in the country, including those that are foreign-owned.

1.5. Methodology

The research will review a number of primary sources of law including international human rights treaties and conventions, the Constitution of Kenya and the constitutions of South Africa, the USA and Canada for analysis and to draw lessons on the horizontal application of bills of rights to the private sphere. It will also refer to the *Companies Act Cap 486 Laws of Kenya* and

[111] African Development Bank and Government of Kenya, The State of Kenya's Private Sector (2013) 23.
[112] Ibid; United Nations Conference on Trade and Development, Report on the Implementation of the Investment Policy Review (2013) 2.

Companies Act 2015 of Kenya, to highlight provisions that can be applied to impose human rights obligations on corporations, and will draw on lessons from relevant sections of the *UK Companies Act 2006*. Other laws to be reviewed include sections of the *Penal Code Cap 63 Laws of Kenya*, which can be amended to impose punishment on corporations for violation of human rights. These will be compared with the relevant sections of the Australian Criminal Code which has provisions that Kenya can emulate.

The research will include – where relevant – a comparative analysis of the laws in other jurisdictions that offer a plausible example of regulation and enforcement mechanisms for corporate responsibility for human rights. It will involve interpretation of laws and international guidelines on the subject to find out what they provide regarding the human rights obligation of business.

Secondary sources of law will be applied in the study. Case law, journal articles and books will be reviewed. Reference will also be made to empirical studies on corporate social responsibility in Kenya, and studies on the relationship between signing and ratification of treaties and the practice of human rights in a number of countries, to assess the loss or otherwise for failure to create or recommend binding international human rights treaty obligations for corporations.

1.6. Conclusion

The study comes at a time when the contribution of business to the global agenda is acknowledged and appreciated; but must be checked by introducing a systematic way of dealing with human rights concerns.[113] The current state of the debate on human rights and business presents a moment of 'historical transformation'[114] at the end of which it is hoped that a well-defined jurisprudence on the matter will emerge. Immediate answers to the question of corporate obligation for human rights in International Law do not seem forthcoming, but the subject cannot be ignored and must be deliberated further with the aim of forging a path towards a definitive solution. This study seeks to give greater specificity to the corporate obligation for human rights at the domestic level, attempting to propose legal considerations to effect corporate human rights obligations.

[113] As Mary Robinson notes in R Sullivan (ed) *Business and Human Rights Dilemmas and Solutions* 2003 11 'the manner in which companies address human rights is a litmus test for the fairness of the globalisation process.'
[114] Alan Atkisson quoting Prof. John Ruggie in *Corporations and Human Rights: How to Fill the Gap* dated October 30, 2006 available at http://www.worldchanging.com/archives/005207.html, accessed on 22 July 2014.

The UN Human Rights Council endorsed Ruggie's Guiding Principles: they are here to stay. As many acknowledge, the Guiding Principles have received much wider acceptance than any of the previous attempts to gain international consensus on the question of business and human rights.[115] The UN Guiding Principles do not comprise law, but they offer an international standard and an invaluable source of goals that can guide both companies and states to aim high in the effort to create a corporate culture that respects human rights. It is only when applied by states in their legal system that international standards acquire force and have an impact.[116] It is hoped that proposing a framework for human rights and business in Kenya will offer a guide for the implementation of corporate obligation for human rights.

This chapter laid the foundations for the study. It introduced the research problem and outlined its objectives. Justification for the research was made, its main tenets pointed out and the methodology was briefly described. The outline of the study has been highlighted, definitions presented and the assumptions and delimitations of its scope established. On these foundations, the study proceeds with a detailed description of the research.

1.7. Chapter Outlines

Chapter Two continues the study with a defense of Ruggie's overall preference to offer voluntary guidelines for states and corporations as opposed to binding international corporate obligations. The chapter highlights some of the criticisms levelled against Ruggie's approach and his proposals, arguing that they are not fatal in the effort to make corporate entities accountable for human rights violations. The chapter seeks to show that application of the UN Framework will be a useful prerequisite for laying the foundation for the implementation of a Business and Human Rights Treaty in the future.

Chapter Three presents the Constitution of Kenya, outlining its horizontal provisions that make the Bill of Rights binding on juristic persons, and attempts to project the possible impact it will have in developing the business and human rights jurisprudence. The chapter begins by considering the inconsistent interpretation that courts have given to International Law under the 2010 Constitution, suggesting further development of the jurisprudence before International Law can be meaningfully integrated in the domestic law. The chapter then seeks to show that the

[115] See Lopez op cit note 56 at 77; Deva op cit note 65 at 103.
[116] Shashi Tharoor 'Are Human Rights Universal?' (Winter 1999/2000) 16(4) *World Policy Journal* 1-16.

public-private divide created by traditional constitutions is not accurate, arguing that the increase in the power of the modern corporation justifies their subjection to the bills of rights. The chapter reviews possible models of horizontal application, drawing lessons from the South African constitutional model, which is most similar to Kenya's.

Chapter Four reviews the topic of corporate social responsibility. The chapter notes the importance given by many corporations, specifically in Kenya, to the notion of CSR, and the same time highlights the absence of a unified understanding of the duty. The chapter reviews Ruggie's definition of the corporate responsibility to respect, and his view that it is acknowledged in the corporate social responsibility of the company. It begins by considering the fact that many corporations in Kenya do not make reference to human rights in their policies; they do not consider their human rights obligations as a topic in its own right, but rather as a component of their corporate social responsibility. The chapter seeks to demonstrate that CSR cannot be an absolute measure of a corporation's human rights obligations by highlighting the differences in the concepts. It proposes the use of specific human rights language in company policies, and the use of corporate law to bring a human rights understanding to corporations.

Chapter Five discusses the first pillar of Ruggie's framework, the state duty to protect which includes an obligation to ensure that third parties do not violate human rights. The chapter discusses the duty as involving offering guidance to corporations on what their responsibility comprises, which, as Ruggie proposes, should involve a mixed economy of approaches, voluntary and obligatory, that complement each other. The chapter reviews the Ratification of Treaties Act provided for under the Constitution of Kenya outlining the procedure for making and ratifying treaties. It highlights the practical challenges that arise from the Act's requirements which might make it difficult to domesticate a treaty on business and human rights (if it existed), further supporting the case for the development of the domestic jurisprudence on business and human rights before negotiating a treaty on the same. The chapter also offers suggestions on what would constitute an ideal model for tracking and reporting human rights performance through formal public reporting, as a way for the state to ensure that corporations live up to their human rights obligations. A proposal is made to adopt the Global Reporting Initiative guidelines in preparing corporate reports.

Chapter Six discusses the corporate responsibility to respect, Ruggie's second pillar in his Framework on business and human rights. The corporate duty arises from the acknowledgement

that the primacy of the duty of the state to protect against human rights violation does not in any way preclude the responsibility of business for its actions. The argument is made that defining the corporate responsibility to respect necessitates a shift away from the concept of shareholder supremacy. This will make it possible to consider other stakeholders who make a contribution to the business, and thus be concerned for their interests. The Chapter reviews the question which human rights are important for business, as some say it should be a limited category of business-related rights, and others opine that they should be responsible for all human rights. The chapter then considers the different positive facets of the corporate responsibility devised by Ruggie to counteract its apparent negative character, which will bring about a corporate culture respectful of human rights, thus making the effort of business entities to respect human rights sustainable.

Chapter Seven reviews the third pillar of the UN Framework, Access to Remedy for victims of corporate human rights violation. It appraises the different levels of remedial measures – operational or company level mechanisms, the non-judicial mechanisms (the KNCHR) and the judicial mechanism, the courts, and recommends the procedures to be followed in approaching the various means of redress. The chapter reviews the attitude that Kenyan courts have had in the past on the subject of human rights violations as this is most likely to affect future expectations on its approach. A proposal is made for amending the penal law of the country to make it possible to bring claims for human rights violations against companies by imposing on them a corporate criminal liability.

Chapter Eight presents the implication of the changes suggested by the UN Guiding Principles, and implementation of the 2010 Constitution on the corporate law of the country. The chapter proposes amendments and additions to particular laws to enforce the corporate obligation for human rights. It proposes amendment of director's duties to require them to consider the interests of stakeholders in decision-making, including an explicit obligation to consider the human rights impact of company operations. Constituency Statutes, state laws in the USA which were enacted with the intent to codify social and community obligations of directors, are proposed as a model for the amendment of the Companies Act. Specific proposals regarding the Business Review are recommended, outlining specific areas directors should report on. The chapter also proposes coordination between departments and considerations necessary to align sectoral policies to the national strategy and the state's international human rights obligations as expressed in its Constitution and in international law. This chapter further makes a proposal to

the Commission charged with implementing the Constitution to include a specific section on business and human rights in the Action Plan drawn up to implement the 2010 Constitution.

Chapter Nine concludes the study, summarizing the findings and recommendations of the research. In concluding this study, the chapter reviews the core arguments of the research and proceeds to make recommendations under the state duty, the corporate responsibility and access to remedy pillars of the business and human rights framework and proposes the way forward.

CHAPTER TWO

2. A DEFENSE OF RUGGIE'S APPROACH AND FINDINGS ON THE QUESTION OF THE CORPORATE OBLIGATION FOR HUMAN RIGHTS

2.1. Introduction

The introduction chapter reviewed the attempts made at the international level to regulate corporate human rights conduct. One of the most recent outputs of the international deliberations on the subject is the UN "Protect, Respect and Remedy Framework"[1] together with the UN "Guiding Principles on Business and Human Rights"[2] (the UN Guiding Principles) developed to implement the Framework. Both documents were developed by the Special Representative of the Secretary General of the UN on Business and Human Rights, John Ruggie. Ruggie, who had been tasked to provide clarity regarding standards of corporate responsibility and accountability of business and the role of government in regulating transnational corporations and other business entities in the area of human rights.[3] At the onset of his mandate, it was hoped that Ruggie would come up with a report 'making recommendations on new kinds of legislation, regulation, or standard-setting activity' to provide clarity at the international level.[4] However, Ruggie argued against coming up with a set of binding international obligations, thereby presenting an apparent return to the status quo he was tasked to move away from.[5]

Ruggie's decision not to create binding international obligations for business appears to be the biggest criticism of his findings.[6] This chapter enumerates a number of justifications to

[1] UN General Assembly ,Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5.

[2] 'UN General Assembly, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04 [UN Guiding Principles].

[3] Human Rights Council Resolution 2005/69 'Human rights and transnational corporations and other business enterprises' (Ruggie Mandate).

[4] Alan Atkisson *Corporations and Human Rights: How to Fill the Gap* available at *http://www.worldchanging.com/archives/005207.html*, accessed on 9 September 2011.

[5] John Ruggie *Business & human rights: Treaty road not travelled* 6 May 2008 available at *http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers*, accessed on 12 October 2009.

[6] See Penelope Simons, International law's invisible hand and the future of corporate accountability for violations of human rights (2012) 3(1) *Journal of Human Rights and the Environment* 14; Robert C Blitt 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48(1) *Texas International Law Journal*, 52-56. In the *Joint Civil Society Statement to the 17th Session of the Human Rights Council* (May 30 2011) endorsed by over 40 organisations from around the world, the civil society asked for the inclusion of a clear indication prior to the adoption of Ruggie's resolution of commitment to "a future intergovernmental standard-setting process" subsequent to adoption of the UN Guiding Principles; available at *http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council*, accessed on 17 December 2014.

illustrate that the decision by the Special Representative not to develop binding international obligations at the first instance is not fatal to the effort to make corporate entities accountable for human rights violations. Negotiations at the international level presuppose a minimum of consensus among the different states; in the absence of this consensus, it is imperative that common ground be established: what human rights can be linked to business – all, or only some; how are the positive duties for the realisation of social and economic rights to be understood in relation to business; are the concepts of corporate social responsibility and human rights linked and to what extent; in a case like Kenya's where the Constitution provides for human rights of juristic persons, how are its provisions to be interpreted and how would the constitutional provisions fare against International Law obligations? These and numerous other issues must be deliberated and a greater understanding reached within the domestic context in order to provide a sound basis for the effective implementation of an international treaty. The study thus supports the preference for development of the domestic jurisprudence as proposed by Ruggie. This is seen as a more feasible and effective option for the present moment, and a useful prerequisite for laying the foundation for the implementation of a business and human rights treaty in the future.

In discussing Ruggie's findings and the extent of my reliance on them, I do not consider the entire spectrum of his proposals. I will limit myself to what I consider necessary or relevant to the typical corporation in Kenya, the prevalent form of corporate entity. Whereas Ruggie's work and findings are directed at transnational corporations and other business enterprises, this study will limit itself to the category of 'other business enterprises', as these, rather than the former, constitute the majority of the business entities in Kenya. Most of the business entities in Kenya operate within the state and would be classified as small in scale (in comparison with the multinational companies), but they are corporations nonetheless and subject to human rights standards. For this reason, this research does not look at the question of extraterritoriality, or obligation of home states for violations committed abroad. Nor does the study look at the case for supporting business respect for human rights in conflict affected areas, for the reason that Kenya is not a conflict affected state in the sense understood generally, as defined by international organisations such as the World Bank.[7] This research contemplates the typical corporation in Kenya and makes proposals with that kind of entity in mind. Multinational

[7] See for example 'Harmonized list of fragile situations FY15' available at *http://www.worldbank.org/en/topic/fragilityconflictviolence/overview*, accessed on 11 June 2015.

corporations will nonetheless be included in the ambit of the proposals made because the recommendations made will apply to all corporations operating in the country.

2.2. Should Ruggie have built upon the UN Norms to develop a binding treaty?[8]

A legal corporate human rights obligation as would be presented in an international treaty would be more ideal compared to the social norm for corporations proposed by Ruggie in the second pillar of the UN Framework because it would trigger more effective regulatory and remedial mechanisms.[9] Binding obligations in the form of a treaty would have the advantage that they defy differing national standards; corporate obligations would be the same across the board, thus deterring the possibility of corporations evading their obligations by seeking to operate in poorly regulated jurisdictions. If direct obligations existed under an international treaty, monitoring bodies would review corporate conduct as they review state conduct: now they cannot. Any monitoring mechanisms that could be applied to ensure that corporate obligations are adhered to are given effect by the constituting law and in the absence of such law remain unenforceable.

Those who are of the view that the time is ripe for a treaty on business and human rights argue that Ruggie should not have rejected the UN Norms, and perhaps treated them as a predecessor to a binding treaty, in the same way that the Universal Declaration of Human Rights (UDHR) was for the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[10] The UN General Assembly adopted the UDHR in 1948; the UDHR is regarded as the parent human rights document and the constitution of the entire human rights movement. It has also been termed the international *Magna Carta* for all humankind.[11] The UDHR, being a Declaration as opposed to a treaty, was general in its terms. At the time of adopting the UDHR, the committee of experts working on it was cognizant of what they saw as a great difficulty in establishing a complete list of human rights acceptable to all sides. There was a divergence in beliefs of those involved owing to the diversity of the peoples they represented and the different political and economic

[8] See discussion on rejection of the Norms in Section 1.2.1 above.
[9] Ibid.
[10] Ibid.
[11] See Transcript of Eleanor Roosevelt's speech introducing the UDHR to the General Assembly available at *http://www.gwu.edu/~erpapers/maps/UDHRspeech.htm*, accessed on 25 July 2015. See also *http://www.un.org/rights/50/carta.htm*, accessed on 23 August 2014.

systems they subscribed to.[12] As such, the outcome of the deliberations, the rights listed and described in the UDHR were acknowledged to contain great ambiguity.[13]

The ultimate agreement on what should be listed as human rights in the Declaration did not mean that there was consensus on what meaning should be given to the rights. Commenting on a surprise reaction to the agreement the drafters had reached despite the different cultures, ideologies and religions of member states of the UN, one of the drafters is said to have remarked "yes we agree on the rights, so long as no one asks us why".[14] The lack of consensus on the reason behind the choice of human rights was not considered fatal by the drafters. The agreement on the basics was deemed sufficient for the development of a framework that could form the basis for further consideration and development.[15] Commenting on the same point during the first deliberations of the Open-ended Intergovernmental Working Group (OEIWG) on a Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights, precaution was urged against fixed definitions.[16] This was based on the grounds that experience had shown that it was not always possible to agree on definitions although it was possible to reach a common understanding on the subject of deliberation.[17]

Maritain, an academic and philosopher who played a role in shaping the development of an understanding on 'human dignity' during the post-war period proposed that to get an agreement on any universal declaration, the aim should be to agree on what was prohibited or what was accepted, without getting into the reasons for agreeing as such because such a discussion would lead to disagreements, delays and ultimate failure.[18] He was of the view that "rational justifications are powerless to create agreement among men because they (the justifications) are different and perhaps even opposed to each other."[19] If this reasoning was

[12] Preface of the UDHR, cited in Sinai Deutch 'Are Consumer Rights Human Rights?' (1994) 32(3) *Osgoode Hall Law Journal* 537 at 545.
[13] Mary A Glendon 'Knowing the Universal Declaration of Human Rights' (1998) 73 *Notre Dame Law Review* 1153, 1174.
[14] Ibid at 1156, quoting Maritain.
[15] Ibid. The Preamble of the Declaration, following the civil law system of drafting, includes a general part which sets forth the premises, purposes and principles that guide interpretation of rights, and the last section of the Declaration puts the rights in contrast with limits, duties and the social and political context in which they were to be executed (1159).
[16] UN General Assembly Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (10 July 2015) (Draft).
[17] Ibid, para 53.
[18] See Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *The European Journal of International Law* 655, 678
[19] J. Maritain *Man and the State* (1951) 77.

applied by Ruggie, it may have been possible to conclude an international agreement on business and human rights.

The UDHR had an initial 'burs' of enthusiasm[20] and was 'terser, more general and grander in its provisions than treaties'.[21] Unlike the ICCPR, for example, which enjoins the signatories to submit reports showing the measures they have implemented to give effect to the rights enumerated in the Covenant, the UDHR merely 'proclaims a common standard of achievement for the promotion of respect for rights and freedoms by all peoples'.[22] Also unlike the ICCPR and ICESCR, the UDHR was not opened for signatures of states and ratification by interested parties. The UDHR conceptualized the notion of human rights, while the ICCPR and ICESCR fleshed out the details of the ideal that was brought to light by the UDHR.

Referring to the "open-ended general clauses in human rights documents", a member of the Committee constituted to come up with common areas of potential agreement on the meaning of human rights at the deliberations on the UDHR said that the ambiguities did not result from confusion or contradiction but were instead productive ambiguities that reflected experience and knowledge gained over a long history of human rights.[23] These general clauses would be a foundation for future deliberations.[24] The future deliberations did indeed take place, on the foundation that the UDHR had set, and they produced the ICCPR and the ICESCR. In a similar manner, perhaps Ruggie could have used the opportunity he was granted to devise a declaration on business and human rights, albeit not binding, which could have set a firmer foundation for the development of a treaty on business and human rights in the future.

Despite any advantages that could have arisen from developing the Norms, the call for binding obligations for Trans National Corporations (TNCs) and other business entities raises the question how different a treaty would be from the rejected Norms. Would not an attempt to create direct human rights obligations for corporations be met with the same reservations as the

[20] For example, it is content with proffering rights but, unlike other international documents of its nature, is not concerned with establishing punitive measures for those who violate them.
[21] Steiner Henry J and Philip Alston *International human rights in context: law politics morals: text and materials* (2000) 120.
[22] The Preamble of the Universal Declaration of Human Rights states: "Now, Therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms…" Non-state actors like businesses would be part of 'every organ of society'.
[23] Glendon op cit note 13 at 1171.
[24] Ibid.

Norms?[25] There is the possibility that the resistance put up against the Norms would at least contribute to prolonged negotiations for a treaty to iron out differences in views.

2.3. Is the failure to create internationally binding corporate human rights obligations fatal to the business and human rights agenda?

In an attempt to defend Ruggie, this chapter explores some of the reasons why the failure to come up with binding International Law obligations for corporations is not considered fatal to the human rights and business discourse. Ruggie's work and the outcome of his research leaned towards self-regulation and, in this aspect, is more in keeping with the prior initiatives which all resulted in voluntary guidelines, therefore arguably maintaining rather than advancing the debate on the question of business and human rights. Ruggie's arguments maintain the current condition where companies are encouraged but not required to respect human rights, and where business responsibility for human rights at the international level remains unclear.[26] Rather than move beyond the self-regulatory approach as expected, Ruggie stayed true to this approach and the UN Guiding Principles are seen as the latest in a long line of mechanisms adopted to merely encourage rather than oblige business entities to uphold human rights.[27]

David Kinley disputes Ruggie's reason for not pursuing the International Law or treaty option, saying that if we were to shun such tasks (of creating binding international obligations) owing to their perceived difficulty, then most post-war International Law instruments would not have made it 'beyond the stage of high minded rhetoric'.[28] In my view, looking at the two options Ruggie weighed in the course of his work, it was both practical and most reasonable in the circumstances to have opted for the alternative that promised more immediate results. In any

[25] 'Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons' Notes of the Workshop and Public Debate, Notre Dame Law School (14 May 2014) available at *http://business-humanrights.org/sites/default/files/media/documents/note_event_does_the_world_need_a_treaty_on_business_and_human_rights__21-5-14.pdf*, accessed on July 24 2015. Developing countries are largely unlikely to criticise their successful companies; they are against intrusive regulations that would deter them from attracting investors, while developed countries on their part are keen to protect the corporations headquartered in their jurisdiction.

[26] Human Rights Watch, UN Human Rights Council: Weak Stance on Business Standards Global Rules Needed, Not Just Guidance (June 16 2011) available at *http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards*, accessed on 25 December 2014.

[27] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 138,139-140. See also Oxfam's perspective on the Guiding Principles, Business and Human Rights**:** An Oxfam perspective on the UN Guiding Principles (June 2013) 4. Oxfam is of the view that in defining the duties of states and business entities, the GPs have placed [human] "rights firmly back on the CSR agenda".

[28] David Kinley *Civilizing Globalization: Human Rights and the Global Economy* (2009) 199.

case, Kinley concedes that the international treaty option will 'inevitably be a long road';[29] the current state of business and human rights requires a more immediate solution.

2.3.1. UN Guiding Principles are an interim measure of practical application pending the negotiation of a treaty on business and human rights.

It will be noted, to his credit, that Ruggie acknowledged that his work and proposals did not in any way rule out the option of internationally binding obligations; they were indeed a possibility but at a future time.[30] His reservation against a treaty therefore was only with regard to its appropriateness as the solution needed for the present moment. International Law appears as an immature legal system whose enforcement mechanisms lag behind its legislation. It is conceded that lack of enforcement does not mean the absence of an obligation.[31] Nonetheless, rather than pushing for an international treaty that would then face the typical hurdles of treaties in international law, it is proposed to first develop the domestic jurisdiction to create a workable system of corporate accountability for human rights obligations (which is what Ruggie tries to do with the UN Framework and Guiding Principles) before embarking on the negotiation of a treaty.

After adoption of the UN Guiding Principles, the Human Rights Council established a Working Group on the issue of human rights and transnational corporations and other business enterprises.[32] Among other things, the Working Group was to promote the effective and comprehensive dissemination and implementation of the Guiding Principles, to offer support where requested and solicit and disseminate good practices identified in the process of implementing the Guiding Principles.[33] Following on the consultative approach that characterised the process leading up to the Guiding Principles, the Working Group operates by requesting for – and considering input – from the broad range of stakeholders on the issues it

[29] John Ruggie *Business & human rights: Treaty road not travelled* 6 May 2008 available at *http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers*, accessed on 12 October 2009.
[30] See concluding remark in John Ruggie 'Business & human rights: Treaty road not travelled' (6 May 2008) *Ethical Corp*. 43 where he says that the framework he proposes 'offers a platform for generating cumulative and sustainable progress without foreclosing further development of international law.'
[31] John H Knox 'The Ruggie Rules: Applying Human Rights Law to Corporations' (August 16, 2011) *Wake Forest Univ. Legal Studies Paper*, also available in In Radu Mares (ed) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2011) 51-83.
[32] Human Rights Council, Resolution (6 July 2011) A/HRC/RES/17/4.
[33] Resolution 17/4, ibid 2-3. See also *http://www.ohchr.org/EN/Issues/Business/Pages/ImplementationGP.aspx*, accessed on 24 August 2014.

seeks to address.[34] Two annual surveys were completed, for 2012 and 2013, and received a relatively low response rate with no African country responding.[35] The initial 3-year mandate of the Working Group was extended for a further three years from June 2014.[36] The Human Rights Council also established a Forum on Business and Human Rights to function under the guidance of the Working Group, to discuss and promote dialogue on issues arising in implementation of the Guiding Principles.[37] The Forum has organised three annual meetings of member states, and a fourth is scheduled for December 2015.

Further to Resolution 17/14[38] and development of the deliberations on the issue of the obligation of TNCs and other business enterprises, The Human Rights Council in 2014 established an 'Open-ended Intergovernmental Working Group (OEIWG) on a Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights'.[39] The mandate of the OEIWG was to elaborate an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises.[40] Kenya was among the states that supported this historic resolution.[41] Majority of the participating states were in favour of the proposal, but there was some resistance to the idea on grounds that the focus of the intended instrument seemed to be on trans-national corporations to the detriment of domestic corporations.[42] Those opposing the move called for equal treatment of companies,

[34] In November 2011, the Working Group called for submissions on its program and received contributions from a broad range of stakeholders available at
http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx, accessed on 7 June 2012.
[35] UN General Assembly Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises 'Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and corporations' (16 April 2013) UN Doc A/HRC/23/32/Add.2 para 8. If Kenya or any other African country responded to the survey, they did not give their permission for their responses to be published.
[36] Human Rights Council, Draft Resolution A/HRC/26/L.1.
[37] Paragraph 12 of Resolution 17/4 op cit note 32.
See http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx, accessed on 24 August 2014.
[38] Adopting the UN Guiding Principles and establishing the Working Group on the issue of human rights and transnational corporations and other business enterprises.
[39] Human Rights Council 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) A/HRC/RES/26/9.
[40] Draft Resolution on Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (25 June 2014) A/HRC/26/L.22/Rev.1.
[41] Action on the Resolution on the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights – available at
http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14785&LangID=E>, accessed on 9 June 2015.
[42] Statement of the ESCR Net Corporate Accountability Working Group (CAWG) "States at the Human Rights Council must ensure all business enterprises are the subject of new normative international developments. …The

domestic or trans-national, which, being of the same nature – profit making entities – stand the chance of neglecting or inadequately addressing operational impacts in the quest for profits.[43] The deliberations on the question whether the binding treaty proposed should regulate TNCs only, or whether domestic corporations should also be regulated, continued to be a subject of deliberations in the First Session of the OEIWG.[44] In the event that resolution of the matter determines that the treaty will only be applicable to TNCs, there would be need for an alternative set of laws and regulations to govern national corporations, adding to the reasons in support of development of the domestic jurisprudence on business and human rights.

The OEIWG was tasked to begin collecting views from states and other stakeholders, conduct deliberations of the scope, nature and form of the proposed instrument and is expected to submit a report on the progress made for consideration at the Human Rights Council's thirty-first session.[45] The OEIWG held its first session on July 6-10 2015, thus commencing talks on the development of a treaty on business and human rights.[46] The work of the inter-governmental Working Group is the continuation of the long road that could eventually result in an internationally binding instrument on business and human rights. The working group will undoubtedly build on the consensus developed during the course of Ruggie's research, and the work being done as a result of his proposals together with the UN Guiding Principles, which many states and corporations have taken up and are trying to implement. The UNGPs are considered by many states as a starting point and reference for the work of the OEIWG.[47] The discussions that have been generated in the course of Ruggie's mandate and the deliberations around the implementation of the Guiding Principles have created awareness and raised questions that will feed into the treaty making process. The Framework and Guiding Principles are serving their purpose in the intervening period: they can be applied to guide states and

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ESCR - Net CAWG calls on states at the Human Rights Council to ensure that any resolution on business and human rights presented to the Council in this XXVIth session does not limit the scope of any future UN normative development only to the activities of transnational corporations."

[43] Ibid.

[44] Human Rights Council Report (Draft) of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (10 July 2015) para 53. Para 13 of the same report notes that '... A number of delegations also argued that resolution 26/9 was clearly defined and did not need further clarification and does not apply to national companies'.

[45] Ibid.

[46] Ibid.

[47] Ibid para 49 which reads in part: 'Several States considered that UN Guiding Principles are a starting point and a reference for the work of the OEIWG.' The Panel deliberating on the 'Implementation of the UN Guiding Principles on Business and Human Rights: A Renewed Commitment by All States' noted the importance of the '… UN Guiding Principles and its role as reference point for the process of an international legally binding instrument…'.

corporations in taking practical steps at present to live up to their obligations. Other reasons that support the development of the domestic jurisprudence on business and human rights before embarking on work on a treaty are discussed below.

2.3.2. Ratification of a treaty on business and human rights will not of itself guarantee compliance with human rights obligations

It may be easier for states to commit to treaties that offer reciprocal benefits, for example bi-lateral or multi-lateral treaties that require signatories to give certain favourable treatment to other member states, than a general treaty that offers no immediate tangible benefits for the signatories. In a bilateral treaty, a source of motivation for a state to honour the terms of the treaty would be the fact that its efforts will be reciprocated by the partner state.[48] A state is unlikely to ratify a bilateral economic agreement and fail to abide by its terms because there are consequences immediately applicable for not observing the promises made. But human rights treaties impose obligations without offering any tangible or immediate benefits; member states are expected to uphold and protect human rights, and if they do this, it is not because of any direct expectations on the other states. In the absence of direct obligations as would arise under a multilateral treaty binding the contracting states, it is difficult for other states to intervene and require violating states to comply.

The drafters of the UDHR held the view that the most effective defense of human rights would be in the minds and wills of the people. The UDHR therefore expressed the hopes of its founders; the formation of a human rights conscience in the people[49] so that, convinced of the value of human rights these individuals and social groups would seek to secure them. Capturing this view, one of the main architects of the Declaration observed:

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without

[48] Oona A Hathaway 'Why Do Countries Commit to Human Rights Treaties' (2007) 51(4) *Journal of Conflict Resolution* 589.
[49] Glendon op cit note 13 at 1175.

> discrimination. Unless these rights have meaning there, they have little meaning anywhere.[50]

Declarations and documents by themselves would not bring about the change needed. To be effective, the proposals for change must be accompanied by resolute action by both the rights holders and the duty bearers: the rights holders to know their rights and seek them, and the duty bearers to uphold, respect and protect the rights, and ensure that they are respected, upheld and protected by others.

Commenting on the status of the world at the 50th Anniversary of the UDHR, a leading human rights lawyer observed that the barbarous acts that gave rise to the universal effort to draft human rights instruments continued to recur and human rights for many remained an elusive dream.[51] More than fifteen years later, the situation is perhaps even worse with wars and atrocities continuing to claim the lives of numerous people. What was noted at the time of drafting the declaration continues to be as true today, that "even the noblest and most solemn of declarations could not suffice to restore faith in human rights".[52] The writings declaring rights needed action to give them life, absent which they remained mere declarations. Further reference will be made to a number of empirical studies that have attempted to show the correlation between signing treaties and the behaviour or practices of states.

The Relation between treaty ratification and state observance of human rights obligations as shown in human rights ratings is not always linear. A study carried out in 2002 by Hathaway sought to establish whether countries complied with human rights treaties, and if the treaties improved human rights practices in the country.[53] The study involved the analysis of over forty years of data from 166 countries in five areas of human rights law.[54] One of the findings was that treaty ratification is not infrequently associated with worse human rights ratings than expected;[55] states with the worst ratings of human rights violation sometimes had higher ratification than those with better ratings.[56]

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[50] Eleanor Roosevelt, quoted in Paolo G Carozza 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97(1) *American Journal of International Law*, 38.
[51] Glendon op cit note 13 at 1173.
[52] Ibid at 1174.
[53] Hathaway Oona A "Do Human Rights Treaties Make a Difference?" (2002) 111 *Yale Law Journal* 1935.
[54] Ibid at 1935-6.
[55] Ibid at1940.
[56] Ibid at 1999.

A similar study by Hafner-Burton and Tsutsui also proved the "paradox of empty promises" thesis, where states sign treaties to signify compliance but violate them in practice. The act of signing treaties by some states was tantamount to an act of "window dressing" which gave rise to the danger that the legitimacy thereby derived in the eyes of other states removed the pressure from the violating state and acted as a shield against criticism as they engaged in or allowed violating acts at the domestic level. There was no positive relation between human rights compliance and the number of treaties that a state had signed; the data showed that states that had signed more treaties were more likely to repress human rights than those that had not signed the treaties. Ultimately, the study concluded that international human rights treaties do little to encourage better human rights practices in a country, and in many instances it did not stop states from a spiral of increasing repressive behaviour and may even exacerbate poor or violating practices.[57]

A scathing response to the Hathaway study findings was rendered by Goodman and Jinks who labelled them as "wildly counterintuitive".[58] Although they acknowledged that this particular study was the most well-conceived empirical study on the subject at the time, they took issue with the fact that it failed to adequately account for the means by which and conditions under which human rights norms are incorporated into national practice.[59] They point out that ratification of treaties is only a point in the broader process and not the "magic moment" of acceptance of human rights norms.[60] Goodman and Jinks proposed that rather than considering the ratification of treaties as a measure of compliance, the various processes that necessarily accompany the signing should be given importance.[61] Such processes include the reservations subject to which the treaties are ratified, the adoption of implementing legislation and the withdrawing of crippling reservations among other practical concerns.[62] If these were considered, what becomes important is not so much the signing or ratification of treaties, but rather the factors that move the process forward, or those that make it stall.[63]

[57] See Emilie M Hafner-Burton & Kiyoteru Tsutsui 'Human Rights in a Globalising World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 76.
[58] Ryan Goodman and Derek Jinks, Measuring the Effects of Human Rights Treaties 2003 14(1) *European Journal of International Law*, 171.
[59] Ibid at 172.
[60] Ibid at 173.
[61] Ibid at 174.
[62] Ibid.
[63] Ibid at 173.

Goodman and Jinks also took issue with the data sets used to arrive at the findings. They argued that owing to problems of conceptualising the variables, it was not accurate for Hathaway to conclude that the lack of a significant relationship between signing treaties and state practices showed that treaty impact is insignificant.[64] They proposed instead that the data should account for change in violating behaviour. If using torture as a measure of state compliance for example, the study must check if reduction in torture was replaced by another form of human rights abuse before concluding that human rights violations decreased because torture decreased.[65] The study did not take such factors into account. Hathaway used only five human rights for her study; Goodman and Jinks proposed that the effectiveness of a treaty should rather be assessed by its impact on all the rights contained in the treaty, or a larger sample than the five human rights analysed in her study.[66] They concluded that signing treaties builds national human rights cultures; that treaties have a widespread effect on practices of states by changing the discourse on expectations regarding certain rights.[67] In the absence of accurate studies that connect the law to reality, they proposed adherence to the conventional assumption that treaties advance the cause they claim to promote.[68]

There is credit to Goodman and Jinks' criticisms; Hathaway's study may have produced different results had all the suggestions proposed in the critique been borne in mind. In a similar study carried out by Keith to establish whether signing of the ICCPR had an observable impact on state behavior, the main conclusion was that it would be "overly optimistic" to expect being a party to an international human rights treaty to produce results that could be observed.[69] The data analysed covered 178 countries over a period of eighteen years and across four measures of human rights behaviour.[70] A synthesis was done of 27 rights categories found in the ICCPR using two standards of measure for human rights.[71] The data analysis was grouped into states parties to the ICCPR against states that were not; the human rights situation of the state before

[64] Ibid at 178.
[65] Ibid at 174.
[66] Ibid at 175. In a similar empirical study, Keith analysed the effect of treaty signing using a synthesis of all the 27 categories of human rights contained in the ICCPR. See Linda Camp Keith 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?' (1999) 36(1) *Journal of Peace Research*.
[67] Ibid at 178-81.
[68] Ibid at 182.
[69] Ibid.
[70] Ibid.
[71] The Freedom House Political and Civil Rights Index and the Personal Integrity Measure (for serious crimes)

signing the ICCPR was also compared to the situation after. An inquiry was made to establish whether the improved behaviour after signing of the ICCPR could be attributed to the decision to sign the instrument. This study supported the conclusion that being party to the ICCPR 'may only be the final step in a long socialisation process within the international community that influences state willingness to protect human rights".[72] The socialisation process would include factors such as a building of consensus and the creation or facilitation of the capacity within the government to implement the obligations assumed.[73]

It is further noted that reliance on reported rights to inform the analysis may not lead to accurate results because repressive regimes may sensor the media, thus reporting fewer violations than committed.[74] Additionally, an efficient monitoring and reporting treaty mechanism can result in more cases being reported, which may not necessarily mean an increase in violations; a higher incidence of reported violations could also be a consequence of the treaty affording lawyers terms to meaningfully phrase problems that existed before, thereby giving the impression of increased cases where that may not be the case in reality.[75] However, later studies made the same observations that Hathaway made, and at the very least raise the probability that there is some truth in the findings.[76]

Some of the findings of the empirical studies indicated that the signing of international treaties by states does not always signify or guarantee compliance with its provisions: states were

[72] Ibid.

[73] In arriving at the conclusions that it did, the study was cognizant of other genuine hurdles that may lead to the negative correlation, for example the presence of war or political instability in a country or the slow progress of laws and institutions such as a judiciary that lacked independence. Additionally, if treaties were signed, they required implementing laws to be made in the domestic jurisdiction; if there was little or no effort to draft and enact implementing laws, the consequences of signing the treaty would not be observable even in the absence of a negative will on the part of the signatory state. (Keith op cit note 66)

[74] The data used in a study by Hafner-Burton &Tsutsui tested the measure of government repression of security of persons as seen in the level of murder, torture, forced disappearance and political imprisonment every year.[74] (op cit note 57 at 1391). The scale of repression was drawn from the US Department of State and secondarily from the annual reports prepared by the Department, and also reports by Amnesty International and international non-governmental organisations. The data considered six core human rights treaties. (ICCPR, ICESCR, CAT, CERD, CEDAW and CRC). Some states had not signed onto any treaty, and some had signed all six. The duration of time for which a state had signed the treaty was one of the measures of analysis of the data.

[75] Goodman and Jinks op cit note 58 at 176

[76] In later empirical studies carried out to determine the impact of the global legal and civil society on human rights regime, similar findings to the ones in Hathaway's study were found, showing that there was no impact or that there was actually a negative correlation between ratification of treaties and negative human rights impact (see Hafner-Burton &Tsutsui op cit note 57; Hathaway op cit note 53 at 1935). The reason for such a negative correlation could be attributed to the motivation of states to sign treaties – if states are moved to sign treaties because there are no stringent measures imposed for non-compliance, the act of signing and ratification can be a mere "public relations" exercise employed to make them look good, and possibly act as a cover for the actual negative activities they engaged in.

moved to comply by the political mobilisation of actors pushing for compliance rather than the mere signing of documents.[77] The strength of International Law in many states with poor practices came from NGOs and western liberal states, which paid attention to and exerted pressure on these states to change.[78] Civil society provided the enforcement mechanism that the treaties lacked; the action and pressure from international non-governmental organisations moved governments to change their behaviour.[79] Compliance with international treaty requirements is thus seen by some as a matter of coercion and coincidence rather than the law.[80]

However, coercion from other states for violating states to comply is usually only strategic: powerful states seeking to impose sanctions do so not looking at whether states had signed treaties or not, and it is arguable that pressure is brought to bear upon weaker states that the stronger states would have something to gain from if human rights were respected.[81] These findings support the view by other authors who say that it is democracy, peace and economic development rather than signing of treaties that leads to the protection of human rights.[82] The impact of the media and human rights activists projecting human rights violations and creating pressure on violating states to react are seen as having more impact on the action of states than the mere act of signing treaties.[83] If this observation is accurate, then states can be moved to respect human rights even without signing treaties. What is needed is monitoring of practices,

[77] Ibid. Owing to the rigidity of law, Dine wonders whether human rights should rather be an issue of political negotiations, which are more accommodating. See J Dine *'Companies, International Trade and Human Rights'* (2005).

[78] Hathaway op cit note 53 at 2003.

[79] Emilie M Hafner-Burton & Kiyoteru Tsutsui 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) American Journal of Sociology 407, 422-3.

[80] Jack L Goldsmith and Eric A Posner *The Limits of International Law* (2005); Hathaway (op cit note 53 at 1946) observed that realist and neo realist approaches suggested that state compliance with international human rights law was more out of coincidence than the force of law.

[81] Goldsmith and Posner ibid. Hafner-Burton &Tsutsui op cit note 57 also observe that States complied when it was in their "rational self-interest" to do so.

[82] Goldsmith and Posner op cit note 80. The study by Hafner-Burton and Tsutsui concluded that states that violate or allow an environment conducive to the violation of human rights are moved to correct the situation usually not merely because they sign international treaties, but more because of the pressure that is brought to bear upon them by human rights activists or other states. States that had a greater presence of international non-governmental activity by its citizens were more likely to protect the rights of their citizens.[82] (Hafner-Burton &Tsutsui op cit note 57).

[83] Ibid. In the same vein, Tushnet observes that in the final analysis, change comes not because of adoption of bills of rights, but because of the political mobilisation that led to the Bill of Rights. (Mark Tushnet (ed) *Constitutional law* (1992). In a similar way, the authors observe that the decline in human rights abuses in Latin America and African dictatorships in recent decades was not necessarily linked to signing of treaties but rather political pressure, economic sanctions and internal resistance to authoritarian rule (Goldsmith and Posner op cit note 80).

and pressure on government to stop the violating acts, or to exercise its powers to stop third parties violating the rights.

2.3.3. Strong institutions vital to ensure capacity to align behaviour of states with their human rights obligations

It has been said, with some credit to the argument, that human rights law by its very nature can be an authoritative tool in negotiations even in the absence of enforcement because it reflects some pre-negotiated and internationally legitimate understanding about what is just.[84] Those who argue thus are of the view that the mere entrenchment of human rights rules in the social and political contexts counts for more than their formal enforceability.[85] If human rights have an authoritative force by mere existence, a lack of enforcement mechanisms in International Law would be of little consequence. The creation of a treaty on business and human rights in this context would have a greater advantage than if enforcement was considered a necessary accompaniment of the treaty. The mere existence of rules can be a spur for conscientious corporations to seek to abide by them and make the effort to put measures in place to achieve this end.

It is also true, however, that many corporations which perceive that there is nothing to lose by disregarding the law will not be deterred by its existence. In many cases, the law will be present in the operating environment of corporations, for example in labour laws. But other factors could play a more defining role;[86] for example, a cultural context of impunity where law breaking does not result in any negative consequences; or foreign companies that venture into the country in search of cheap labour and enter into agreements with the government to legitimise this objective. If the latter were the case, the mere existence of the law will not stop violation of human rights.

Ratification of treaties could thus fail to change the behaviour of states if states ratify treaties without the capacity or will to comply with human rights obligations. The fact that human rights atrocities are committed in states that have signed international treaties could lead to the question why states ratify treaties if they have no intention of complying with them.

[84] Daniel Adler & Michael Woolcock 'Justice without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia' 2009 2(2) *Justice & Development Working Paper Series* 182.
[85] Ibid at 183.
[86] Ibid.

Alternatively, what moves states to change behaviour pursuant to signing or ratifying treaties?[87] Because of the low cost of ratification, many states ratified treaties without the will or capacity to align domestic behaviour with the treaty obligations.[88] The implementation of international treaties relies too much on the good will of the parties, and if this were lacking, there would be little change in behaviour.[89] In the absence of self or external enforcement mechanisms, states can, and do, contravene treaties they have signed with no dire consequences, or at least no immediate consequences.[90] Without the capacity and will to implement obligations signed onto, the act of the state will amount to mere window dressing, or it will be a far cry from the reality intended.

Another empirical study carried out by Hathaway supported the claim that even without international enforcement; treaties are likely to lead to change in behaviour where there is domestic enforcement of treaty commitments.[91] Development and strengthening of institutions that can ensure that the obligations signed onto in a treaty on business and human rights will be enforced will therefore serve to make the obligations signed onto more practical. In addition to the courts, other entities such as the national human rights institutes will play a part in ensuring that any corporate obligation for human rights are respected. It may be worthwhile to develop these institutions first before taking on the treaty obligations. The formal signing of a treaty on human rights and business when the treaty is eventually negotiated will then be a symbolic recognition of behavioural norms and international standards that the state had previously accepted and began to act upon.[92]

For practical reasons, experiences at the domestic level have been found to be useful in the development of jurisprudence at the international level. Experiences of constitutionalisation and adjudication of socio-economic rights at the national level from jurisdictions such as South Africa, India and Argentina were factored in the development of the "Optional Protocol for the International Covenant on Economic Social and Cultural Rights",[93] (Optional Protocol) providing lessons that helped to develop a stronger and more effective system at the international

[87] Hathaway op cit note 53 at 592.
[88] Hafner-Burton & Tsutsui op cit note 57.
[89] Keith op cit note 66 at 110.
[90] Hafner-Burton & Tsutsui op cit note 57; Hathaway op cit note 53 at 1940.
[91] Hathaway op cit note 48 at 593.
[92] Keith op cit note 66.
[93] UN General Assembly Resolution A/RES/63/117 (10 December 2008).

level.[94] It was considered useful to assess current trends in the legal enforcement of socio-economic rights at the national level, in order to project the impact an Optional Protocol was likely to have at the international level, and thus decide if it was a worthy option to pursue or not.[95] For the reason that victims of international human rights abuse seek remedy at the domestic level, it is important that the development of the international system be informed by the reality of the domestic context, to avoid a disconnect between the international and local spheres and ensure that confidence in international human rights is not undermined by a perception of inapplicability.[96]

Ruggie's preferred approach requiring states to take up the responsibility of ensuring that human rights violations by corporations are prevented or redressed is in keeping with international law. It has been considered a development in International Law that treaties require states to provide legal remedies for corporate violation of treaty provisions.[97] The UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights sought to create binding corporate human rights obligations at the international level, but the obligations were to be enforced under the domestic law of the states. The draft Norms stipulated that:

> States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.[98]

The proposed use of domestic laws to impose human rights obligation on companies in this instance was referred to as the "usual means of international law".[99] Examples of treaties that required domestic enforcement of its provisions include the Council of Europe Criminal Law Convention on Corruption, which requires state parties to:

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[94] Aoife Nolan 'Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland' (2014) 12(1) International *Journal of Constitutional Law* 61, 92.

[95] Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque E/CN.4/2006/WG.23/2 (30 November 2005) para 62.

[96] Nolan op cit note 94 at 92.

[97] Developments in the Law: International Criminal Law - Corporate Liability for Violations of International Human Rights Law (May, 2001) 114(7) *Harvard Law Review* 1943, 2032.

[98] Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, (26 August 2003) E/CN.4/Sub.2/2003/12/Rev.2 Article 17.

[99] D Kinley, J Nolan and N Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Companies and Securities Law Journal* 30, 31

> … adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person.[100]

The Inter American Convention against Corruption provides that:

> … each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.[101]

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides that:

> Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.[102]

The United Nations Convention against Transnational Organised Crime provides that:

> Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organised criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.[103]

Each state party was required to take measures at the domestic level to hold legal persons or corporations liable for violation of the various treaties and conventions. Although the treaties and conventions were of international character and there was a presumption that their enforcement would be at the international level, it was preferable – perhaps for the same practical reasons that Ruggie alludes to – to have enforcement at the national level.[104]

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[100] Article 18 on Corporate Liability.
[101] Article VIII on Transnational Bribery.
[102] Article 2 on Responsibility of Legal Persons.
[103] Article 10 on Liability of Legal Persons.
[104] Melba K. Wasunna, Human Dignity and Corporate Accountability for Human Rights Violations, *Kenya Law Journal*, 11 available at http://kenyalaw.org/kl/index.php?id=4524, accessed on 27 September 2015. See also Dine Janet *Companies International Trade and Human Rights* (2004) 174 where she queries whether the place of human rights should be in the international legal system owing to the absence of enforcement mechanisms in international law.

The UN Guiding Principles will apply domestic means to establish measures to hold corporations liable for violation of human rights. Ruggie offers an ideal guide for the development of the domestic jurisprudence. He offers what may be considered a timely solution that will set a more solid foundation for further developments, including the development of a treaty on business and human rights. Without sound institutions at the national level, deliberations at the international level will only be a one-sided approach to a double-faced problem and will not yield the results expected. For this reason, it could be more prudent to develop the domestic systems of enforcement before embarking on the development of a treaty, especially for a jurisdiction like Kenya, where the majority of business entities are domestic corporations.

The UN Framework and the UN Guiding Principles offer states a means to build a foundation which must be set before any effective work can be carried out at the international level. In order to prepare the state to implement treaty provisions by ensuring enforcement, reforms that aim to enhance the state's capacity to comply with human rights treaties should be considered. Such reforms include for example guidance in drafting effective legislation and crafting strategies to overcome institutional inertia and empower relevant institutions to take on monitoring or enforcement duties. These factors will better prepare states, including Kenya, to ratify treaties with the intention and capacity to improve state practices.[105]

2.4. Exhaustion of local remedies a prerequisite for recourse to enforcement at the international level

It is a rule of International Law that local remedies must be exhausted before international proceedings can be instituted.[106] In a case decided at the European Court of Human Rights on the principle of subsidiarity, the Court held that:

> …[I]n line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved insofar as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention.

[105] Hathaway op cit note 63 at 2023.
[106] *Switzerland v. United States of America* (Interhandel Case) (1959) International Court of Justice Reports, 27.

Even when the International Treaty on Business and Human Rights exists, it will be a requirement that any parties to a dispute have recourse to local remedies and exhaust them before they can take the matter to an international court. The fact that local remedies must be exhausted before recourse is had to International Law is a reason to prefer the development of a dependable domestic system of the business and human rights jurisprudence before an international treaty on the subject is sought.

Ruggie disputes the strict distinction made between voluntary and mandatory obligations, noting, for example, that even though treaties are considered mandatory, they are not so in the strict sense because in the absence of an international enforcement mechanism, no one can be forced to implement them.[107] Because there are no enforcement mechanisms for many of the international human rights instruments, International Law resorts to domestic enforcement of its obligations for treaties that have been domesticated.[108] Therefore, assuming that an international treaty for corporate human rights obligations was created, there would still be the hurdle of enforcement to deal with.

Many of the modern human rights treaties lack effective and reliable enforcement mechanisms, the most common enforcement mechanism being voluntary self-reporting.[109] The ICCPR and ICESCR require states to file periodic reports detailing their efforts to comply with the provisions of the covenants; but the recommendations of reporting committees have no legal force.[110] Under the existing mechanisms, states do not take seriously their obligation to report on progress: many have overdue reports[111] and those that submit them offer a description of domestic law rather than an analysis of the human rights record of the country.[112] Additionally, whereas the Committee can make comments on the human rights situation of a country, it cannot compel the state to act on the comments made.[113]

[107] Professor John G. Ruggie Opening Statement to UK Parliament Joint Committee on Human Rights. Special Representative of the UN Secretary-General for Business and Human Rights London, (3 June 2009), 2
[108] Goldsmith and Posner op cit note 80.
[109] Hathaway op cit note 53 at 2023.
[110] Goldsmith and Posner op cit note 80.
[111] Majority of the signatories to the ICCPR have overdue reports, see *http://www.ccprcentre.org/state-reporting/overdue-reports/* accessed 16 February 2015.
[112] Goldsmith and Posner op cit note 80.
[113] Keith op cit note 66 at 754.

Noting the shortcomings of international law, Ruggie expressed uncertainty about the efficiency of any attempt at enforcement at the international level.[114] In his view, the proposal of an international court for business entities is not realistic in the near future.[115] Yet enforcement mechanisms are essential, to mete out punishment to violators, and procure redress to the victims, addressing the violating actions in the bid to ensure rights are upheld. If no such mechanism exists or can be created for business and human rights, it may be too optimistic to expect much from an international treaty in terms of timely remedy for victims of corporate abuse.

2.5. Other criticisms leveled against Ruggie in the research and deliberations leading up to the UN Framework and Guiding Principles

2.5.1. Lack of consensus

Some critics say that there was a lack of tolerance for opposing views in the process and disregard has consequently been shown for the apparent 'consensus' that characterised Ruggie's deliberations throughout the consultations, drafting and adoption of his findings.[116] If this criticism holds any water, the uncritical adoption of the UN Guiding Principles could be seen as undermining the legitimacy of his findings and proposals and the entire process that resulted in them. In the view of some, the 'consensus' proposition is seen as part of Ruggie's vocabulary,[117] and a fact that leads to self-legitimisation of the outcome.[118] Surya Deva argues that there should have been a 'piercing of the "façade" of consensus', a going against this 'coalition of the

[114] John Ruggie *Business & human rights: Treaty road not travelled* (6 May 2008) available at *http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers* accessed on 12 October 2009.
[115] Ibid.
[116] See for example David Bilchitz 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7(2) *Sur - International Journal on Human Rights* 199 at 255 et esq available at *http://www.surjournal.org/eng/conteudos/pdf/12/10.pdf*, accessed on 9 August 2014. The author is of the view that the consensus approach was seen as a way to avoid rejection of the findings should they fail to gain the approval of states and business entities or the Human Rights Commission, as happened to the UN Draft Norms.
[117] Carlos Lopez, 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) at 69-70. Lopez questions the perception of unanimous adoption of the propositions made by Ruggie, noting that although many people may have been consulted, the outcome was not (and was not intended to be) endorsed by all the stakeholders, or even a majority of them – it was the document of its author. As such the consensus alluded to was only apparent.
[118] Surya Deva, 'Treating Human Rights Lightly: A Critique of the Guiding Principles' Complicity in Undermining the Human Rights Obligations of Companies' in Deva & Bilchitz ibid at 78-104.

willing'[119] if a more robust outcome was to be arrived at. Deliberations of any kind ought to be preceded by expression of the fundamental differences that give rise to the need for the deliberations, then negotiations would follow to try and address the differences and only then can an agreement be reached, reflecting the compromises made to arrive at a given position. Ruggie's critics argue that he failed to acknowledge the differences that arose regarding the issues in discussion, he did not articulate them, neither did he acknowledge the final position taken in view of these differences; nor did he offer reasons why his choice was the preferred option.[120] However, there is evidence to the contrary of this argument.[121] There seems to be an exchange of views around Ruggie's findings at all stages, for example as documented by the Business and Human Rights Resource Centre.[122]

David Kinley notes in his description of Ruggie's work:

> Ruggie's tenure in the position has been marked by extra ordinary energy, a commendable willingness to engage and openness to debate; a determination to find common ground and move off that which has been 'poisoned'; and a prodigious output of well-researched, succinct and readable reports and papers.[123]

A record of consultation meeting reports, including responses to the various outputs delivered by Ruggie are kept by the Business and Human Rights Resource Centre, in support of Kinley's view.[124]

Ruggie adopted a consensus approach to arrive at the UN Guiding Principles, taking a clear turn away from the means that had been applied in previous failed attempts to create human rights

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[119] Ibid.
[120] Ibid at 81.
[121] See for example the opposition to the Guiding Principles by Amnesty International (See 'Amnesty International attacks draft Ruggie human rights standards' available at *http://www.businessrespect.net/page.php?Story_ID=2658* accessed on 16/5/2012. Ruggie responded in a letter "Bizarre response by human rights groups to UN framework plan" giving reasons why the opposition was unfounded and not in the best interests of those it sought to speak for. Article available at *http://www.ft.com/intl/cms/s/0/629fbcd0-2361-11e0-8389-00144feab49a.html#axzz1v2sgH5w5*, accessed on 4 August 2014.
[122] See*http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010/Reportstatements,* accessed on 20 February 2014.
[123] David Kinley *Civilizing Globalization: Human Rights and the Global Economy* (2009) 197
[124] See *http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010/Reportstatements*, accessed on 5 August 2014. In an Inter-active Dialogue with the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, for example, Amnesty International voice their dissatisfaction with the UN Framework. In this regard, see the array of documents filed in the website under 'Responses & commentary - NGOs, experts & business groups'.

obligations for corporations.[125] As an initiative, Ruggie's work stood out compared to the previous initiatives around business and human rights because it was more inclusive;[126] he held consultations with numerous stakeholders from governments, business (which otherwise would not have had a say in the Human Rights Council[127]) and civil society thus resulting in an output representative of the views and wishes of a broad spectrum of interested parties and therefore more likely to be accepted. Ruggie's work was characterised by continued support by the Council, and the Guiding Principles were eventually unanimously adopted by the Council in June 2011, thus giving them legitimacy.[128]

Ruggie's approach has been praised and criticised in the same breath: criticised on the basis that arriving at a consensus could have demanded too much compromise in view of the differences between the negotiating states, that it would consequently undermine the agreement reached;[129] it was praised on the basis that it 'prizes dialogue and agreement over ambition'[130] thereby presenting practical solutions that can be applied in the present.

Ruggie explains that at the time of starting any treaty negotiations a minimum consensus, one that went beyond the mere acknowledgement of the existence of a problem, was needed among states. This, in his view, was missing on the subject of human rights and business, hence

[125] The UN Norms sought to impose direct obligations on corporations.

[126] Human Rights Resolution 2005/69 para 3 states: "The Commission on Human Rights… (3) Requests the Special Representative, in carrying out the above mandate, to liaise closely with the Special Adviser to the Secretary-General for the Global Compact and to consult on an ongoing basis with all stakeholders, including states, the Global Compact, international and regional organizations such as the International Labour Organization, the United Nations Conference on Trade and Development, the United Nations Environment Programme and the Organization for Economic Co-operation and Development, transnational corporations and other business enterprises, and civil society, including employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations."

[127] Karin Buhmann 'Navigating from 'train wreck' to being 'welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework' in Deva & Bilchitz op cit note 117 at 57.

[128] The Human Rights Council is tasked with the unique role of providing global leadership in human rights under its mandate to promote 'universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner'. (General Assembly Resolution A/RES/60/251) The Council seeks to promote human rights education and learning as well as advisory services, and serves as a forum for dialogue on thematic issues on all human rights, as it did in deliberating on Ruggie's work and findings. (A/RES/60/251 Resolution adopted by the General Assembly Human Rights Council (3 April 2006) Para 5(b)) The Council is further mandated to promote the full implementation of human rights obligations undertaken by states. Its role in taking forward the business and human rights debate is therefore of utmost importance. The activities leading up to the Guiding Principles through a process managed by the Human Rights Council adds to their authoritative status. (Nolan op cit note 27 at 158) Before the Norms, the Draft Code developed in 1990 following almost two decades' work was rejected by the Council. The Norms were the work of a group of independent experts and as such they would not have been binding, even if they were accepted. See Knox op cit note 31.

[129] See David Bilchitz 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7(2) *Sur - International Journal on Human Rights* 199 at 216 available at *http://www.surjournal.org/eng/conteudos/pdf/12/10.pdf*, accessed on 17 December 2014.

[130] Nolan op cit note 27 at 161.

his preferred approach.[131] Faced with the problem of failure of corporations to respect, promote or uphold human rights, a tempting solution is to fix this problem by drafting better rules, creating internationally binding obligations against corporations and building modern bureaucratic institutions to enforce them, perhaps an international court to enforce the corporate obligations created.[132] This may be perceived as a shortcut to attaining the desired end, but it may be more preferable to begin with dialogue within states involving all the different players, then among states. Dialogue over issues arising will generate concern and procure commitment from the deliberating parties; a result will be agreement on principles which can then build onto further agreement on rules and a commitment to enforce the rules.[133] Ruggie subscribes to this line of thought, while his critics propose the reverse, creation of rules and then working towards a consensus on them. Whereas the same end may ultimately be reached, this research proposes a preference for the former, beginning with a dialogue and an effort to build consensus among the different stakeholders, then building on that to generate a binding agreement.

The subject of business and human rights is a relatively new field where more questions are asked than answers given to the meaning of concepts and procedures. Development of a human rights respecting corporate culture at the domestic level is therefore important as it will create common ground for any solid progress in the business and human rights field; corporations must appreciate the role that they have to play, taking it as an obligation they must fulfill not if they can, but always; knowing what is expected of them and how they are to bring it about. States on their part must also appreciate their obligation to facilitate and ensure that corporations understand and uphold human rights. States should be able to hold corporations accountable if they fail in this task, and know the means they can apply to attain this end. Any agreement about what the duty to uphold human rights means, and what it entails, must be preceded by discussions among states which also requires a certain level of harmony of thoughts among the negotiating parties. It seems more rational therefore to begin by creating consensus as a foundation for any further progress at the international level. The UN Framework and Guiding Principles will go a long way in creating this consensus within and among states, building a solid foundation for the negotiation of a treaty.

[131] John Ruggie 'Business & human rights: Treaty road not travelled' (6 May 2008) *Ethical Corp*. 43. Penelope Simons, a critic of Ruggie acknowledges this fact; see Penelope Simons op cit note 6 at 41.
[132] See Adler and Woolcock op cit note 84 at 184.
[133] Ibid.

2.5.2. The UN Guiding Principles re-state the obvious

In his 2005 HRC Mandate, Ruggie was asked to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.[134] In his findings, he noted that direct corporate human rights standards did not really exist. In law, human rights obliges only states – only states can be held accountable for violations and individuals were liable only for grievous crimes.[135] Direct human rights obligations for business do not exist in International Law for all human rights, but they are nonetheless guaranteed indirectly through the state.[136] International law, awake to reality of corporate violation, holds them accountable indirectly through the state. The conventions of the UN on human rights and the comments of the UN interpreting international conventions impose the blame for violations of human rights on the state on behalf of third parties (such as business entities) thereby in turn conferring on the state the obligation to ensure that private persons within their territory respect and do not violate or contribute to the violation of human rights. The UN Guiding Principles are thus criticised for re-stating what already exists and Ruggie's point of departure that corporations did not have obligations in International Law is argued to be inaccurate.[137]

As some argue for an international system of corporate obligations for human rights,[138] others opine that engagement with business on the issue of human rights does not give rise to new obligations unknown in international law.[139] David Bilchitz, says that it is incorrect for

[134] Human Rights Resolution 2005/69, 1(a).

[135] Human Rights Council Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (22 February 2006) E/CN.4/2006/97. [Ruggie Report 2006] para 60. Other authors also express this view. See John Christopher Anderson 'Respecting Human Rights: Multinational Corporations Strike Out' (2000) 2(3) *University of Pennsylvania Journal of Labour and Employment Law* 463 at 468.

[136] Rein A Mullerson 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990) *European Journal of International Law* 33, 36. See also Wasunna, op cit note 104 at 11.

[137] David Bilchitz'A chasm between 'is' and 'ought'? A Critique of the Normative Foundations of the SRSG'S Framework and Guiding Principles' in Deva & Bilchitz op cit note 117 at 108.

[138] For example as presented in the UN Draft Norms.

[139] The UDHR is proclaimed "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms". In making this proclamation, the UDHR provides for private duties, ie human rights obligations owed by private parties to each other- this is unique and an exception (Knox op cit note 31.) – the treaties that come after it, the ICCPR, ICESCR, American Convention on Human Rights, the European Convention on Human Rights and Fundamental Freedoms, do not make provision for such private duties, arguably to avoid the possible mistaken implication that human rights are mere interests to be balanced off against duties owed. If this view is accepted, one sees indeed that corporate obligation for human rights has existed for longer than seems to be acknowledged.

Ruggie to argue that corporations have no human rights obligations in International Law because, in any case, these would effectively exist by extension of the State Duty to Protect.[140] He argues that "this [the duty of states to ensure that the rights of individuals are not violated by third parties] is an essential component of the uncontroversial duty to protect which Ruggie embraces as one prong of his framework."[141]

It will be noted that Ruggie does indeed make this very observation, contrary to the above criticism. As he progresses with his work and takes it to completion, Ruggie holds the view that international standards for corporations are not necessary because they follow from states' international obligations to regulate and adjudicate human rights generally, including the behaviour of non-state actors.[142] In my view, Ruggie acknowledges the existing obligations of corporations in International Law right from the beginning of his work. In his 2007 Report, he says that "The regional human rights systems also affirm the state duty to protect against non-state abuse, and establish similar correlative state requirements to regulate and adjudicate corporate acts".[143] He goes on to say that "the increasing focus on protection against corporate abuse by the UN treaty bodies and regional mechanisms indicates growing concern that states either do not fully understand or are not always able or willing to fulfill this duty"[144] therefore necessitating the elaboration of these duties as he set out to do. He says that *'states are not the only duty bearers under international law'*[145] (emphasis added) and he proceeds to acknowledge that there has been an evolution from the initial state-only-liability thinking and notes that 'long-

[140] Bilchitz op cit note 137 at 111.
[141] Ibid.
[142] Buhmann op cit note 127 at 52. In her analysis, the point Ruggie makes is that international standards are not needed because states are already bound and because of the horizontal aspect of states' obligations under international human rights law, business entities will also be bound. This conclusion would be in tandem with the UDHR which provides in its preamble that its language 'proclaims as a common standard of achievement for the promotion of respect for rights and freedoms by all peoples including every organ of society…' In envisioning "the right to an effective remedy by competent national tribunals for violations of rights provided by law whether the violation is done by states or other actors" (Article 8), the UDHR clearly considers that state duty involves the duty to ensure that violations are not committed by other non-state actors.
[143] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie "Business and human rights: mapping international standards of responsibility and accountability for corporate acts"' (19 February 2007) A/HRC/4/35 [Ruggie Report 2007] para 16. See also Nsongurua Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105 at 13 where the author observes that under the African Charter for Peoples and Human Rights, 'a state's culpability for human rights violations extends to all individuals and entities within its jurisdiction. Therefore, the duty of protection mandates that states ensure that their laws render illegal any conduct that would be in breach of the treaty, whether or not the conduct is committed by the government or by a private entity.'
[144] Ruggie Report, ibid para 16.
[145] Ibid para 19.

standing doctrinal arguments over whether corporations could be subjects of International Law were beginning to yield new realities'.[146]

Ruggie further noted that because corporations had certain rights under bilateral investment treaties, and owing to the fact that they were subject to duties under several liability conventions dealing with environmental pollution, it was more difficult to maintain the initial position that corporations should not be held liable for breach of responsibilities in other areas of international law.[147] Such observations clearly made and reflected throughout his work are quite contrary to the allegations that he fails to acknowledge the existing human rights obligations of corporations. The point that Ruggie makes, which in my view is valid, is that with the possible exception of certain war crimes and crimes against humanity, there are no *generally accepted* international legal principles that bind corporations directly.[148]

The distinction being made here seems to be between direct and indirect obligations. The contention in my view is whether it is even advisable that corporations have direct human rights obligations owing to the difficulties that will be encountered in enforcing them. Ruggie grapples with the question whether the entire body of human rights obligations applies to corporations.[149] He came to a negative conclusion: the entire body of human rights obligations did not apply to corporations as human rights instruments generally did not impose direct legal obligations on corporations. International Law supports Ruggie's position; it distinguishes between direct and indirect obligations for human rights.[150]

The duty of the state to ensure that corporate violation of human rights can thus be found along a continuum. For a majority of corporate obligations, international instruments merely require states to ensure corporations do not violate human rights – but they do not state what

[146] Ibid para 20.
[147] Ibid.
[148] Ruggie Report 2006 op cit note 135 para 60: 'The Norms are said merely to "reflect" and "restate" international legal principles applicable to business with regard to human rights. At the same time, they are also said to be the first such initiative at the international level that is "non-voluntary" in nature, and thus in some sense directly binding on corporations. But taken literally, the two claims cannot both be correct. If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so.' Other authors also express this view. See Anderson op cit note 135 at 468. Currently no clear affirmative legal duty exists.
[149] Knox op cit note 31.
[150] Ibid.

states should do to achieve this end.[151] For another category of corporate obligations, treaty bodies or regional tribunals can be required to interpret the duty of the state, and to say how it should ensure corporations do not violate human rights; decisions of these tribunals and treaty bodies are then endorsed by the UN General Assembly. In elaborating on the nature of state duty implied in the instruments, the UN Committee on Economic, Social and Cultural Rights (ECOSOC or the Committee) directs states to use legal or political means to respect the enjoyment of the right to health and to prevent *third parties* from violating the right to health in other countries.[152] In the same General Comment the Committee attributes violation of the obligation to protect to the failure of the state to prevent infringement of the right by third parties.[153] In General Comment Number 15, the Committee enjoins states to prevent abuse of the right to water by both citizens *and companies*.[154] There is a direct obligation on corporations for a much smaller category of human right violations - for grievous crimes, for example, genocide, war crimes, crimes of aggression and crimes against humanity.[155] Ultimately, International Law contemplates more duties for corporations than it specifies, and it specifies more duties than it enforces.[156]

In most instances, corporations are considered nationals of their state of incorporation, or where they conduct their main business, and therefore expected to rely on their government for protection, having no direct access to International Law for protection of their rights.[157] In other circumstances however, a more direct link between corporations and International Law may be drawn. If contractual relations involve the state on the one hand, and the corporation on the other, for example for the exploration of natural resources, because the corporation performs activities that impact the state or more than one state, and because the contractual relations may expressly be governed by International Law – if the provisions of the agreement so stipulate, the private corporation may be regarded as possessing a measure of international personality, and

[151] Ibid. The obligation of states here is obligation of conduct, not result; see Human Rights Council 'Protect, Respect and Remedy: A Framework for Business and Human Rights, 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) [Ruggie Report 2008] para 14.
[152] General Comment No.14 para 39.
[153] Ibid para 51.
[154] Paragraph 33.
[155] Article 5 of the Rome Statute of the International Criminal Court.
[156] Knox op cit note 31.
[157] Wolfgang Friedmann, Olive J Lissitzyn & Richard C Pugh *International Law Cases and Materials* (1969) 216.

therefore subjects of international law.[158] Whatever duties corporations have cannot be identical to state obligation for human rights, yet it is only states that are accorded this direct obligation as set out in the treaties that contain them. What Ruggie means, therefore, is that no obligations exist for corporations as do for states, at least not framed in a clear and universally acceptable manner.[159] Whereas state duties are enforceable and have been so for a long time, corporations have not been considered subjects of International Law in a similar manner.[160]

2.5.3. Use of vague terminology

In undertaking the task of fulfilling the mandate given to him, Ruggie faced a difficult situation: he could not create direct legal obligations of corporations for International Law (as the Norms – which he outrightly rejected - tried to) but at the same time he needed to come up with obligations that have a real impact.[161] What was expected in essence was a treaty, but not like the Norms. In Pillar 2 and 3, Ruggie deals with this problem by attempting to balance between avoiding overstating the corporate obligation on the one hand and allowing corporations to violate rights with impunity on the other, because they had unenforceable obligations. He thus crafted the corporate obligation as societal expectations as opposed to binding obligations as the Norms had done, and then proposed ways of making corporations aware of the potential legal costs of violating the Guiding Principles, in the hope that this would deter them from committing violations.

It has been argued that going by the terminology he applies in the UN Framework and Guiding Principles, the law was not 'necessarily at the heart of Ruggie's framework'.[162] Ruggie is criticised for not having done substantive work in defining the corporate obligation for human

[158] Ibid.
[159] If one argues that corporation duties exist in the same manner as state duties (as David Bilchitz seems to argue; see discussion in Bilchitz op cit note 138 at 128-132), then how are they enforced? The UDHR does speak to corporate obligations but lacks the necessary enforcement mechanisms to effectively impose such a duty (Anderson op cit note 135 at 468).
[160] See generally Buhmann op cit note 127. This is the point Ruggie attempts to make where he is accused of using 'system specific' language to appeal to the different issues raised in the debate, for example, that companies cannot have international law obligations.
[161] Knox op cit note 31.
[162] International Law Society 'The Ruggie Guiding Principles on Business and Human Rights: What Do They Mean for Lawyers?' (Panel discussion, 5 July 2011) available at http://international.lawsociety.org.uk/files/Ruggie%20panel%20discussion%20summary.pdf accessed on 21 September 2013.

rights. Some aspects of Ruggie's findings extend beyond legal concerns.[163] He creates a vague responsibility to respect that is not exactly a legal obligation, continuing the ambiguity of corporate codes of conduct, which are non-binding. The Guiding Principles refer to responsibilities and not duties of corporations, giving the impression that companies have no legal duties. Robert Grabosch observes that nowhere in the Framework or Guiding Principles does Ruggie elaborate the standards of any human rights in the business context.[164] Surya Deva opines that the language of the Guiding Principles has the potential to undermine the corporate obligations for human rights.[165]

Ruggie's responsibility to respect is much under-specified; arguably not to distort the political and social status quo, which does not recognise corporate obligation for human rights, and thus stand a chance to survive.[166] Ruggie is said to have used confusing terminology, which did not exist in international law, specifically the creation of the 'protect/respect' cages in the 2008 'UN Protect Respect Remedy Framework'.[167] While he is of the view that corporations can violate all human rights, Ruggie nevertheless strongly argues for the 'protect/respect' cages which characterise the framework for business and human rights. Ruggie describes the corporate responsibility to respect as a baseline responsibility and adds that unless the companies perform certain public functions, more should not be required of them in terms of human rights obligations.[168] In essence therefore, he places no limitations on the rights, but limits the respective corporate duties.[169] His position implies that although business entities can inflict a varied range of human rights violations, they have the corresponding duty only to respect and not more. This gives the impression that the obligation required of business entities is much less

[163] Knox op cit note 31.

[164] Robert Grabosch SRSG John Ruggie's Draft Guiding Principles for the implementation of the United Nations 'protect, respect, and remedy framework' (27 January 2011) *Position Paper of the European Center for Constitutional and Human Rights* at 19.

[165] See Deva op cit note 118 at 94, and generally his discussion of the casual use of human rights terminology at 91-8.

[166] Haines Fiona, Macdonald Kate & Balaton-Chrimes Samantha 'Contextualizing the business responsibility to respect: How much is lost in translation?' in Radu Mares (ed) *The UN Guiding Principles on Business and Human Rights: Foundations and implementation* (2011) 107-128(19).

[167] Response of Surya Deva and David Bilchitz to Comments of Professor John Ruggie on 'Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?' (15 January 2014).

[168] Human Rights Council 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13 [Ruggie Report 2009] para 61-65.

[169] Florian Wettstein 'Making Noise about Silent Complicity: The Moral Inconsistency of the "Protect, Respect, and Remedy Framework' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) at 245.

compared to the harm they can cause, thereby implying that they can do whatever they want to do.

Ruggie defines the responsibility to respect as comprising responsibility to 'avoid causing or contributing to adverse human rights impacts' and to 'seek to prevent or mitigate adverse human rights impacts'.[170] Ruggie's efforts to distinguish between the obligations of corporations and those of states led him to use language that can leave room for corporations to get away with not fulfilling anticipated responsibilities. "Duty" is considered obligatory, while "responsibility" is voluntary, thereby implying that the duty of the state is obligatory, while that of corporations is not.[171]

However, if one agrees that International Law does not as yet impose direct obligations on companies, then Ruggie's distinction between duty and responsibility is indeed valid. In his 2010 report, Ruggie says that:

> The term "responsibility" to respect, rather than "duty", is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies.[172]

He thus gives the term 'responsibility' a very specific meaning, which, if accepted, may justify the distinction he creates between state and corporate obligations for human rights, implying that states have a legal obligation whereas the obligation of corporations is only a moral or social one.[173] He goes on to clarify that 'respect' does not only imply a negative duty as the critics interpret it, but rather include positive implications as those that require the business entity to "undertake human rights due diligence to become aware of, prevent and address adverse human rights impacts" which in reality would entail positive acts such as integrating human rights policies throughout company operations.[174]

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[170] Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 [UN Guiding Principles] 14(13).
[171] UN General Assembly Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (10 July 2015) (Draft) para 68.
[172] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' (9 April 2010) A/HRC/14/27 [Ruggie Report 2010], 12 (55).
[173] Robert McCorquodale 'Corporate Social Responsibility and International Human Rights Law' (2009) 87(2) *Journal of Business Ethics* 385, 391.
[174] Ruggie Report 2010 op cit note 172 para 59.

To add to the confusion and difficulty in giving meaning to the duty defined by Ruggie, the UN Guiding Principles are proposed not to be applied as a one-size-fits-all framework, but rather in context-specific circumstances.[175] Yet again in the same breadth, the responsibility to respect human rights applies to all entities irrespective of size, sector, operational context, ownership or structure.[176] The responsibility to respect contemplated is universal, and at the same time modifiable to be applicable to different contexts. The leeway given to states to tailor the responsibility to respect to suit particular entities can be used to reduce the impact of the responsibility and it could easily translate into a lesser obligation for one entity compared to another.[177] Additionally, insistence on a universal standard that applies to all entities regardless of context can be seen as an imposition of western ideas, a propagation of 'colonial imperialism' resulting in measures that are far removed from the local reality.[178] This can lead to resistance to the Guiding Principles or subsequent entity-specific regulations by local corporations.

Although the vagueness is criticised, it has its advantages, which justify the approach chosen by Ruggie. The flexibility offered by the context-specific application of the Guiding Principles will make the burden of compliance bearable on the business entities concerned. Sensitivity to the operating context of the different business entities is important to determine how businesses connect with communities.[179] This knowledge will be invaluable in undertaking the human rights due diligence, analysing the corporation's operations to foresee any likely negative human rights impact on the stakeholders, in order to put in place preventive or mitigating measures in good time.

The universal applicability of the Guiding Principles follows from the universal nature of human rights, and the nature of business entities, which, being similar, presumes the capacity to violate human rights by all entities. But, as shown above, the well-meaning duty to contextualise the operations of the Guiding Principles, is necessary if the responsibility to respect were to be practical. However, what is lacking is clear procedural guidelines necessary to translate the general principles of the responsibility to respect into every day operational context.[180]

[175] UN Guiding Principles op cit note 2 para 15.
[176] Ibid at 14.
[177] Haines et al op cit note 166.
[178] Ibid.
[179] Ibid at (4).
[180] Haines et al op cit note 166 at 7.

Another criticism seen as Ruggie's invention is his replacement of the 'violation' language typical in human rights discourse with 'risk' and 'impact' mitigation - this has the potential to undermine the value of human rights.[181] The risks normally considered by business entities in the usual course of their operations are risks to the business, to profits or production, but human rights risks are risks to the right holders. Because it involves individuals who are owed rights, anticipating and mitigating against human rights risks cannot be simply a calculation of probabilities to the business; effort must be made *not* to confuse the contexts by ensuring engagement and communication with persons, victims of corporate violations of human rights.[182]

While some make this distinction between direct and indirect obligations, others still argue against the notion of internationally accepted human rights standards for business. Steven Ratner notes:

> To the extent that one contemplates recognising in law a large number of duties on entities other than the State, one has potentially asked International Law to do too much and ignored the expectation that states should enjoy the prerogative to regulate most areas of private conduct on their territory.[183]

In apparent support of this notion, Ruggie says in his Report that '[w]hile corporations may be considered "organs of society", they are specialised economic organs, not democratic public interest institutions and as such, their responsibilities cannot and should not simply mirror the duties of states.[184] The effort to distinguish the obligations of the state and corporations give rise to the need for the different terminology that Ruggie uses in his findings.

2.6. Conclusion

If Ruggie has not proposed binding corporate obligations for human rights thus taking the argument beyond mere expectation, what has his work contributed to the debate on business and human rights? Did he succeed in advancing the debate? Yes he has. The fact that Ruggie does not offer any uniquely novel solution is no reason to undermine the usefulness of his work.

[181] See Deva, op cit note 118 at 91-8.
[182] Ibid at 17.
[183] Steven R. Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2002)111 *Yale Law Journal* 443, 466.
[184] Ruggie Report 2008 op cit note 151, 16. These duties of states include that of promoting and protecting human rights.

Where other attempts stopped at merely stating that corporations have human rights obligations, Ruggie went ahead to specify the state and corporate duties, to expound on them and propose ways of making them accountable for violation of those rights by offering remedies for corporate violations.[185]

Despite the existence of the state duty to protect, the different policy options the state can employ to fulfill this duty with respect to business activities are not clear.[186] Ruggie's work has sought to "elaborate on the implications of existing standards and integrate them into a comprehensive template to be applied in different national contexts and for business entities of different sizes as each state or corporation would deem appropriate".[187] This view responds well to the criticism against the Draft Norms: that they were designed to take away the attention and resources necessary to improve the capacity of states to implement their human rights laws by attempting to place direct obligations on corporations.[188] The UN Framework and Guidelines are addressed to corporations, and states, offering guidance on understanding the obligations of each in the task of promoting human rights. If domestic mechanisms were well developed and able to handle the human rights grievances brought before them, there would be no need to escalate the problem to the international level. Further, if the Guiding Principles are effectively implemented, the need for a treaty may be diminished.[189]

Because International Law mostly depends on the domestic jurisdiction for enforcement, it is important to have a well-developed domestic law jurisprudence on the subject of business and human rights. Additionally, because the human rights and business jurisprudence is an emerging one, and in view of the fact that not much has been achieved in the effort to regulate this area even within states, it would be more important to consider what could be done presently while more lasting solutions are sought and evaluated. There is more to gain by focusing in the present, giving meaning to corporate obligations at the state and corporate level, creating

[185] Knox op cit note 31.
[186] Ruggie Report 2008 op cit note 151, 27.
[187] UN Guiding Principles op cit note 2 at 5(13-4).
[188] Response of United States Council for International Business (USCIB) to the Draft Norms, available at *http://www.coc-runder-tisch.de/inhalte/texte_grundlagen/tk_news_TALKING_POINTS.htm*, accessed on 31 May 2012. 'We believe that, while well intentioned, this approach would be counterproductive because it risks undermining the resources and attention necessary to improve the capacity of national governments to implement and enforce their existing human rights laws, with which all companies – foreign or domestic, local or global – must already comply. It would also shift the focus away from some of the worst cases of human rights and labour abuses that take place in local economies.'
[189] Knox op cit note 31.

consistent state practice, and moving on to seeking consensus at the international level later, when substantive progress has been made at the domestic level to agree on this relatively novel concept of business and human rights.[190] With the negotiations of a treaty on business and human rights now underway, and the attendant difficulties now more perceptible,[191] the UN Framework and Guiding Principle remain a concrete tool that can be applied in the present to advance the business and human rights deliberations, making corporate respect for human rights a practical concern for states and corporations, pending the ultimate conclusion of the treaty.[192]

[190] Customary international law, which is an alternative means for international law, can find its way into domestic laws, arising from a subjective interpretation of consistent state practice and is accompanied by a sense of obligation on the part of the state to adopt given practices.
[191] The OEIWG held its first session July 6-10 2015. See UN General Assembly (Draft) Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (10 July 2015).
[192] See approvals of the Guiding Principles by different panellists at the OEIWG's first session, ibid.

CHAPTER THREE

3. THE HUMAN RIGHTS OBLIGATIONS OF CORPORATIONS UNDER THE 2010 CONSTITUTION OF KENYA

3.1. Introduction

The promulgation of the 2010 Constitution in Kenya came at the same time as the Special Representative of the Secretary General of the UN on the question of Business and Human Rights, John Ruggie, was finalising his mandate and proposing the way forward in the debate on business and human rights. The traditional form of constitutions distinguish between governments and private persons, the former being bound by the Bill of Rights and the latter free to do what they willed, on the basis that the power of government to regulate them is limited by the Bill of Rights .[1] The 2010 Constitution moves away from the traditional application of the constitution to the public sphere by making provision for a horizontal application of the Bill of Rights to incorporated or unincorporated juristic persons. Because it binds juristic persons, the 2010 Constitution of Kenya is expected to have an important impact on the relationship between business and human rights.

This chapter will query the traditional perception that constitutions and bills of rights are written for states only.[2] It will attempt to situate the Constitution of Kenya within the possible frameworks of horizontal models, and assess what benefits would accrue by adopting the interpretation most likely to be adopted in applying the Constitution to non-state actors such as business entities. The discussion on horizontality focuses on the South African model because it is on this model that the Kenyan Constitution is most closely mirrored. Decisions made by South African courts on interpretation of the horizontality provisions are reviewed with the aim of gleaning possible lessons that the Kenyan courts can apply in interpreting the relevant provisions of the Constitution.

[1] Mark Tushnet (ed) *Constitutional law* (1992).

[2] Although it is acknowledged that one definition of a Constitution or its purpose does not exist, it is noted that the initial idea of a constitution was a contract between the state and the people. For those who did not believe in natural law, constitutions formed the contractual basis of the social contract between the citizens and the state; the constitution provided the rights and obligations of the citizens. Those who believed natural law also believed in the constitution government existed as a mechanism for enforcing the substance of natural laws. See Ian Loveland *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (5ed) (2009) ch 1 on Defining the Constitution, 7-10.

3.2. The place of International Law in light of the 2010 Constitution

After the end of colonisation and cessation of the numerous inequalities that the system propagated, the nation state emerged as the new social and political group, a sovereign entity separate from the colonial states, and with it came the view that individual rights were given by the state, which could, when it so desired and at its wish, curtail the rights and freedoms for what it perceived as the greater good of the group or state.[3] Before 2010, the constitution which had been in force since independence provided for a limited set of human rights, all of them civil and political rights. Chapter Five of the old Constitution made provision for the rights to life and personal liberty; it provided for freedom from slavery, forced labour, inhuman treatment, deprivation from property, freedom of conscience, expression, assembly and association, freedom of movement and protection against arbitrary search and entry and discrimination.[4] By providing for a limited set of rights, the old constitution implicitly gave the state discretion with regard to human rights, presumably giving greater importance to the enumerated rights and freedoms, thus giving the wrong perception of human rights as something the state can choose to grant or withhold. With such an understanding, human rights in the emerging states of the Third World did not have the meaning they had in the western countries where they embodied the notions of inalienability and individuality.[5]

The 2010 Constitution of Kenya is hailed as being one of the most progressive in Africa as pertains the subject of human rights.[6] As one human rights activist noted in the deliberations leading up to the 2010 Constitution, with the new Constitution, the state would henceforth not pretend to give rights (as it presumably did in the numerous cases of political detentions and other human rights-infringing actions it perpetrated under previous political regimes), but would now secure and protect the rights elaborately outlined in the new Bill of Rights .[7] The 2010 Constitution categorically states that rights and fundamental freedoms 'belong to each individual and are not granted by the State'.[8] The Bill of Rights is said to bind all persons,[9] including

[3] Adamantia Pollis & Peter Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1979) 9.
[4] Chapter 5 of the Constitution of Kenya, Revised edition 2008 (2001)
[5] Ibid
[6] UNDP Report on Translating Kenya's rights-based Constitution, 5. See also 'Commission for the Implementation of the Constitution of Kenya: Quarterly Report for October to December 2012' 5.
[7] Njoki Ndung'u 'Overview of Changes of the Proposed Constitution', presentation at Business Leaders Forum on the Proposed Constitution (1 July 2010) See Summary Report at 11.
[8] Article 19(3)(a).

juristic persons, departing from the general position that constitutions are generally enforceable only against the state,[10] implying an appreciation of the changing circumstances where the public-private divide is somewhat blurred.

It is envisioned that the Bill of Rights will offer a framework for development of government policies on economic, social and cultural matters.[11] It covers a list of civil and political rights, and economic, social and cultural rights all clearly enumerated.[12] The Bill of Rights goes beyond the rights listed and will include those rights not in the Bill but which are recognised and conferred by law.[13]

International human rights perform an important task of filling in the gaps in domestic bills of rights, if they do not exist at all, or if they are inadequate: it substitutes the domestic Bill of Rights .[14] However, in places where a written constitution exists and where it provides for all the human rights that are found in international law, and where it further provides for a horizontal application of the bill to non-state actors, International Law plays no 'non-duplicative' function and may be seen to be superfluous.[15] The advantage of International Law over constitutional law would be that International Law binds states acting beyond their jurisdiction, but even then, much depends on the treaty language and whether it makes provision for such an interpretation.[16]

The constitutional Bill of Rights is similar to the international Bill of Rights because both protect the fundamental rights of citizens. The Constitution of Kenya makes provision for both civil and political rights, and economic, social and cultural rights, as is provided in International Law in the two main human rights instruments, the ICCPR and the ICESCR. The 2010 Constitution goes further to clarify that the rights and freedoms enumerated in the Constitution

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[9] Article 260. Also see Section 3.4 below. See also the decision of the Court in the case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* para 55 deliberating on this provision.

[10] See Aoife Nolan 'Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland' (2014) 12(1) International *Journal of Constitutional Law* 61 at 65.

[11] Article 19 (1).

[12] Chapter 4 of the Constitution. The section on economic, social and cultural rights was developed with the help of experts from countries with 'strong rights-based constitutions, such as South Africa and India. See UNDP Report, 26.

[13] Article 19 (3) (b).

[14] Stephen Gardbaum 'Human Rights as International Constitutional Rights' (2008) 19(4) *European Journal of International Law* 764.

[15] Ibid.

[16] Ibid at 765

"do not exclude other rights and fundamental freedoms not in the Bill of Rights , but recognised or conferred by law…"[17] Human rights are given constitutional status to show the state's commitment to them as very important legal norms.[18]

There is also similarity in the scope of application in that although both the international and domestic bills of rights were initially intended to regulate state action, both have evolved to include non-state actors within their jurisdiction. International treaties now include non-state actors in their purview either directly, or indirectly by requiring states to ensure that non state actors do not violate or contribute to the violation of human rights.[19] Modern constitutions, including Kenya's, have evolved from an exclusive state-centred structure, or interpretation, and many are now considered to extend their jurisdiction to non-state actors through a horizontal application of the Bill of Rights, or by interpretation.

The creation of an internationally binding instrument on corporate obligations for human rights will offer direct application of human rights to corporations, much in the same way as the Bill of Rights is directly applicable to corporations. If possible at all, it is rare for there to be a conflict between a state's human rights obligations and other International Law obligations: state obligations in International Law are the same obligations if found or provided for in national laws.[20] The 2010 Constitution of Kenya might therefore render an international treaty on business and human rights gratuitous for the particular circumstances of Kenya.

3.2.1. Incorporating International Law in Kenya under the Treaty Making and Ratification Act: some practical challenges

The process of incorporating International Law into national laws will require development of national laws, the international and domestic systems being two different legal systems and therefore not allowing for an automatic or seamless translation of regulations. An interesting feature of the 2010 Constitution of Kenya is its provision for a monist state as opposed to the dualist state that existed under the old constitution.[21] Under monism, there is no need for the

[17] Article 19(3)*(b)* of the 2010 Constitution
[18] Gardbaum, op cit note 14 at 755
[19] Ibid at 749-68
[20] Ibid at 754
[21] See Chapter 1 of the 2010 Constitution which states that: (5) The general rules of international law shall form part of the law of Kenya and (6) any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. See also The International Commission of Jurists (ICJ Kenya) et al 'State of Torture and Related

explicit translation of international norms into national law.[22] This makes all the international treaties that Kenya has ratified applicable as part of its national law without the need for translation or adoption as was the case before. The monist doctrine in International Law applies two approaches; one that holds International Law to be supreme in the case of conflict with domestic law, and one that defers to domestic jurisdiction to resolve any inconsistencies.[23]

For all states, including monist states like Kenya for whom International Law forms part of domestic law without any additional special requirements, International Law does not usually dictate how they should fulfill their obligations.[24] This means that no matter what is decided at the international level, the state has to come up with norms and procedures to apply in enforcing the obligations signed on to. The Treaty Making and Ratification Act, Act 45 of 2012, (the Act) was enacted to give effect to Article 2(6) of the Constitution[25] and to provide the procedure for making and ratification of treaties. The Act recognises that International Law operates on a separate legal system from domestic law (in the same way that a dualist approach to application of International Law does), and thus makes provision for the domestication of the treaty. In view of the requirements under the Act, it is the suggestion of some that legislation by parliament be enacted and applied to harmonise the two systems.[26]

Adoption of International Law requires thought and will be better assimilated and applied to the extent that there is clarity for its application in the domestic context, taking the national circumstances and procedures into consideration. In deciding whether to ratify a treaty or not and before it is approved for ratification, the Cabinet will consider a number of issues required under the Act.[27] Upon deliberation, it may be decided that laws are required to be enacted or amended prior to

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Human Rights Violations in Kenya: Alternative Report to the Human Rights Committee to Inform its Review of Kenya's Third Periodic Report at Its 105th Session (9 - 27 July 2012) on the Implementation of the Provisions of the International Covenant on Civil and Political Rights in Relation to Torture' (June 2012) at 8.

[22] Malcolm D Evans (ed) *International Law* 3 ed (2010) 417.

[23] Antonio Cassese *International Law* (2001) 213-25.

[24] Rein A Mullerson 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990) *European Journal of International Law* 33, 40. For states that are dualist in nature, it is impossible to apply international law without the use of national laws; any international treaties ratified must be translated into national law before they can be applicable at the domestic level. For such states, failure to adopt internationally binding rules does not present a tragic obstacle in the effort to make corporations accountable for human rights.

[25] Article 2(6) states 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.

[26] Tom Kabau & Chege Njoroge, 'The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System' (2011) 44(3) *Comparative and International Law Journal of Southern Africa*, 298.

[27] Section 7. Some of the issues to be presented in the Cabinet Memorandum include: '… (e) requirements for implementation of the treaty; (f) policy and legislative considerations; (g) financial implications; … (m) the views of

ratification in order to make the treaty to be ratified clearer. Financial implications of implementing the treaty may demand its postponement to such a time as the necessary resources for implementing it will be available. Article 2(4) of the Constitution provides that any law that is inconsistent with the Constitution is invalid to the extent of the inconsistency, meaning that ratified treaties that are not consistent with the provisions of the Constitution will not be applicable. The monist doctrine contemplated in the Constitution is therefore not as direct as may be imagined but, rather, consists of a harmonisation of international and domestic law where they interact at different levels.[28]

Once approved by Cabinet, the treaty and accompanying memorandum will be submitted to parliament for ratification.[29] A parliamentary committee will be set up to review the treaty, and is expected to ensure public participation in a review of the treaty before considering it for approval.[30] The Constitution requires Parliament to conduct its business in an open manner, and facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[31] Further, the Constitution includes public participation as part of the national values and principles of governance.[32] To guarantee useful public participation in the process of considering the treaty, a number of principles can be applied including preemptive move by government and civil society to invite public participation; inclusiveness that enables all interested persons and relevant groups, including the vulnerable and marginalised, to fully participate in the deliberations; transparency that enables the process to be open to input at all stages; and respect for public input ensuring it is given due consideration.[33]

In a study carried out to evaluate local participation under the new constitutional provisions,[34] a number of challenges to public participation were identified. Citizens, especially the poor found it difficult to participate, having little personal incentive.[35] In some instances, the issues under consideration were too technical for effective following and intervention by citizens, thus

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the public on the ratification of the treaty; (n) whether the treaty sought to be ratified permits reservations and any recommendations on reservations and declarations; … (p) whether expenditure of public funds will be incurred in implementing the treaty and an estimate, where possible, of the expenditure.'

[28] Kabau & Njoroge op cit note 26, 299.

[29] Article 8.

[30] Article 8(3).

[31] Article 118.

[32] Article 10.

[33] Organisation of American States 'Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development' (2001) 4-5.

[34] The World Bank 'Six Case Studies of Local Participation in Kenya: Lessons from Local Authority Service Delivery Action Plan (LASDAP), the Constituency Development Fund (CDF) and Water Action Groups (WAGs)' (October 2013).

[35] Ibid iv.

necessitating prior training by government and civil society.[36] When it comes to participation in the assessment of international treaties, there will be need to communicate the content of the treaties and explain its implications for there to be useful deliberations about them. Additionally, effective mobilisation of the citizens for participation requires time and resources to compensate those involved in the technical and administrative work of organising the meetings. Also, for the interaction with citizens to be useful, there must be an effective way of communicating the feedback and incorporating it in the process in question.[37] The ultimate implications of the requirement of public participation is that even after the drafting of a treaty on business and human rights and its coming into force, there would still be a further road to travel before the treaty is applicable locally.

3.2.2. The position of the courts on the place of international law: jurisprudential hurdles

The Constitution of Kenya is the supreme law of the land.[38] International Law forms part of the law of the country,[39] but any law, including International Law that is inconsistent with the Constitution will be invalid to the extent of the inconsistency.[40] The text of the Constitution is ambiguous on the place of International Law in relation to the other legal norms, thus leaving it to the courts to determine what value it will have in deciding cases before them.[41] Whereas there is no denying that International Law will have a bigger role to play under the 2010 Constitution in the decision of matters touching on human rights, there is no telling what place exactly, or what priority will be given to it, owing to the different decisions arrived at by the court on the matter. The interpretation given so far has tended to underplay the role of international law, and if this view persists the place of International Law will effectively be relegated to a lower rather

[36] Ibid v.
[37] Ibid vi.
[38] Article 2 of the Constitution. If a state constitution makes provision for a given issue, international law cannot be applied to override what the constitution says – see Ralph G Steinhardt 'The Role of International Law as a Cannon of Domestic Construction' (1990) *Vanderbilt Law Review* 43 (4) 1103, 1104. In the United States, for example, where international law may be applied without need to show proof of acceptance of a rule of international law into domestic legislation, in the case of conflicting international law and domestic legislation, courts will apply the latter – see Wolfgang Friedmann, Olive J Lissitzyn & Richard C Pugh *International Law: Cases and Materials* (1969). 101. It will be noted that despite the prevalence of domestic law, general or ambiguous words will be interpreted to give effect to international law.
[39] Article 2(5) and (6).
[40] Article 2(4) of the Constitution.
[41] See discussions in Section 1.5 in Chapter 1 above.

than higher plane as would have been imagined should be the intention of the drafters of the 2010 Constitution.[42]

Article 2(6) of the Constitution provides for the application of International Law in Kenya. Owing to the inconsistent decisions by the courts on the interpretation of this provision, it is not very clear what attitude the courts will adopt in applying International Law to cases before them. This lack of a consistent interpretation would seem to suggest further development of the jurisprudence before International Law can be meaningfully integrated into the domestic law. Without clear jurisprudence on the topic, which is lacking owing to the very recent application of the Constitution, and without legislation to explain the international obligations, there is a likelihood that different courts will arrive at different interpretations. A few cases decided on the question of applicability of International Law domestically are illustrative of the different conclusions that may be arrived at.

The petitioners in the case of *Beatrice Wanjiku & another v Attorney General & another*[43] claimed that because Kenya had ratified the International Covenant on Civil and Political Rights which disallows civil jail for matters whose cause of action arises from contractual obligations, they were entitled to a declaration that civil jail for debtors violates, infringes or threatens rights and fundamental freedoms provided for in the Constitution and human rights conventions.[44] The judge in this case was of the view that under Article 2(6) of the Constitution, international treaties and conventions were subordinate to the Constitution and even subordinate to parliamentary legislation on grounds that these laws were made by the democratically elected representatives of the people. In the judge's view, "a contrary interpretation would put the Executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional set up".[45]

The court's decision in this case made reference to similar cases previously decided which had arrived at different conclusions. In *Re Zipporah Wambui Mathara*,[46]a case decided after the 2010 Constitution came into force, the debtor was committed to jail for failing to settle a debt, and brought a petition claiming that under Article 2(6) of the Constitution the ICCPR was

[42] See Maurice Oduor, 'The Status of International Law in Kenya' (2014) 2(2) *Africa Nazarene University Law Journal* 114.
[43] [2012] eKLR.
[44] Paragraph 1.
[45] Wanjiku, supra note 43 para 20.
[46] 2010] eKLR.

applicable as part of the laws of Kenya, and it provides that no one shall be imprisoned merely on ground of inability to fulfil a contractual obligation. Allowing the application of the International Law provision, the judge in this case held that:

> … by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan Law. This covenant makes provisions for the promotion and protection of human rights and recognises that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed.[47]

Reference was also made in the *Wanjiku* case to the decision in *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa*[48] where the main issue before the court was the question whether it was unconstitutional to commit a debtor to civil jail. The judge failed to find a hierarchy of applicable laws when International Law was in conflict with domestic law. The judge in this case said:

> In my view, Article 11 of the International Convention on Civil and Political Rights cannot rank *pari passu* with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of section 40 of the Civil Procedure Act. Nor for that matter, can it render section 40 unconstitutional. For that reason for as long as section 40 remains in the statute Book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts. Since however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other.[49]

Failure of the Constitution to outline a hierarchy of application of the different sources of law and therefore failing to give a clear position to International Law *vis-a-vis* domestic laws has created a problem of applicability, leading to the differences in views as expressed in the court decisions highlighted above. The Diamond Trust case thus expressed no preference of either law over the other, and the *Mathara* case expressed preference for application of International Law over domestic law. Disregarding precedents that had given preference to International Law in the face of

[47] Ibid.
[48] Ibid.
[49] Ibid.

conflict, the judge in *Wanjiku* expressed preference for domestic law.[50] In the *Mathara* case, the court has been criticised for not engaging in a jurisprudence-building analysis of the relationship between International Law and local law and 'merely agreeing' that International Law was part of Kenya law and considering the question of applicable law only as *obiter*.[51] In the *Wanjiku* case, the judge expressed his view that International Law could not have been intended to be superior to national laws on the basis that the latter were made by democratically elected representatives of the people, *per incuriam*, not relying on any trite law, again failing to engage in any jurisprudence-building analysis.[52] In the *Diamond Trust* case, the judge failed to reach conclusion on the matter of hierarchy of applicability of domestic versus international law, being of the view that the court was not the proper forum to decide the matter.[53] The judge's decision in this case begs the question which forum would be ideal to determine the issue if not a court of law.

3.3. The public-private divide in constitutional application

The constitution limits the powers of the institutions it creates. Because the constitution establishes the executive, judiciary and legislature as institutions of government and makes provisions for their functioning, it ought to impose limitations on them, and these limitations should be enforceable.[54] However, the inclusion of limitations on the operation of juristic persons presents an interesting deviation from the traditional intent of constitutions; unlike the

[50] The precedence of domestic jurisdiction is favoured by leading figures in international law, such as Kelsen. See Charles Leben 'Hans Kelsen and the Advancement of International Law' (1998) 9 *European Journal of International Law*, 287.

[51] Oduor op cit note 42 at 114. In the penultimate paragraph of the Ruling, the judge moves on to offer a brief consideration of the Constitutional issues raised in the petition, saying: 'The provisions of the Constitution of Kenya 2010 was also invoked, and this ruling would not be complete without a commentary on those submissions.'

[52] In para 20 of the Judgment the Judge held: 'I take the position that the use of the phrase "under this Constitution" as used in the Article 2(6) means that the international conventions and treaties are subordinate to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94. Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional set up.'

[53] The Judge in this case held 'In the spirit of the new Constitutional order, it is more likely than not that Kenyans would prefer a system in which there is no threat of civil jails. Until a decision is taken at a proper forum, section 40 of the Civil Procedure Act will continue to haunt the liberal freedoms enshrined in the Constitution until it is repealed or found to be unconstitutional at a proper forum.'

[54] K C Wheare *Modern Constitutions* (1960/1966) 60. Wheare argues that to claim otherwise would be to reduce the business of constitution making to nonsense.

arms of government, the constitution does not create the corporate institution whose powers it seeks to limit.

In the era prior to the 2010 Constitution, the decisions of the courts show that not too much thought went into giving meaning to corporate liability for wrongs or violations of human rights by corporations in their capacity as separate legal entities. A look at the cases that touch on the issue reveals that not too much importance was given to the differences in the nature of the personality of corporations and their management or directors, and the crime of corporations was attributed to natural persons who managed the entities.[55] The general view has also been that fundamental rights and freedoms contained in the constitution are primarily available against the state because the constitution's function is to define what constitutes government and to regulate the relationship between governments and governed.[56] In the court's view, the rights or interests of individuals are taken care of in the sphere of private law and ought to be redressed as such. In a case before a Kenyan court for redress of human rights violation against a corporation the judge held that the alleged breach of duty by the appellant (a corporation) could not stand because:

> the duties imposed by the constitution under the fundamental rights provisions are owed by the government of the day to the governed. I am of the opinion that an individual or group of individuals as in this case cannot owe a duty under the fundamental rights provisions to another individual or group of individuals since no duty can be owed by an individual or group to another under the fundamental rights provisions of the constitution…[57]

In arriving at this conclusion, the court was attributing the claim against the corporate entity to the individuals entrusted with its running. If constitutional rights can only be owed by the state to the governed, then corporations or other business entities cannot be held liable for human rights violations, contrary to Ruggie's 'Corporate Duty to Respect' which envisages accountability of corporations for human rights violations.

[55] See discussion in George O Otieno Ochich 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008) *Kenya Law Report Journal* available at *http://kenyalaw.org/kl/index.php?id=1919* accessed on 5 August 2014. See discussion of these cases. In the case of *R v Rootes (Kenya) Ltd & B S Dobbs* [1958] EA 13, *EA Oil Refineries Ltd v Republic* [1981] KLR 109, and *Republic v Gachoka & another* [1999] KLR, respondents who were business entities were convicted of the charges made against them and in one instance the respondent corporation was sentenced to a jail term.
[56] *Kenya Bus Services Ltd & 2 Others vs AG* 2005 (1) KLR 787.
[57] Supra.

In the case of *Kenya Bus Services Ltd & 2 Others v AG,*[58] decided under the old constitution of Kenya, the court, having defined the Constitution as an instrument of government, held that fundamental rights and freedoms are contained in the Constitution and are primarily available against the state because the Constitution regulates the relationship between governments and governed. Noting the absence of local decisions on the matter, the Court resorted to the Trinidad and Tobago case of *Teitinnang v Ariong & Others*[59]*, which* was deemed representative of the Kenyan position. The court in that case held that the rights and duties of individuals and between individuals are regulated by private law and no remedy could be sought or given against a private individual for breach of a fundamental right. The judge in this case held:

> I am of the opinion that an individual or group of individuals as in this case cannot owe a duty under the fundamental rights provisions to another individual or group of individuals since no duty can be owed by an individual or group to another under the fundamental rights provisions of the constitution.[60]

The court's decision in this case reflects the understanding of the constitution as being applicable only to violations by the state or state agencies. If the action is against the state, anyone whose rights are infringed can approach the court without recourse to other means. In the case of *Kibunja v AG & 12 Others (No. 2),*[61] also decided under the old Constitution, it was held that where a party alleges infringement of constitutional rights he has the right to bring an application directly and speedily under the Constitution, irrespective of any other recourse that may be available to him under any other law.[62]

One of the objections against the applicability of the constitution to the private sphere was the argument that applying the constitution to private litigation would fundamentally change the function of courts, transforming them from reviewers of the law into legislators. In Canada, the authority given to courts to determine whether an action amounted to a state action and therefore was subject to the Charter, or otherwise, was questioned and the objectors claimed that it had the effect of transferring power from elected representatives (the legislature) to judges who are neither elected by the people nor removable by the people.[63] It was argued that courts were

[58] 2005 (1) KLR 787.
[59] (1987) LRC Const. 517 at 599.
[60] Kenya Bus case supra note 56.
[61] KLR [2002] 2, 6.
[62] Supra para 2, 7.
[63] Beverly McLachlin in Conor Gearty & Adam Tomkins (eds) *Understanding Human Rights* (1996) at 25-26.

unprepared for the task of legislating and by nature unsuited to it because they did not give room for building consensus among competing interests in arriving at an ideal compromise, but rather produced outright winners and losers.[64]

In responding to this objection, it will be noted that it is the ordinary function of the court to take general legal provisions or principles and apply them to specific cases, whether this happens in the horizontal application of the constitution, or in its traditional vertical application.[65] The reason that other institutions or bodies were better qualified to make policy decisions ought not to justify stopping the court from pronouncing on the issue, especially if the question of horizontality arose together with other constitutional issues the court was expected to make a pronouncement upon.[66]

Similarly, in the deliberations leading up to the Constitution of the Republic of South Africa, 1996, it was argued that in developing common law and legislation the court would encroach on the functions of the legislature.[67] It was the view of some that Article 8(2) of the South African Constitution would bestow on the courts the task of balancing competing rights, a task viewed as unsuitable for the judiciary.[68] The objection was rejected on grounds that the Courts have always been the sole arm of the government responsible for developing common law.[69] The objection failed to recognise the inherent duty of courts to balance competing rights in any case before them, even when the Constitution applied only to the state, it being well within its competence.[70] The court also noted that courts had no power to alter legislations but only to determine their compliance with the Constitution.[71] It was noted that courts provide less opportunity for individuals to participate in social and economic discussions compared the opportunities provided in the political forums these issues would otherwise be deliberated in.[72]

Another objection against removing the public-private divide and allowing aggrieved private persons to bring cases under the constitution was that it would result in a flood of

[64] Gavin Anderson 'The Limits of Constitutional Law: The Canadian Charter of Rights and Freedoms and the Public-Private Divide' in Gearty & Tomkins ibid at 548.
[65] Nolan op cit note 10 at 65.
[66] Ibid.
[67] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) (6 September 1996) para 77.
[68] Ibid para 55.
[69] Ibid para 54.
[70] Ibid para 55.
[71] Ibid.
[72] R Elliot & R Grant 'The Charter's application to private litigation, (1989) 23 *UBC Law Review* 459, 466 cited in Anderson op cit note 135 at 548.

litigation well beyond the court's capacity.[73] Referring to this danger, made imminent by the decision in *Meskell v CIE*[74] which stated that there was no need for a specified cause of action for a claim of violation of rights to be brought before the court, Heuston queried whether "nominate torts like assault, tort, false imprisonment would disappear and be replaced by "innominate claims for infringement of rights.[75] He could not predict what would happen in Ireland but expressed preference for the US system where claimants were expected to approach the court using existing avenues before resorting to the constitution. In the US case of *Paul v Davis*,[76] the court held that it would be considered improper for an aggrieved person to approach the court under the constitution without first following the due process of law, since:

> … the weight of [the court's] decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.[77]

This was the position of the Irish courts subsequent to *Meskell*, despite the bold pronouncement in that case that availability of alternative avenues of redress was inconsequential to a violation of rights claim.[78] In a case decided after *Meskell*, the court made it clear that the constitution would be used to provide relief only where it was not possible to provide relief under any other available cause of action, or where the relief applicable was ineffective to protect the claimant's constitutional right.[79]

In principle, courts should require compliance with the constitution in all cases, whether involving government or government agencies or private persons or companies.[80] The traditional public-private divide in constitutional application appears less relevant in modern times. Courts that resisted this interpretation initially and interpreted the constitution strictly as a "government

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[73] Gavin op cit note 64. See also Danwood Mzikenge Chirwa, 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10(2) *Law, Democracy and Development* 21 at 16.
[74] [1973] IR 121.
[75] Heuston, Robert 'F Personal Rights under the Irish Constitution' (1977) 11 *U. Brit. Colum. L. Rev*. 294, 314
[76] *Paul v. Davis* 424 U.S. 693 (1976).
[77] Ibid.
[78] Nolan op cit note 10 at 74.
[79] *Hanrahan v Merck Sharp and Dohme (Ireland) Ltd*. [1988] IESC 1 para 24. See discussion in Chirwa op cit note 73 at 21.
[80] Lord Irvine commenting on the Human Rights Bill during its second reading in the House of Lords: '[I]t is right as a matter of principle for the courts to have a duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? …' HL Deb, 24 November 1997, c 783, cited in Gavin Anderson 'The Limits of Constitutional Law: The Canadian Charter of Rights and Freedoms and the Public-Private Divide' in Gearty & Tomkins op cit note 63 at 537.

document" eventually came round to realising that the constitution did have a place in private action, in given circumstances. The text of the Canadian Charter of Rights and Freedoms (the Charter) seems to restrict the Charter's application to the national and provincial parliament and government;[81] Canadian courts have however developed case law to the effect that the Charter has limited application in non-state-connected activities where governmental connection in the violating act can be established.[82] Although initially the US courts were adamant that "individual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment",[83] this initial stance was amended. The courts identified situations where the constitution would apply to private action: if an act is directly regulated by government;[84] if an act was carried out under the coercive power, or with the encouragement, of the state; acts of a non-state actor carried out with the involvement of the state or if the violating act was done in the exercise of a function usually carried out by the state.[85]

By creating a public-private divide where only some breaches of the constitution are punished (depending on who committed them, whether a public or private actor), a serious problem is raised. It would mean that the Bill of Rights has two categories of rights, those that attract official punishment, and those that do not. This is not an accurate interpretation of the function of the constitution. The constitution guarantees the basic values of society, and threats to these basic values in fact can come from the private sector as much as from government. When rights have been violated, what matters should not be who committed the wrong act but rather that a violation was indeed committed; and if it was committed, then whoever did it should be punished. In the case of *Velasquez v Honduras*,[86] the court, in establishing what state responsibility for violation of human rights entails held:

> For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognised by the Convention is irrelevant - the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognised by the Convention has occurred with the support or the acquiescence of the government, or whether the state has allowed the act to take place

[81] Section 32(1) of the Canadian Charter of Rights and Freedoms.
[82] Chirwa op cit note 73 at 22.
[83] See Civil Rights Cases (1883) – Decision arising from a number of challenges to the Civil Rights Act of 1875.
[84] *Jackson v Metropolitan Edison Co*. 419 U.S. 345 (1974) The court in this case held that a determination whether the action was a state action depended on the type of action, and the sufficiency of the state involvement. See Case Note in Robert B Carpenter '*Constitutional Law -- Public Utilities State Action -- Jackson v. Metropolitan Edison Co.'* (1975)16 *Boston College Law Review* 867.
[85] Chirwa discusses these different scenarios in Chirwa op cit note 73 at 26-30.
[86] Inter Am Ct.H.R (Ser. C) No. 4 Judgment of July 29 1988.

> without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.[87]

It would thus be inaccurate to create a strict division between public and private violators because states consist of much more than government: the constitution should be able to reach every corner.[88] In creating the public-private divide, the assumption is made that governments and legislatures have coercive power and therefore need the constitution to constrain this power, but that private actors base their relations on mutual consensus and therefore lack this coercive power and do not need constitutions to restrict their actions.[89] However, the consent between private parties is not always a consent of equals; it can be formal as opposed to substantive. Courts should not therefore ignore the oppressive power that corporations can have.[90]

Gavin observes that the public-private divide created in constitutions is not an accurate reflection of reality.[91] Society comprises a thick web of interdependent relations that make it difficult to delineate a pure public-private divide or exclusion of constitutional reach from what is considered private.[92] Tushnet finds two answers to rebut the presumption that bills of rights are designed only to curtail excessive governmental power.[93] First, he notes, corporations are bound by the Bill's provisions because of the fact that social charter provisions are written into bills of rights, and the nature of social charter rights necessarily link them to corporations, for example the right to a reasonable standard of living or the right to jobs and housing.[94] Violation of the right to a reasonable standard of living is bound to arise at the behest of corporate entity-employers in more or at least equal measure as government employers, and the former should be held accountable under the constitution that provides for the rights as much as a government employer would. Secondly, according to what he calls the state action doctrine, Tushnet argues that private power can be re-characterised as power delegated to corporations by government but ultimately attributable to government.[95] Corporations should be liable to the extent that they carry out violating acts in the course of exercising any such powers. Chirwa agrees that the

[87] Supra para 173.
[88] Anderson op cit note 80 at 545-47.
[89] As demonstrated by Gavin, ibid.
[90] Ibid at 541-44.
[91] Ibid at 544.
[92] Ibid.
[93] Tushnet op cit note 1 at 13.
[94] Ibid.
[95] Ibid.

public-private distinction defies coherence,[96] and is problematic as it calls for a complex and not very accurate determination of what is sufficient to amount to an action of state.

Perhaps the Kenyan courts will be spared the onerous obligation of 'charting through murky waters'[97] highlighted above in deciding the question of the applicability of its Bill of Rights due to the clarity of the constitutional provision binding all persons, including non-state actors.[98] In theory, the Constitution of Kenya offers a strong tool for the application of human rights obligations against corporations. A horizontal application of the Bill of Rights in theory implies a change in the nature and structure of corporations to include an explicit demand that they respect and protect human rights,[99] contrary to their current definition as entities created to make profits for shareholders. A horizontal application of the Bill of Rights in theory provides a clear way of ensuring that corporate laws are aligned with the spirit of the constitution and the human rights it provides for.[100] But how are the provisions creating horizontality likely to be interpreted?

3.4. Analysis of different constitutional models of horizontal application

The debate around the applicability of the constitution to private action seems to culminate in the conclusion that enforcement of fundamental rights requires a nexus with the state: violation of human rights that arise in the private sphere will be regulated by ordinary law, and be considered a constitutional concern only if the ordinary law failed to sufficiently remedy the violation.[101] For those constitutional provisions enforceable against private persons, the general position seems to be that the normal way of obtaining remedy would be through ordinary legislation; the state exercises its duty to protect by ensuring that laws exist or are enacted against private

[96] Chirwa op cit note 73 at 21, 23.
[97] Loveland op cit note 2 at 675. Nolan, op cit note 10 at 89-90 was of the view that the clarity of Article8(1) and (2) which made a clear case for horizontality made the state-connected test applicable in the US and Canada unnecessary.
[98] Article 20(1) of the Constitution.
[99] David Bichitz 'Business and human rights: the responsibility of corporations for the protection and promotion of human rights'(2008) SAIFAC.
[100] See Shashi Tharoor 'Are Human Rights Universal?' (Winter 1999/2000) 16(4) *World Policy Journal* 1-16. The author says that human rights cannot be truly universal without development because universality must be predicated on the most underprivileged achieving empowerment.
[101] In India, it has been held that Article 21 of the Indian Constitution provides recourse for violation committed by the state, and if violation is by private actors recourse will be had via common law remedies. See Sandeep Challa, The Enforceability of Fundamental Rights vis-a-vis Private Persons: An Analysis of the Interpretation of the Supreme Court, *Nalsar Student Law Review*, 144.

persons who violate the rights.[102] Reference to court developments and court decisions from other countries may be instructive in Kenya's quest to develop its own law to effectively deal with the novelty of the provision binding natural and legal persons to the Bill of Rights. The study now briefly reviews the different models of horizontal application of the Bill of Rights, with the aim of situating Kenya's constitution and attempting to project how it will be interpreted.

3.4.1. Canada

The Canadian Charter of Rights and Freedoms states:

> 32(1) This Charter applies:
> a) To the Parliament and government of Canada in respect of all matters within the authority of Parliament including…
> b) To the legislature and government of each province in respect of all matters within the authority of the legislature in each province.

The section makes the Charter applicable to the government and government departments.[103] Although the Charter values make reference to the need to develop the law to give meaning to constitutional rights, the courts have not been able to effectively explain what balancing between constitutional and private rights means or how it is to happen.[104] Despite the existence of Constitutional values and the use of the courts' inherent jurisdiction to give weight to the Constitution, the confusion arising from the attempts of courts to determine whether the

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[102] Ibid at 145.

[103] See Graham Garton 'The Canadian Charter of Rights Decisions Digest, Justice Canada' (April 2005) (CanLII) under Section 32(1) 'Section 32(1) - Application of Charter'. See also Swinton, Katherine. "Application of the Canadian Charter of Rights and Freedoms " in W S Tarnopolsky & G A Beaudoin (eds) *The Canadian Charter of Rights and Freedoms - Commentary* (1982) 44-45 cited in *RWSDU v Dolphin Delivery para 30:*

> "The automatic response to a suggestion that the Charter can apply to private activity, without connection to government, will be that a Charter of Rights is designed to bind governments, not private actors. That is the nature of a constitutional document: to establish the scope of governmental authority and to set out the terms of the relationship between the citizen and the state and those between the organs of government. The purpose of a Charter of Rights is to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed by the document, while relationships between individuals are left to the regulation of human rights codes, other statutes, and common law remedies, such as libel and slander laws. Furthermore, s. 32(1) specifically states that the Charter applies to "the Parliament and government of Canada *in respect* of all matters within the authority of Parliament" (emphasis added). It is governmental action which is caught, not private action."

[104] Aharon Barak 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (2003) at 46.

constitution was applicable to private action or to what extent is noteworthy.[105] The provision has been subjected to judicial interpretation, in a bid to answer numerous questions arising, including whether the Charter applied equally to the private sector as to the government;[106] to what extent constitutional rights could be enforced against corporations and the question whether constitutionalism could be an effective safeguard against the abuse of private power.[107] The wording of the provision, seen in light of the amendments that led to it, was said to be 'intentionally vague as to deliberately raise the question whether the constitution applied to the private sector or not',[108] leaving it to the courts to make the determination.

The Canadian courts have approached the question if and how the Charter could apply to the private sector with formal technicality.[109] The question of applicability to the private sphere was first considered in the case of *RWSDU v Dolphin Delivery*[110] where it was held that the Charter would not apply to the private sphere generally, but only insofar as and to the extent that there was a direct and precisely defined connection between the offending action and the government.[111] This decision of the court gave rise to other questions: what amounts to a direct and precise link with the government; was it sufficient that a law passed by the government was the source of the offending action? Later cases attempted to refine these requirements. At one point, Canadian courts required that the connection with government had to be so direct and precisely defined as to turn the private actor into government.[112] The measure would be to ascertain if the private entity was fulfilling a government role and how it represented its role, and to establish if it resembled a public entity.[113] Yet even this decision raised further questions: how much connection was sufficient to change the nature of the actor from private to government – in other words, how direct is a direct link? In what way could the given actor be said to have changed in nature from private to public? Ultimately, the Canadian courts' attempt to diminish

[105] Ibid.
[106] In *Hunter v Southern Inc*, 1984 2 SCR 145, the respondent, a business entity, brought a successful claim against the appellants for violation of Section 8 of the Canadian Charter of Rights and Freedoms which provided that 'Everyone has the right to be secure against unreasonable search or seizure'.
[107] Gearty & Tomkins op cit note 63.
[108] In the previous version of the Section, the Charter was said to apply to "the parliament and government of Canada and to all matters within the authority of Parliament. Gearty & Tomkins op cit note 63 at 531.
[109] Gavin Anderson 'The Limits of Constitutional Law: The Canadian Charter of Rights and Freedoms and the Public-Private Divide' in Gearty & Tomkins op cit note 63 at 549.
[110] [1986] 2 SCR 573.
[111] Supra, see para 36.
[112] Anderson op cit note 109 at 539.
[113] Ibid at 536.

the public-private distinction and make the Charter applicable across the divide was easier said than done. This effort to obscure the public-private divide was nonetheless believed not to have been the most correct interpretation of the Charter.[114] Reviewing the application of the Canadian Charter of Rights, Gavin agrees that a constitution establishes and regulates government institutions, leaving these institutions to order the private affairs of people in a space where the Charter of rights should not intrude.[115]

The "state doctrine theory", called as such or implied by the action of courts is applied to determine whether conduct by non-government entities has sufficient link with government to effectively make the action a government or public action. The theory comes with its challenges. How, for example, will the determination be made of the source or depth of state influence that would be considered sufficient to link a private entity to the state and thus justify extension of the application of the constitution to them? In reviewing the Canadian Charter of Fundamental Rights, Gavin observes that the wording of Section 32 was deliberately vague, left to the ultimate deliberation of the courts.[116] He points out that had the legislature wanted to make any of the positions clear it would have done so: to say with certainty whether the Charter applied to private persons or it did not, or whether it applied to only some of them.[117] He proceeds to interrogate the meaning intended by the wording of the Constitution which raises a myriad of further questions whose answers are complicated:[118] can non-governmental bodies be subjected to the Charter, and on what basis: because they are linked to the government or because they are exercising a governmental function? Can the Charter apply between two private persons where there is no government intervention in the violating act?[119] Can the Charter apply to a case of traditional private law for example tort or contract? He looks to the decided court cases to see what their determination was, and presents the complex decision-making process arising from the courts that presents a case that is far from clear.

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[114] Ibid at 549.
[115] Ibid.
[116] Ibid at 531.
[117] Ibid.
[118] The provision made the Charter of Rights applicable to the legislature and courts and he queried: what was meant by application of the charter to parliament and provincial legislatures in respect of all matters within their authority? Does 'government' include courts? Anderson op cit note 107 at 530.
[119] Article 12 of the Indian Constitution provides that "state" should be interpreted to mean government, parliament, state legislatures and additionally also 'all other authorities within the territory of India under the control of the Government of India.' This creates room for a wider interpretation of "state" to include not only the traditional government-related agencies but also private actors that can be said to be under the control of the government.

3.4.2. The United Kingdom

In the UK, there has been a difference of opinion on the question whether the European Convention on Human Rights – domesticated by the Human Rights Act (1998) – could be applied in private litigation against companies. Reasons have been given on both sides, starting with an effort to construe the meaning of the wording of the European Convention on Human Rights (the Convention). The Human Rights Act in the UK, enacted to "give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights"[120] makes it unlawful for a public authority to contravene the Convention rights. In deciding any matter under the Human Rights Act, therefore, it must first be established whether the party accused of contravening the Convention right is a public authority.[121]

In a case before the European Court of Justice, *B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste Internationale*,[122] the defendant was a private sector organisation with no governmental links. It was held that the rules prohibiting discrimination under the Treaty of Rome on free movement of workers applied both vertically and horizontally in actions between individuals and/or companies.[123] It was the court's view that the intention of the Treaty to allow free movement would be defeated if, although the states refrained from breaching the rights, violations arose from associations or organisations that did not come under public law.[124] The court's reasoning was that if the private sector was excluded from the ambit of the Treaty, it would create inequality in its application. Consequently, the Treaty requirements and the numerous economic activities in the European Community which were carried out in the private sector would go unchecked, resulting in the violation of the Treaty.[125] The subjection of private bodies to the Treaty also meant that the possibility that services would be transferred from public

[120] United Kingdom Human Rights Act (1998) 1.

[121] Loveland op cit note 2, Chapter 22 on 'The Impact of the Human Rights Act 1998' 648. A criterion is established to determine what 'public authority' means or what entities could be considered public authorities, and what actions amount to actions of public authorities. It is arguable that, had UK Parliament wished to make the Act applicable to natural or legal persons, it could have expressly said so in no uncertain terms. (see Loveland at 650).

[122] Case 36/74 [1974] ECR 1405.

[123] Loveland op cit note 2 at 383.

[124] Paragraph 18 of Judgment, p 1419.

> "The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3 (c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law."

[125] Paragraph 19 of the Judgment, page 1419.

to private bodies to evade the scrutiny of the treaty was eliminated.[126] Although the dispute before the court did not involve companies, the court made it clear that the Treaty did not apply only to public bodies but also to the "furthest recesses of private sector economic activity".[127]

A question of applicability to the private sphere arose in a case brought under the Human Rights Act, centered on a provision which provided that the Act applied to "public authorities".[128] A white paper was given to support the argument, listing public authorities to include the central and local government, the police, prisons courts and companies responsible for areas of activity that were previously within the public sector, to the extent that they were exercising public functions.[129]

3.4.3. Ireland

The provisions of the Irish Constitution do not make it directly applicable to private persons, but courts have interpreted the Constitution to have an indirect application to non-state actors. Horizontality in Ireland arose from judicial decision-making as opposed to an express provision of the Constitution as in the case of jurisdictions such as South Africa.[130] In Ireland, the Constitution is applicable to the private sphere via interpretation of Article 40(3) of the Irish Constitution which expresses the state duty to protect.[131] In interpreting the provision, the Irish courts have developed a "constitutional tort" which arises when individual rights are violated by a third party; the constitution in these cases will have a direct horizontal effect on the non-state actor third party.[132] In the USA and Canada, remedy for human rights violations is available through private law actions, but in Ireland, the Constitution has a "full horizontal effect" and

[126] Loveland op cit note 2, Chapter 11 on 'The European Economic Community 1957 – 1986' 383.
[127] Ibid at 384.
[128] Section 6 of the Human Rights Act 1998.
[129] Paragraph 2.2 of the White Paper cited in Loveland op cit note 2 at 648.
[130] Chirwa op cit note 73 at 21, 37. See also Aoife Nolan 'Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland' (2014) 12(1) *International Journal of Constitutional Law* 61, 63, 64.
[131] Article 40(3)*(1)* The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen; and (2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
[132] Nolan op cit note 130 at 69.

claims for human rights violation by private parties may be based directly on the constitution, without the need for recourse to private action.[133]

In the Irish case, *Meskell v CIE,*[134] the court held that constitutional rights can be protected, regardless of the existence or otherwise of a formal cause of action.[135] It is precisely because they can be claimed by everyone that constitutional rights are fundamental.[136] The court based its decision on the fact that a constitutional right carries within it its own right to a remedy or to enforcement.[137]

Unlike other constitutional models that make a distinction between the public and private divide, the Irish Constitution fuses the public and private spheres.[138] In the case of *Educational Company of Ireland Ltd v Fitzpatrick*[139] it was held that:

> … if one citizen has a right under the Constitution there exists a correlative duty on the party of other citizens to respect that right and not to interfere with it. To say otherwise would be tantamount to saying that a citizen can set the Constitution at a naught and that a right solemnly given by our fundamental law is valueless.[140]

The Irish courts thus also see constitutional rights as entitlements to be protected against infringement and they undertake to ensure that they are respected by all and if violated, recourse is had against those who violate, whoever they may be.[141] By taking this stand, Irish courts avoid the absurd conclusion that some breaches of constitutional rights can go unpunished just because they were not committed by the 'state' or state actors.

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[133] Chirwa op cit note 73 at 21, 37.
[134] [1973] IR 121.
[135] M*eskell,* supra at 133: 'a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it.'
[136] *Meskell* supra 121, 132-3 The Court held: '...a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any ordinary forms of action in either common law or equity and... the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.'
[137] *Meskell* supra note 134, 121.
[138] This has been said to be likely due to the natural law philosophy foundation of the Irish Constitution; under natural law, rights inhere in the person and are not granted by positive law. If seen as inherent, human rights will therefore be protected from violation by anyone and not only by the State which is given form by the written law. See Nolan op cit note 130 at 72.
[139] (1961) IR 345.
[140] Supra, 368.
[141] Article 40(3) of the Constitution provides: The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

It has been argued, however, that despite the existence of horizontality, Irish courts have not used the concept to impose constitutional rights obligations on non-state actors such as corporations. This aversion could be attributed to a "serious lack of conceptual clarity" regarding when, how and to what extent the horizontal effect should be given effect by Irish courts.[142] After *Meskell,* existing alternative avenues, rather than the constitutional provisions, were used to channel constitutional remedies: the application of the Constitution tended to be limited by the courts by holding that the constitutional tort will not lie where recourse can be had to existing remedies in common law or legislation.[143] A further limitation of the Irish horizontality was the refusal of Irish courts to interpret constitutional rights as imposing positive obligations on non-state actors, a fact that makes it hard to deal with claims against non-state actors for positive violation of socio-economic rights.[144]

3.4.4. Possible interpretation of horizontal provisions: lessons from South Africa

Unlike the other constitutions highlighted above which depend on the courts to make a deliberation on whether the facts of each case in question are sufficient to make the Bill of Rights applicable in the private sphere, the text of the South African Constitution makes it unequivocally applicable to natural and juristic persons, though subject to the nature of the right and the nature of the duty imposed by the right.[145] By providing for the application of the Bill of

[142] Nolan op cit note 128 at 74

[143] See for example *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd.* [1988] ILRM para 24.

> 'So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts – for example, negligence, defamation, trespass to person or property – a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskell v C.I.E*. IR 121); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right. But that is not alleged here. What is said is that he may not succeed in having his constitutional rights vindicated if he is required to carry the normal onus of proof. However, the same may be said about many other causes of action. Lack of knowledge as to the true nature of the defendants' conduct or course of conduct may cause the plaintiff difficulty, but it does not change the onus of proof.' Cited in Nolan op cit note 128 at 74

[144] Nolan op cit note 130 at 87.

[145] Article 8(2) of the Constitution.

Rights to juristic persons, the Constitution of Kenya most resembles the South African model of horizontality. The application of the Bill of Rights to non-state actors is made explicit in the text of the constitution, unlike the Irish or Canadian or UK models where horizontality has arisen more from judicial decisions than an interpretation of the text of the constitution. As such, there may be useful examples to be drawn from the jurisprudence of the South African courts on the matter, built over the last two decades since the adoption of its current constitution.

The advent of the post-apartheid regime and the ushering in of a radically new law (the Constitution) of South Africa called for a change of the existing laws to reflect the new 'democratic dispensation'.[146] The provisions of the 1996 Constitution reflect the effort to remedy the wrongs of the past which was characterised by inequalities in material wealth and resources. The Constitution makes extensive provision for Economic Social and Cultural (ESC) rights. Decisions of the South African courts on the issue of ESC rights were guided by the notion that 'the state, acting on its own and *in partnership with the private sector* (emphasis added) had a responsibility in fields such as housing, welfare, education, and employment.'[147] This interpretation is justified by the authority given to the state to take 'reasonable legislative and other measures'[148] to give effect to such rights, and a realisation that it would indeed be practical to get the help of the private sector if the economic, social and cultural rights are to be effected. This reasoning is seen as the rationale behind the constitutional provisions making the Bill of Rights binding on juristic persons. In reflecting on the inequalities that exist in the social context of the South African society on the question of health, the South Africa Human Rights Commission noted that these inequalities could not effectively be addressed through a rights framework alone and it was proposed that a preferred approach would require strengthening the health care system in its entirety, calling for the engagement of the state with regard to the

[146] Department of Trade and Industry '*South African Company Law for the 21st Century, Guidelines for Corporate Law Reform'* (May 2004) General Notice 1183 of 2004, 25 para 2.2.2 available at <*www.polity.org.za/attachment.php?aa_id=1326*>, accessed on 23 July 2014.

[147] De Villiers B 'Social and Economic Rights' in David van Wyk, John Dugard, Bertus de Villiers & Dennis Davis *Rights and Constitutionalism: The New South African Legal Order* (1994) cited in M Seleoane '*Socio Economic Rights in the South African Constitution, Theory & Practice'* 44 available at *http://www.hsrcpress.ac.za/product.php?productid=2048cat=36page=1&freedownload=1,* accessed on 31August 2014.

[148] The Constitution Articles 24(b), 25(5), 26(2), 29(b), 32(2) See also Nolan op cit note 128 at 80. Additionally, s 8 (2) of the Constitution obliges the State to respect, protect, promote and fulfill all rights in the Bill of Rights. (emphasis added).

enforcement of the Constitutional obligations of private actors.[149] Reporting on the right to health, the UN General Assembly also noted that "Ministers and senior public officials have also acknowledged that the pharmaceutical sector has an indispensable role to play in relation to the right to health and access to medicines".[150] If the corporation contemplated in the South African Constitution was to become a reality, the state in this case would have a clear and direct obligation to effect corporate compliance with human rights obligations.

The similarity in the provisions between the Kenyan and South African positions is outlined below. The text of Article 20 of the Kenyan Constitution on the application of *Bill of Rights* compared to Article 8 of the South African Constitution reads as follows:

> *20(1) The Bill of Rights applies to all law and binds all State organs and all persons.*

This is similar to Article 8(1) of the South African Constitution which provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state" and Article 8(4): "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person."

'Person' is defined in the Kenyan Constitution to include "a company, association or other body of persons whether incorporated or unincorporated".[151] The court made note of the meaning of this provision in the case of *Abdalla Rhova Hiribae & 3 others v Attorney General & 7 Others* where the judge held:

> To my mind, the express constitutional provision that the Constitution in general and the Bill of Rights in particular applies to and binds all persons represents a radical departure from the position under the former constitution where only the state could be held liable for violation or infringement of constitutional rights. In my view, where the facts so demonstrate, an individual or corporate person such as the 2nd, 3rd, 4th, 6th and 7th respondents can be held to have violated another person's constitutional rights, and appropriate orders or declarations issued.[152]

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[149] South African Human Rights Commission 'Comments on UN Draft Human Rights Guidelines on Access to Medicines'

[150] UN General Assembly Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (11 August 2008) A/63/263 para 23

[151] See Article 260 of the New Constitution on 'Interpretation'. This is similar to the situation in India where 'person' under the Constitution (s123) includes a body of persons, corporate or incorporate.

[152] [2013] eKLR para 47. The Court made a similar decision in the cases *Law Society of Kenya v Betty Sungura Nyabuto & Another* Petition No. 21 of 2010, *B.A.O & Another v The Standard Group Limited & 2 Others* Petition No. 48 of 2011 and of *Amy Kagendo Mate v Prime Bank Limited Credit Reference Bureau & another* [2013] eKLR para 23.

Article 20 (2) of the Kenyan Constitution reads:

> *Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.*

This is similar to Article 8(2) read with Article 8(4) of the South African Constitution. Article 8(2) on 'Application' reads: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right' and Article 8(4): 'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person.'

Article 20 (3) of the Kenyan Constitution reads:

> *In applying a provision of the Bill of Rights , a court shall— a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.*

This is similar to Article 8(3) (a) of the South African Constitution which provides: 'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court: (a) in order to give effect to a right in the Bill must apply or if necessary develop the common law to the extent that legislation does not give effect to that right.' b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

> *20 (4) In interpreting the Bill of Rights , a court, tribunal or other authority shall promote - a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom*; and *b) the spirit, purport and objects of the Bill of Rights* .

This is similar to Article 39(1) *(a)* which provides that: 'When interpreting the Bill of Rights a court, tribunal or forum: - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom…' There is a slight difference between Article 20(4)*(b)* of the Kenyan Constitution and Article 39(2) of the South African Constitution which enjoins every court, tribunal or forum to promote the spirit, purpose and object of the Bill of Rights when interpreting *any legislation*, and not only when interpreting the Bill of Rights as the Kenyan Constitution states.

Article 8(1) and (2) of the South African Constitution in applying to all law and binding all persons have been interpreted as contemplating rights and obligations of both individuals and

juristic persons.[153] Article 8(2) appears to impose both positive and negative duties on non-state actors.[154] It was thought that the state by itself could not manage to provide for the economic and social rights because the nature of these constitutional rights obliged it to provide for 'even the barest of necessities'[155] for its citizens, a task for which the state was highly unlikely to ever have sufficient funds for. Friedman supports the constitutional interpretation enjoining the private sector in realising the constitutional rights. He argues that given the history of the country, its limited resources and the inequalities that existed, the task of rebuilding the country was too daunting, and unlikely to be fulfilled by the state alone. He sees horizontality as a form of redistribution tool for the enormous wealth that lay with the private sector and which could be applied to create equality and enhance the dignity of those who had been previously deprived.[156]

The South African Constitutional Court acknowledged the role of the private sector in realising human rights in the case of *South Africa v Grootboom*.[157] The court in the case acknowledged the role of non-state actors in provision of housing, and held that Article 26(1) of the Constitution imposes a negative obligation on the state and all other entities and persons to desist from impairing the right to housing.[158] The court held:

> A right of access to adequate housing also suggests that it is not only the state that is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.[159]

Like the South African Constitution, the Kenyan Constitution makes provision for a wider scope of rights than the previous constitution. Socio-economic rights tend to have a greater association with business, forming as they do a majority of the human rights that businesses can be linked with in the their daily operations. Tushnet was of the view that the adoption of

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[153] In the deliberations that resulted in the current Constitution of South Africa, objection was taken to Article 8(2) on grounds that horizontality was not a universally acceptable concept. See Certification Case supra note 67, para 53. Traditionally, constitutions were the preserve of the state.

[154] Nolan op cit note 130 at 79.

[155] Gregory S Alexander 'Socio-Economic Rights in American Perspective: The Tradition of Anti-Paternalism in American Constitutional Thought' in A J Van Der Walt (ed) *Theories of Social and Economic Justice* (2005) available at *http://www.africansunmedia.co.za/Portals/0/files/extracts/Theories%20of%20Social%20and%20Economic%20Justice%20Extract.pdf,* accessed on 6 August 2014.

[156] Nick Friedman 'Human Rights and the South African Common Law: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 67.

[157] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2001 (1) SA 46

[158] Ibid.

[159] Ibid para 35.

economic and social rights would lead to a classification of real and fake rights – the former being civil and political rights that were enforceable, and the latter being economic and social rights which, in his view, were only aspirational – and this fact would lead to an undermining of the constitution because it would be seen as entrenching unenforceable rights.[160] That his fear has come to pass is one victory: economic and social rights are found in constitutions as an acknowledgement that human rights are rights regardless of the ability of states to provide for them. However, the reality brought about by implementation of these rights will be a separate issue and the real test of the value of having a progressive Bill of Rights.

In theory, the realisation of economic, social and cultural rights is likely to be more expensive and resource-intensive compared to that of civil and political rights: they tend to demand a positive obligation more than a negative one. Additionally, owing to the longer acceptance of civil and political rights, systems and measures to enforce civil and political rights are more likely to already be in place, compared to those needed for socio-economic rights which may have to be instituted now.[161] The government will need to have a clear understanding of what its obligations for human rights are, and what it needs to do in order to demand from corporations compliance with their human rights obligations or facilitate it.[162] The court will be aided in giving meaning to the rights by considering the nature of each right, in light of the individual or juristic person claiming violation as provided under Article 20 (2) of the Kenyan Constitution.[163]

The *Certification of the Constitution of the Republic of South Africa* case (Certification Case) came before the South African Constitutional Court at the time of transition from the old to the new Constitution in 1996.[164] In the case, the Court reviewed complaints and written submissions from political parties, special interest groups and members of the public at large and

[160] Tushnet op cit note 1 at 13.
[161] Nolan op cit note 130 at 81-81.
[162] See ICJ Kenya Workshop Report 2005, 14. The speaker in one case said that such rights were 'aspirational phrases incapable of proper legal protection in the Kenyan legal system', and 'empty phrases incapable of enforcement and monitoring'. See also G Alexander, Why are there no socio-economic rights in the American Constitution? (Sept. 20 2004) (unpublished manuscript) available at *http://www.docstoc.com/?doc_id=19788213&download=1,* accessed on 5 August 2014. See also Nigel Ashford *Principles for a Free Society* 2 ed (2007) at 47 'Socio-economic rights are not human rights'. Although such objections did not carry the day and the 2010 Constitution provides for economic, social and cultural rights, the objection is not unique and should be given some thought in order to arrive at accurate and practical solutions in the effort to delineate their meaning in the process of operationalizing the Constitution.
[163] The South African Court in the *Holomisa* case noted that Article 8(4) required that the nature of the juristic person be taken into account in ascertaining whether a particular right is available to a person or not.
[164] *Certification* case supra note 67.

analysed each provision of the new Constitution against constitutional principles. The Certification judgment sought to certify that all the provisions of South Africa's proposed new constitution complied with certain principles contained in the country's current constitution.[165] In the Certification Case, objection was raised to Article 8(2) imposing obligations on individuals as opposed to granting rights only as was the understanding under the previous constitution.[166] In rejecting the objection, the Court reiterated the fact that rights were almost always limited and the courts had to constantly balance competing rights against each other.[167] It further held that since the legislature was bound by the Bill of Rights, its actions and decisions were subject to constitutional scrutiny.[168]

The Court in the *Certification* case rejected an objection to the extension of rights to juristic persons,[169] further holding that "many universally acceptable fundamental rights would be fully recognised only if afforded to juristic persons as well as natural persons".[170] An example was given of freedom of speech, which, it was said, must be afforded to the media for it to be fully recognised.[171] In the *Certification* case, an objection was also raised to affording rights to wealthy corporations under Article 8(4) on grounds that it would increase their undue advantage over poor individuals, because they have the resources to enforce their rights unlike individuals. The Court also rejected this objection, noting that there were many small companies in South Africa which needed protection, and the Constitution through the said provision would afford it to them.[172]

If the literal interpretation was applied in interpreting the Constitution, a reading of the provision making the Bill of Rights horizontally applicable to corporations ought to inform the analysis of corporate compliance with human rights obligations. If a law binds all persons, it means they are subject to it, not only as recipients of the rights that are due to them, but also as duty bearers with an obligation not to infringe them. If rights in the Bill of Rights are owed to individuals, and they are, then all state organs and all persons have the obligation at the very least not to infringe human rights. They may not have the obligation to provide for them as this

[165] Ibid para 1-2.
[166] Ibid para 56.
[167] Ibid.
[168] Ibid.
[169] Ibid para 57.
[170] Ibid.
[171] Ibid.
[172] Ibid para 58.

may not be within their power, but because they have the power to infringe them, they must refrain from doing so. By implication therefore, should the 'person' fail in his duty, he will be liable under the provisions of the Constitution. Although the initial case decided under the new Constitution of South Africa denied this interpretation, subsequent cases subscribed to it.

The first case to be decided under the new Constitution of South Africa on the question of non-state actors and whether they were bound by the Constitution was the case of *Du Plessis and Others v De Klerk and Another.*[173] In this case, the rationale in the *Dolphin Delivery* Canadian case was applied resulting in a decision that constitutional rights could be invoked against an organ of government but not against a private litigant.[174] The case of *Khumalo & Others v Holomisa*[175] was the next case decided on the applicability of constitutional rights to non-state actors. In this case, the judge held that the right of free expression was enjoyed by all persons, *including the press*.[176]

The case of *Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay N O & Others*[177] involved the governing body of a public school against the trustees of a trust that owned the property on which the school was built. The respondents (trustees) successfully secured an eviction order against the school, and a case was instituted claiming violation of the right to education of the learners. It was held that the Member of the Executive Council (MEC) for Education for the Province (and not the Trustees) had an obligation under Article 8(1) of the Constitution to respect, promote, protect and fulfill the learners' right to education, and she had failed in this obligation.[178] The Constitution imposed no obligation on the Trust to make any property available to the MEC for the use of the school. The court was of the view that the purpose of Article 8(2) was not to impose duties of the state on private parties and neither to obstruct private autonomy, but to require private parties not to interfere with or diminish the enjoyment of rights.[179] This view of the court acknowledged a potential invasion of constitutional rights by non-state actors. It was therefore held that the Trust had a negative

[173] 1996 (3) SA 850 (CC).
[174] Ibid para 49.
[175] CCT53/01.
[176] Ibid para 26. See affirmation of this in Danwood Mzikenge Chirwa, 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10(2) *Law, Democracy and Development* 21, 42.
[177] CCT 29/10 (11 April 2011).
[178] Paragraph 54.
[179] Paragraph 58.

constitutional obligation not to impair the learners' right to basic education.[180] The eviction order granted by the High Court ordering the MEC and others claiming right to the property to vacate the premises was upheld.

In cases like these, the court is called upon to deliberate on competing rights: usually the right to property against the other human rights outlined in the constitution. Following the decision in *Port Elizabeth Municipality v Various Occupiers,*[181] the court in *Musjid* held that in the face of such competing rights, the Constitution imposed new obligations and other new and equally relevant rights outlined in the Constitution, balancing these against the right to property rather than hierarchalising them, considering the facts of each particular case. In the Court's words:

> … The judicial function in these circumstances [of contrasting rights] is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.[182]

The case of *Lingwood and Another v Unlawful Occupiers of R/E of ERF 9 Highlands*[183] was a case for the eviction of unlawful occupiers by an individual owner. The court held that the obligation to provide adequate housing or suitable alternative accommodation for the homeless or unlawful occupiers lay with the state or responsible organs such as municipalities.[184] Reference was made to the case of *Modderklip Boerdery v Modder East Squatters & Another*[185] where it was similarly held that the obligation to provide housing was an obligation of the state, and that the state would strive to comply subject to availability of resources: the obligation had not been transferred to individual land owners. Referring to yet another decision, the judge in *Lingwood* agreed that it was inconceivable that the obligation to provide shelter for the homeless would be shifted to ordinary owners of land by the state which itself had a conditional obligation limited by availability of resources.[186] The decision of the court was that no obligation lay with

[180] Paragraph 60.
[181] 2005 (1) SA 217 (CC).
[182] Ibid para 23.
[183] (2006/16243) [2007] ZAGPHC 231.
[184] Supra para 20.
[185] 2001 (4) SA 125 (T) 23 E-G (Cited in *Lingwood*, supra para 22).
[186] *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002(1) SA 125 (T) 23 E-G.

the applicants as private land owners, and the City of Johannesburg had the task to provide alternative accommodation for the occupiers who were required to move.

In *Johnson Matotoba Nokotyana & Others v Ekurhuleni Metropolitan Municipality and Others*[187] a claim was brought under Articles 26 and 27 of the Constitution, together with Chapters 12 and 13 of the National Housing Code. It was held that reliance on the Housing Code must fail, for failure of the applicants to satisfy prerequisite conditions for the application of the two provisions. In pronouncing judgment, the judge held that it was the Court's repeated view that where legislation had been enacted to give effect to a constitutional right, the litigant should rely on the legislation to support his claim, or alternatively challenge its constitutionality as opposed to approaching the Court directly under the Constitution.[188] Following the earlier precedents, the court held that the applicants would not be permitted to rely on the Constitution, appropriate alternative legislation being available, and it would therefore not be proper for the court to consider their claim under the constitution.[189] It was further held in *Nokotyana* that where the Constitution provided for a specific right, the applicant should approach the court on the basis of that provision, as opposed to the general right to human dignity, under which a claim to the right could alternatively fall.[190]

It is noteworthy that the majority of cases decided by South African courts so far on the question of horizontality concern economic, social and cultural rights: the right to housing and the right to education. The nature of the functions of private or non-state actors makes their likely impact on socio-economic rights a reality. It is therefore likely that as the jurisprudence unfolds before the Kenyan courts, a majority of the rights in issue will similarly be economic, social and cultural rights.

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[187] CCT 31/09 [2009] ZACC 33.

[188] Ibid para 48. The Court cited *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009) at para 73, where the Court stated that "this Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution": *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at paras 22-6 (in the context of the Promotion of Administrative Justice Act 3 of 2000 which gives effect to the constitutional right to administrative justice in section 33 of the Constitution); *MEC for Education, Kwa Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 40 (in the context of section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Equality Act) and *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at para 52 (in the context of labour legislation and the labour rights protected in section 23 of the Constitution).

[189] *Nokotyana* supra note 177 para 49.

[190] Ibid para 50.

Despite the constitutional provision making a horizontal application of the Bill of Rights possible, the jurisprudence of the South African courts on horizontality is not as well developed as would have been expected.[191] The courts have tended to show a reluctance in applying the Bill of Rights horizontally, at least avoiding to make any radical conclusions.[192] The decisions ultimately mirror decisions in other jurisdictions which also show that despite constitutional provisions, courts are conservative in holding that the bills or rights have a horizontal application.[193] Only in the *Juma Musjid* case did the court hold that a private entity had an obligation to uphold human rights under the constitution, in this case a negative duty to refrain from violating the learners' right to education. The reason for the conservative nature of the court's decisions seems to be the considered opinion of some authors that the express application of Article 8(2) does not directly extend to economic, social and cultural rights owing to their inherently limited nature. By definition, economic, social and cultural rights are subject to progressive realisation based on the state's available resources – as such, they cannot be unconditionally demanded of non-state actors.[194]

In the *Holomisa* case, it was held that once it had been determined that a natural person is bound by the provisions of the Bill of Rights, the court ought to apply Article 8(3) of the Constitution and if necessary develop the common law to give effect to that right.[195] If existing laws contradict the object, purpose and spirit of the Constitution they should be amended. In a similar manner, if it is determined that a juristic person is bound by a given right, meaning it possessed the right and was owed the duty with regard to it, and additionally that it also owed an obligation to respect the rights of others in relation to the same, any law that fails to give effect to this right ought to be developed to conform to it. The provision therefore enjoins the juristic person to respect the right – and to have its rights respected. Chirwa interprets Article 8(3) as providing avenues for enforcing obligations of non-state actors, or providing redress for violations committed by non-state actors.[196] Article 8(3) excludes direct recourse to the Bill of Rights for redress; it mandates the legislature to "devise remedies for redressing violations by

[191] Nolan op cit note 128 at 81.
[192] Ibid at 86.
[193] Nolan op cit note 128 at 65, referring to the experience in countries like South Africa, Canada, Germany and Columbia.
[194] Nolan op cit note 128 at 79.
[195] *Holomisa* para 31.
[196] Chirwa op cit note 174 at 42.

enforcing obligations of natural or legal persons".[197] The test laid down in *Khumalo* was first to ascertain whether the right in question was applicable to the person, considering its nature; if it did, the next step would be to establish whether it was unlawfully limited by a law and if it was, the solution would be to develop the law to give effect to the right.[198]

The Kenyan Constitution provides that when adjudicating issues concerning the Bill of Rights, courts ought to develop the law so that it gives effect to fundamental rights and freedoms, adopting the interpretation that most favours the enforcement of the fundamental right or freedom.[199] The South African Constitution makes a similar provision.[200] In providing for a constitutional directive to courts to develop the law, Kenya and South Africa follow the model applied in Germany.[201] In Canada, the obligation to interpret laws to give importance to the spirit and law of the Constitution arises from the inherent jurisdiction of the Courts to develop private law and not directly from the constitution.[202] Additionally, the Kenyan courts in interpreting the Bill of Rights will be guided by democratic values including human dignity, equality and freedom, and the spirit and objects that underlie the Constitution.[203] This provision of the Constitution presupposes a double effect – courts will hear private actions based directly on constitutional rights, and they will also interpret and develop existing laws in light of constitutional values.[204]

In *Holomisa,* it was held that when the primary focus of a case before the court was a person as opposed to the state, then the case must be brought under Article 8(2).[205] Chirwa argues that Article 8(2) and 8(3) avail an indirect application of the Constitution through common law and legislation, thus permitting the court to create a new remedy for violation of a right where existing legislation or common law do not provide an adequate one.[206] However

[197] Ibid.
[198] *Khumalo* supra note 173 para 33
[199] Article 20 (3).
[200] Article 39 (2).
[201] Dawn Oliver & Jorg Fedtke (eds) *Human Rights and the Private Sphere: A Comparative Study* (2007) 33.
[202] Ibid.
[203] Article 20 (4).
[204] Dawn Oliver notes that in South Africa, a similar double provision exists in the Constitution, but the practice of the courts so far has been to interpret and develop laws to give effect to constitutional values, rather than entertaining private actions based on constitutional rights. This presents a direct effect in theory only, and an indirect effect in practice. See Oliver and Fedtke op cit note 191 at 484.
[205] Christopher J Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *South African Journal on Human Rights* 57, 62.
[206] Chirwa op cit note 174 at 42. See also Sprigman and Osborne. In Ireland, the application of the Constitution would be through direct horizontal application.

others hold the opposite view, saying that Article 8 admits of direct application.[207] Article 39(2) of the South African Constitution is said to have an indirect application, as the court needs to develop common law to comply with the Constitution.[208] This would be the same interpretation as Article 20(4)*(b)* of the Kenyan Constitution, owing to the similarity of the two provisions. Others opine that there is no difference in effect between Article 8 and Article 39.[209]

When the provisions of the constitution are applicable directly to the private sphere, remedies are available to a complainant that would not have been available to him in the absence of these direct provisions. Under indirect application, no new remedies are generated, but the law must be interpreted consistently with constitutional values.[210] In the case of human rights, traditionally viewed as a preserve of public law regulating the relations between the state and the individual, direct application will mean that the entitlements availed to the individual for breach of human rights by the state will also be available if the breach is committed by another private person. This aligns well with the principle that the basis of human rights entitlements is the dignity of the person,[211] and this holds true regardless of who the obligation to respect rests upon, whether the state or another private person. In other words, where the direct method is applied and the constitution specifically provides redress for human rights violations by business entities, there will exist two parallel avenues for redress: the constitutional one with whatever remedies are provided for in the constitution, and the traditional private law avenue (for example company law, contract law, the law of torts) which may deal with the same issues presented by the same person seeking to protect or promote the entitlements of his or her dignity.

In Ireland, courts have no power to develop the law to give effect to rights. Only in cases where common law or statutory remedies are inadequate would an action based directly on the constitution arise.[212] The position of the courts has been that implementation of constitutional rights is primarily a matter for the states, and courts would only intervene where there was failure to implement, or the implementation was inadequate.[213] In the absence of a statutory or common law cause of action, the plaintiff could sue directly for breach of constitutional right;

[207] Iain Currie & Johan De Waal *The Bill of Rights Handbook* (2005).
[208] Chirwa op cit note 174 at 43.
[209] Roederer op cit note 195 at 57.
[210] Chirwa op cit note 174 at 39.
[211] Barak op cit note 50 at19.
[212] Chirwa op cit note 174 at 36.
[213] *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd* (1988) ILRM 629, cited in Chirwa, ibid.

however, if he relied on an existing cause of action he would be confined to the limitations of that tort.[214]

Under the South African Constitution, horizontality is not mandated in all circumstances, and the court has to decide based on the "extent required by the nature of the rights and the nature of the juristic person".[215] The courts appear reluctant to hold that non-state actors are bound by all constitutional rights, though they are less reluctant to make a horizontal application in the case of negative obligation (as in the *Musjid* case) compared to a positive obligation. Reliance on Article 39(2) of the Kenyan Constitution, requiring courts to interpret the law and develop common law to give effect to the spirit and meaning of the constitution, will reduce the need for direct reliance on the constitution in private matters.[216] Similarly, Article 20 (4) provides that in interpreting the Bill of Rights , a court, tribunal or other authority shall promote — (*a*) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (*b*) the spirit, purport and objects of the Bill of Rights . An indirect application of the constitution to the private sphere, as reliance on Article 39(2) of the Kenyan Constitution will amount to, is seen to undermine the Bill of Rights.[217] Similarly, if Article 20(1) of the Kenyan Constitution were to be overlooked in favour of application of Article 20(4), this would likely result in a similar conclusion of undermining the Bill of Rights , opting as it does for an indirect application to the private sphere where a direct application is possible.[218]

Ultimately, horizontality has proved to deliver much less than it promises, and it remains to be seen how its application in the Kenyan context will unfold, considering all the lessons from other jurisdictions, especially South Africa's. Whereas the text of the Constitution offers the possibility for ensuring that corporations are bound by the Bill of Rights and thus respect and contribute to the fulfillment of human rights, much will depend on the attitude of the judiciary in interpreting the law and particularly the provisions of the Constitution on horizontality.

[214] Ibid.
[215] Article 8(2). See also Nolan op cit note 128 at 88.
[216] Ibid.
[217] Ibid at 88 quoting Stuart Woolman 'The Amazing Vanishing Bill of Rights' at fn 145.
[218] Roederer is of the view that the decision of Holomisa removed the illusory distinction between direct and indirect application of the Bill of Rights. See Roederer op cit note 195 at 62.

3.5. Conclusion

The 2010 Constitution heralds a new era of human rights understanding in Kenya. Though remarkable in its provisions, implementation of the 2010 Constitution will be the real challenge, if only for the ambitious nature of its provisions. Whichever method is applied in interpreting the provisions of the constitution, the danger exists that discussion can be diverted from basic policy questions to unproductive controversies about what provisions mean,[219] especially given their novelty.

The 2010 Constitution of Kenya does away with some of the ambiguities of the indirect horizontality constitutional models discussed above and the challenges they raise by making it clear that private persons, including incorporated entities are bound by the Constitution. Contrary to the position taken by the courts under the old Constitution of Kenya whose application was designed to be, in the public sphere, in line with the traditional understanding of constitutions as highlighted above,[220] the courts acknowledge a different application of the Bill of Rights under the 2010 Constitution. In the case of *Abdalla Rhova Hiribae & 3 others v Attorney General & 7 Other*s, following decisions that had been made in similar cases, the judge held:

> To my mind, the express constitutional provision that the Constitution in general and the Bill of Rights in particular applies to and binds *all persons* represents a radical departure from the position under the former constitution where only the state could be held liable for violation or infringement of constitutional rights. In my view, where the facts so demonstrate, an individual or corporate person such as the 2nd, 3rd, 4th, 6th and 7th respondents can be held to have violated another person's constitutional rights, and appropriate orders or declarations issued.[221] (emphasis added)

The Kenyan model of horizontality joins South Africa's which offers a more direct application of the Bill of Rights to corporations and other business entities, and thus presents a more hopeful jurisprudence. However, the clarity of South Africa's direct horizontality appears to be in theory only, as it has not resulted in court decisions holding private persons liable for

[219] Tushnet in Gearty & Tomkins op cit note 63 at 6.
[220] See Chapter 1 'The Independence Constitution: The Constitutional History of Kenya before 1963' on "Defining a Constitution" page 1 in Stephen Ndegwa et al (eds) History of Constitution Making in Kenya (2012).
[221] [2013] eKLR para 47. The Court made a similar decision in the cases *Law Society of Kenya v Betty Sungura Nyabuto & Another* Petition No. 21 of 2010, *B.A.O & Another v The Standard Group Limited & 2 Others* Petition No. 48 of 2011 and of Amy Kagendo Mate v Prime Bank Limited Credit Reference Bureau & another [2013] eKLR para 23.

violation of human rights.[222] The development of the jurisprudence on horizontality so far has shown that whereas the mode of horizontal application is important – the direct model of South Africa seems to have many more advantages than the other indirect models – also important is the judicial attitude and approach towards horizontality.[223] Like the South African position, horizontality in Kenya is not mandated in all circumstances, and it depends on the nature of the right, as the court will decide.[224] Human rights obligations will apply to juristic persons to the extent that the nature of the right in question permits.[225] It will be important for the Kenyan courts to factor in the lessons from other jurisdictions and devise a test that will serve as a conceptual justification in interpreting Article 20 of the Constitution, determining with greater clarity how and when it would apply to provide more consistent decisions by the courts.[226] It is proposed that the courts give a broad interpretation to the "nature of the right" in order to make the Bill of Rights widely applicable to private entities. Factors that can guide the court in determining whether obligation for a given right is suitable for application to a non-state entity include the relationship between the entity and the right-holder and level of dependence between the right holder on the non-state actor, for example in the case of an employer and employee.[227] The courts should also be more willing to impose an obligation where the right in question is important for survival, for example the right to food or health.[228] Ultimately, only time will tell the practical implications of the decision to acknowledge the obligation of corporate entities for human rights, and whether the determination of the obligation will face similar challenges as the South African courts have faced.

By providing that juristic and incorporated persons are bound by the Bill of Rights, the Kenyan Constitution appears to define a different kind of corporation that is expected from inception to have regard for all human rights. In binding juristic persons, the 2010 Constitution

[222] Nolan op cit note 128 at 87.
[223] Ibid at 91.
[224] Article 8(2) on 'Application' which reads: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.'
[225] Article 20(2) of the Kenyan Constitution provides that 'Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.'
[226] Nolan op cit note 128 at 90.
[227] Ibid.
[228] Ibid. In *Juma Musjid*, the application of Article 8(2) was given greater importance because of the fact that the right to education was considered an "empowerment right" indispensable for the realization of the other rights. See *Juma Musjid*, para 41, referring to General Comment 13 of the Committee of the ICESCR which monitors socio-economic rights, including the right to education.

arguably calls for a change in the law of corporations as we know it. The horizontal application of the Constitution to the private sphere thus offers an interesting foundation to establish what meaning should be given to the provision and what the ensuing obligations on the part of the corporate entity would look like.

CHAPTER FOUR

4. CORPORATE SOCIAL RESPONSIBILITY: A MEASURE FOR HUMAN RIGHTS?

4.1. Introduction

Ruggie defines the corporate responsibility to respect as an institutionalised social norm.[1] To show that it has the impact which it would lack as a mere social norm, Ruggie argues that the norm has acquired near-universal recognition.[2] By this he means that the corporate responsibility is acknowledged by almost all corporations through their Corporate Social Responsibility (CSR) initiatives.[3] However, CSR initiatives lack a universal application – each company follows its own definition, making it impossible to have a universal benchmark of what an ideal CSR initiative is. A survey by Ruggie on the subject showed that many corporations understand their human rights obligations mostly as corporate social responsibility obligations, as opposed to human rights obligations in their own right.[4] CSR is further understood as philanthropic duties, "giving back" to the communities in which the corporations operate.[5]

This chapter analyses and seeks to clarify the misconception that corporate social responsibility is synonymous with human rights obligations. It demonstrates that CSR, as typically understood particularly in the context of Kenya, cannot be an absolute measure of a corporation's human rights obligations. It does this by reviewing the failed attempts made in a number of jurisdictions to pass CSR laws, interpreting the failure as saying something about the nature of corporations that does not lend itself to forced social responsibility. A contrast is made with human rights which, as rights, must be respected. The point is made that although human rights and social responsibility may have a nexus - insofar as both demand that the company look beyond a purely profit motive - they have different objectives: one speaks to the responsibility of

[1] Human Rights Council 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (7 April 2008) A/HRC/8/5 [Ruggie Report 2008] para 46.
[2] Ibid.
[3] Ibid para 47. Ruggie explains that 'By near-universal is meant two things. First, the corporate responsibility to respect is acknowledged by virtually every company and industry CSR initiative, endorsed by the world's largest business associations, affirmed in the Global Compact and its worldwide national networks, and enshrined in such soft law instruments as the ILO Tripartite Declaration and the OECD Guidelines'.
[4] Ibid 8. According to Ruggie, many governments take a narrow approach to managing the business and human rights agenda.It is often segregated within its own conceptual and (typically weak) institutional box - kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance.
[5] Ruggie Report 2008, op cit note 1 para 22.

the specific company to do what is within its power – gauged by its own standards – while the other speaks to the duty of all companies, guided by the international Bill of Rights that embodies universal human rights. CSR is seen by some as going above and beyond the law, thus not being a matter of business compliance with legally binding rules, but positive contribution of business to society 'above and beyond compliance with the law'.[6] CSR may go above and beyond the law, but without the law, being only voluntary in most jurisdictions, CSR obligations are not enforceable. This Chapter proposes the use of specific human rights language in company policies, and the use of corporate law to bring a human rights understanding to corporations.

4.2. Corporate Social Responsibility in Kenya

In a review of Kenya's legal landscape on business and human rights, Ruggie observes that although compliance with human rights has been improved through the notion of corporate social responsibility (CSR), the vague nature of the concept in Kenya has made it unusable for creating explicit benchmarks for holding corporations accountable for human rights violations.[7] Corporate Social Responsibility is a recent concept in Kenya[8] and is not well developed, lacking institutions to promote and monitor it as in the more developed corporate jurisdictions such as those of South Africa and the United Kingdom.[9]

Fewer domestic companies compared to international or foreign companies make explicit reference to CSR in their corporate policies and reports,[10] and some make no reference to it although they carry out activities that amount to CSR.[11] CSR is seen by Kenyan companies mostly as a philanthropic concept,[12] a matter of making corporate donations for charitable ends tailored to address national concerns.[13] The philanthropic motivation of corporations is attributed to what has been referred to as the "African values of community spirit" that move companies to

[6] Mark B Taylor 'The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility' (2011) 5(1) *Nordic Journal of Applied Ethics* 9, 11

[7] Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises: *Corporate Law Project*, Kenya October 2010, 9. Judy N. Muthuri & Victoria Gilbert in 'An Institutional Analysis of Corporate Social Responsibility in Kenya' (2011) 98 *Journal of Business Ethics*, 467, 478 also observe that there is no uniform pattern of CSR in Kenya.

[8] Kefa Chesire Chepkwony 'Corporate Social Responsibility: Insights From Kenya', 7; KPMG Profile on Kenya (2012), 18

[9] Muthuri & Gilbert op cit note 7 at 478

[10] 61% of domestic companies compared to 100% of foreign and international companies.

[11] Muthuri & Gilbert op cit note 7 at 474-5

[12] Chesire op cit note 7 at 5

[13] KPMG op cit note 8, 18; Muthuri & Gilbert op cit note 7 at 476.

want to give back to the communities they serve or in which they operate.[14] Most donations are given for AIDS and other health issues, promotion of education and conservation of the environment.[15] Whereas some companies integrate CSR in the core of their activities, for many others it is merely a public relations concern which the company acts upon as a risk mitigating response for reputational rather than moral reasons.[16] The uptake of CSR is dependent on the industry and tends to be most in agricultural companies which serve to produce the bulk of the country's exports, and least in transport and social communication and media companies, perhaps owing to the nature of these firms.[17]

Disclosure of CSR in Kenya is voluntary; the regulatory environment serves neither to constrain the negative impact of company activities nor to promote CSR through incentives and rewards.[18] Although the government sought to enforce regulations on business, for example through environmental laws, it was not ready to go to the extent of regulating CSR for fear of the negative impact this would have on the investment climate and attraction of foreign investments.[19] In a study carried out to analyse CSR in Kenya, it was found that adoption of CSR by companies pursuant to codes of conduct was only 21.5 per cent for the domestic companies, compared to 63.2 per cent of the foreign companies.[20] In another analysis of the business environment of the country, a report by KPMG gives the reasons for a slow uptake of CSR as few incentives given by government, which when viewed against the thin financial margins of companies, made the case for CSR unattractive.[21]

4.3. Defining Corporate Social Responsibility

The question of social responsibility of a company has been under much debate in recent times, but arguably also as much in the past as now. The attempt to define the obligations of business beyond profit-making has taken several forms – business ethics, environmental health and safety requirements, community relations, and to a larger extent corporate social responsibility. Though

[14] Muthuri & Gilbert op cit note 7 at 477.
[15] Ibid at 476.
[16] Ibid at 474.
[17] Ibid.
[18] Ibid at 477.
[19] Ibid.
[20] Ibid at 476.
[21] KPMG op cit note 8.

the meaning is arguably elusive,[22]Corporate Social Responsibility (CSR) is seen by many companies as encompassing their duties with regard to stakeholders, and there have been varying levels of acceptance and different views on the approach to these duties. On one side of the debate are those who support the pure profit-maximising motive and are completely against the idea of a social responsibility for business; they believe that the company, by definition, has one primary purpose and that is to promote the interests of the shareholder as the owners of the business. Some accept the idea of social responsibility, but struggle to find an ideal measure that may be applied to strike a balance between concern for shareholders and meeting the needs of the general public outside the business entity.

Corporate social responsibility is the behaviour of corporations or companies recognising their role as 'persons' within the societies in which they operate. Like the responsibility attributed to a natural person, social responsibility of a corporation arises from ethical considerations that compel the 'person' to move beyond the realm of strict compliance with the ends of the business, to applying its resources in a manner that is not purely business-minded. The EU Commission defines CSR as 'a concept whereby companies decide voluntarily to contribute to a better society and cleaner environment.'[23] Social responsibility is seen as ethical behaviour, a somewhat general obligation to society which can be interpreted in very broad terms.[24]

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[22] Capital Markets Advisory Committee (CAMAC) The social responsibility of corporations Report (December 2006) available at *http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf*, accessed on 18 January 2015. The vagueness of the concept has haunted corporations and those trying to create an enforceable obligation out of it from early times. An apt observation regarding CSR reads: 'The term [social responsibility] is a brilliant one; it means something, but not always the same thing, to everybody. To some it conveys the idea of legal responsibility or liability; to others, it means socially responsible behaviour in an ethical sense; to still others, the meaning transmitted is that of "responsible for," in a causal mode; many simply equate it with a charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a mere synonym for "legitimacy," in the context of "belonging" or being proper or valid; a few see it as a sort of fiduciary duty imposing higher standards of behaviour on businessmen than on citizens at large.' (see Votaw D 'Genius becomes rare' in D Votaw & S P Sethi (eds) (1973) *The Corporate Dilemma* 11).

[23] Cited in J Dine *Companies, International Trade and Human Rights* Cambridge University Press 2005 Cambridge 227.

[24] The definition of CSR of the International Organization for Standardization is: 'Responsibility of an organization for the impacts of its decisions and activities (products, services and processes) on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, including health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organization and practised in its relationships (within its sphere of influence).'

Initially, definitions of CSR sought to bring to light the interconnected nature of corporations with society, dispelling the presumption that they operated as autonomous entities independent of the social environment in which they existed.[25] At the beginning of the attempt to define the concept, CSR was given wide interpretation and corporations a generous role of contributing to the socio-economic welfare of society, allowing its activities to be dictated by the socio-cultural system in which they operated. One such attempt defined CSR thus:

> In this approach, social responsibility in business is the pursuit of socio-economic goals through the elaboration of social norms in prescribed business roles; or, to put it more simply, business takes place within a socio-cultural system that outlines through norms and business roles particular ways of responding to particular situations and sets out in some detail the prescribed ways of conducting business affairs.[26]

CSR was envisioned as an obligation of business to the public for "broad" social ends, a contribution beyond the interests of private persons, shareholders.[27] The future of corporations was pegged on their response to the changing nature of society's expectations under a perceived role that was not merely confined to the production of goods and services.[28] In this context, it is highly unlikely that the corporation would have continued to exist as it was traditionally envisaged, as an entity created to maximise the wealth of its shareholders. Also curious is the apparent assumption that society dictates expectation of business entities, even though it had no perceived role in the corporation.

ISO (International Organization for Standardization) is an independent, non-governmental membership organization and the world's largest developer of voluntary International Standards. It is made up of 165 member countries who are the national standards bodies around the world, with a Central Secretariat. ISO standards aim to give world-class specifications for products, services and systems thus facilitating international trade and relations in the standardized areas.

[25] One such definition reads: 'In short, the new concept of social responsibility recognizes the intimacy of the relationships between the corporation and society and realises that such relationships must be kept in mind by top managers as the corporation and the related groups pursue their respective goals'. (see Walton C C, *Corporate social responsibilities* Belmont, CA: Wadsworth 1967, 18).

[26] Johnson H L *Business in contemporary society: Framework and issues* (Belmont, CA: Wadsworth 1971) 51.

[27] In one of the early definitions of the concept we read: "[Social responsibilities] mean that businessmen should oversee the operation of an economic system that fulfills the expectations of the public. And this means in turn that the economy's means of production should be employed in such a way that production and distribution should enhance total socio-economic welfare… Social responsibility in the final analysis implies a public posture toward society's economic and human resources and a willingness to see that those resources are used for broad social ends and not simply for the narrowly circumscribed interests of private persons and firms. (Frederick William C 'The growing concern over business responsibility' (1960) *2 California Management Review* 54, 60).

[28] The Committee for Economic Development in America noted that business entities were '… asked to assume broader responsibilities to society than ever before and to serve a wider range of human values. Business enterprises, in effect, are asked to contribute more to the quality of American life than just supplying quantities of goods and services. Inasmuch as business exists to serve society, its future will depend on the quality of management's response to the changing expectations of the public'. See Committee for Economic Development (1971) *Social responsibilities of business corporations,* 16).

The liberal definitions of social responsibility initially adopted can be attributed to the attempt to respond to the novelty of the concept, which then met with the reality of corporations and the profit making purpose they were created to serve. The liberal definition was modified with time to reflect a less generous concept. If companies are 'creatures' of the law which defines them and provides for the elements that make them up, the social obligation of the company, if any, will be interpreted only to the extent provided by the law. The objects of the company are prescribed in its constitutive documents, the memorandum of association, which state for what purpose the company is formed, what it can do and what it cannot engage in. If the constitutive documents were to be given a strict interpretation, the discretion to engage in social obligations would be limited in many cases for the reason that many socially responsible ends fall outside the strict mandate of the company.

In subsequent years, the argument of the place of social responsibility in the corporation took the form whether a 'conscience' could be attributed to a business in order to justify the apparently "non-business related" expectations made of it. Does the fact that a company is a separate legal entity, independent from the persons who own it, give the right to proponents of CSR to attribute to it a conscience (corporate though it be) in the same way as 'conscience' is attributed to a natural person? Does the fact of separate personality ascribe to the company a duty or obligation to the community in the same way a natural person has the duty to be a good citizen? In refuting these possibilities, it has been argued that:

> … we cannot and must not expect formal organisations and their representatives acting in their official capacities to be honest, courageous, considerate, sympathetic or to have any kind of moral integrity; such concepts are not in the vocabulary of the organisational language of the game….[29]

In furthering the view against social responsibility, Milton Friedman, a celebrated CSR opponent asks 'What does it mean to say that a business has responsibilities? The social responsibility of business is to increase its profits.'[30] In his view, only people have responsibilities. He further argues that the corporate executive, being an employee of the owners of the business, has a direct responsibility to conduct the business according to their wishes

[29] J Ladd 'Morality and the Ideal of Rationality in Formal Organisations' *The Monist* (October 1970), 499, cited in K E Goodpaster & J B Matthews Jr. 'Can a Corporation Have a Conscience?' (January-February 1982) *Harvard Business Review* 133.

[30] M Friedman 'The Social Responsibility of Business is to Increase Its Profits' *New York Times Magazine* 13 September 1970 at 1.

'which generally will be to make as much money as possible.'[31] Expecting the businessman to carry out social responsibilities in his capacity as corporate executive would be tantamount to defying the interests of his employers and spending money belonging to other people for a general social interest.[32] This expectation, he concludes, amounts to a 'fundamentally subversive' doctrine, in a society where business has only one social responsibility, to maximise profits.'[33] However, concepts attributed to persons can also be attributed to organisations in as much as they are 'persons' operating in a wider community and exercising their functions within society; the company is made up of persons who can be held responsible for breach of social obligations.

Whatever definition is adopted, CSR is seen as an acknowledgment by corporations that they do not exist for the sole purpose of making profits. It can be a good tool to get corporations and business entities to think of their impact on society, and has been applied positively in areas such as environmental management and in labour law to ensure compliance with the minimum wage.[34] To the extent that it leads corporations to have greater care for their employees and other stakeholders, CSR is a very positive concept and ought even to be compulsory. But its limitations curtail its usefulness. Voluntary requirements are unenforceable; without an enabling environment, without laws or structures that can remedy the results of the social irresponsibility of corporations, CSR remains an ineffective concept for full corporate accountability.

In seeming agreement with the voluntary nature of social obligations, majority of proposals to legislate CSR requirements have been unsuccessful. Some failed attempts at regulating the role of business in areas the area of corporate social responsibility are reviewed below with the aim of analysing whether the ultimate rejection of regulated CSR says something about the business entity and its mission that cannot be ignored.

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[31] Ibid.
[32] Ibid at 2.
[33] Ibid at 6.
[34] Peter Utiing, UN Research Institute for Social Development, 'CSR from a Development Perspective: Trends, Debates and Policy Implications' available at *http://www.unrisd.org/80256B3C005BD6AB/%28httpAuxPages%29/7A2FAD29DD049C1AC125754C0039375D/$file/CSRfromaDevPers.pdf*, accessed on 23 January 2015.

4.4. Failed attempts to regulate Corporate Social Responsibility

In addition to the problem of whom corporations are to serve, the social responsibility of corporations also raise the question how the corporation is to be regulated with regard to this obligation to society.[35] Is the regulation of social obligations to be left to the market; do the contractual relations between the stakeholders suffice, such as the contracts that exist between the corporation and suppliers, or with employees and other stakeholders? Are existing laws sufficient to take care of the interests of stakeholders: labour laws, consumer protection laws or health and safety laws? Alternatively, should the public regulation by the state have a role to play in the social responsibility of business? Further, noting the preferred move to avoid the exclusive shareholder primacy theory, would not the enactment of laws reflecting the favoured enlightened shareholder alternative be useful? As one activist observed:

> [N]o one can sensibly argue that well-conceived regulation is not a valuable tool – indeed all the evidence suggests that companies themselves prefer to operate in environments where the regulatory framework is clear and predictable.[36]

Acknowledging the direct link between CSR and directors' duties,[37] would not an attempt to legislate these duties with regard to CSR be legitimate?[38] The failed attempts to regulate CSR through laws in Australia and South Africa as discussed below seem to suggest otherwise.

In Australia, there was a move to introduce CSR law that would force directors to comply with social obligations. The Business Council of Australia in responding to the proposed law argued that companies needed to engage with communities in order to establish the best way of

[35] Larry Cata Backer 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 Columbia Human Rights Law Review, 287 at 295.

[36] Peter Davis 'Tougher laws to improve UK human rights impacts?'**(**February 2009) *Ethical Corporation*47. Davis was at the time of writing Ethical Corporation's politics editor and a director of the Ethical Corporation Institute.

[37] Directors determine what projects the company will undertake; they decide if and how much will be spent in projects that do not directly generate revenues for the company.

[38] See D. Doane, 'The Myth of CSR: The problem with assuming that companies can do well while also doing good is that markets don't really work that way' (Fall 2005) *Stanford Social Innovation Review 23*, 28 available at *http://www.ssireview.org/pdf/2005FA_Feature_Doane.pdf*, accessed on 4 September 2014. Doane says that a whole new strategic approach is needed as an alternative in the question of making corporations more socially responsible, such as direct regulation of corporate behaviour or legislation of social responsibilities of companies and their directors. Legislation of the responsibilities of directors, making them accountable to the different stakeholders will also serve to clarify the corporate accountability problem. Regulating the social expectations of the company through laws will make them enforceable, removing any lack of clarity on what is expected of companies.

co-operating, rather than having obligations imposed on them.[39] A parallel inquiry during the same period was carried out by the Parliamentary Joint Committee on Corporations and Financial Services.[40] Intense deliberations were conducted on the question of social responsibility of corporations and its place in the law of corporations in Australia. The parliamentary committee requested advice on the extent to which directors' duties under the Corporations Act 2001 should include corporate social responsibility or explicit obligations to take account of stakeholders other than shareholders.[41] In a report published in December 2006, the Capital Markets Advisory Committee recommended that no change be made to the Corporations Act to clarify the extent directors duties should consider stakeholder interests in decision-making.[42] The Committee further recommended that CSR reporting remain voluntary, with government intervention in encouraging social responsibility being limited to research and creation of a national network on social responsibility.[43]

In the wake of the reform process that led to the amendment of the Companies Act in South Africa, comments by policy makers pointed to a wider role of the corporation in society and an attempt to legalise the enlightened shareholder position. Directors were permitted to consider the overall profitability of the company and would not be obliged to distribute dividends if in their view to do otherwise would be more beneficial to the long-term continuing interests of the company.[44]

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[39] S McMahon 'BCA Fights Social Responsibility Law' *(*October 17 2005) available at (*http://www.theage.com.au/news/business/bca-fights-social-responsibility-law/2005/10/16/1129401144710.html*,, accessed on 5 August 2014.

[40] Capital Markets Advisory Committee (CAMAC) The social responsibility of corporations Report (December 2006) 2-3, available at *http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf*, accessed on 18 January 2015.

[41] Ibid at 5-9

[42] Ibid, and at 139.

[43] Ibid

[44] This position was given judicial credence in the South African case of *Coronation Syndicate v Lillienfield and the New Fortuna Company* (1903 TS 489) as far back as 1903. The interest inferred is not so much the one time profit maximization wealth creation, but rather the long term benefits to the company. Directors are 'not obliged to maximize current profits in order to satisfy short term demands for dividends at the expense of a growth in profitability in the long term.' In the case of *Cohen v Segal* (1970 (3) SA 702 (W), the court held that directors occupy a fiduciary position and must exercise their powers 'bona fide solely for the benefit of the company as a whole….' 'Members' in turn are defined as 'shareholders' and their interest as profit maximization. The overriding consideration is the interest of the shareholder. (J E Parkinson, 'Corporate Power and Responsibility: Issues in the Theory of Company Law' (1993), 81 cited in Department of Trade and Industry, General Notice 1183 of 2004, '*South African Company Law for the 21st Century, Guidelines for Corporate Law Reform'* (May 2004) 25 para 2.2.2 available at <*www.polity.org.za/attachment.php?aa_id=1326*>, accessed on 23 July 2014, 21)

In the view of the policy makers, the 1973 Companies Act needed a wholesome overhaul to reflect the principles of the new law and to keep within its spirit.[45] According to the policy formulators, an underlying objective of the new corporation law was to promote competitiveness in South Africa by 'encouraging transparency and high standards of corporate governance, recognising the broader social role of enterprises'.[46] In their view, corporations and governments increasingly acknowledged that there is a need for higher standards of corporate governance and ethics and greater collaboration between enterprises and societies in which they operated.[47] In May 2004, the South African Department of Trade and Industry released a policy paper[48] that laid down the basic approach that was taken by the South African government in the company law reform[49] and set the framework for detailed technical consultation that resulted in the Companies Act 2008. The policy makers expressed the view that company law ought to make provision for the needs and expectations of the different stakeholders and also that 'directors should take into account the policies and principles reflected in the Constitution and other forms of regulation for the benefit of other groups.'[50] In the South African context, therefore, it was desired that the corporation have a wider role in society, and be accountable to various stakeholders, roles that the traditional concept of shareholder primacy did not recognise. The policy document categorically stated that:

> ..in the South African context, corporation law needs to take account of stakeholders such as the community in which the corporation operates, its customers, its employees, its suppliers and the environment in certain situations mandated by the Constitution and related legislation.[51]

However, not much was eventually enacted in similar broad and explicit terms when the Companies Act was finally amended. The Companies Act 2008 cannot be said to reflect a 'comprehensive company law review'[52] as was anticipated at the time the review took off. Whereas the formulators of the new law intended for an apparent major overhaul of the existing law at the time to reflect 'the Unique South African context' and to 'take into account… 'the

[45] South African Company Law for the 21st Century ibid at 25 para 2.2.2
[46] Ibid at 25.
[47] Ibid at 14.
[48] Ibid at 25.
[49] Mandisi Mpahlwa, MP Minister of Trade and Industry in the foreword to the policy document, ibid.
[50] Ibid at 25.
[51] Ibid at 26.
[52] Ibid at 15.

legitimate interests of other stakeholder constituencies'[53] of the company, this attempt was watered down in the long run, and not adequately reflected in the final law, the Companies Act of 2008. The wording of the provision of the 2008 Act can hardly be said to represent a novel position, at least not as directly as would have been expected. Why, after advocating such a pro-stakeholder approach, did the amended law settle for the more standard mid-point position that failed to explicitly recognise the 'rights' of the other stakeholders? Why did it rather seem to re-state the primacy of the shareholder, much as was the case in the law that it sought to modify?

In view of the failure to legislate the corporate responsibility of companies in the various jurisdictions highlighted above, would it be reasonable to conclude that social responsibility in profit-seeking is a myth? If the answer to this question is in the affirmative, to what extent can social responsibility and profit maximisation be expected to co-exist? Are the proponents of a wider social responsibility for businesses advocating for an inconceivable corporate objective in a world where social responsibility and profit maximisation are not expected to co-exist?[54] The attempt to do good (carry out socially responsible projects) is seen by those who oppose CSR as only a 'patchwork' approach because such investments are, in any case, unlikely to pay off in the period that stock markets usually require (and in this sense are therefore unfavourable to the business); such attempts are eventually left out in favour of strict business ventures that directly benefit the shareholders.[55]

It may be concluded from the abovementioned failed attempts to regulate CSR through laws that the profit making goal of business entities seems to be upheld as superior to the claims of other stakeholders.

A number of arguments can be proffered against regulation of the social responsibility of corporations. First, statutes generally are a creation of states and in this era of globalisation where corporations transact across borders, it is not easy to envision national regulation that finds favour with the numerous corporations transacting in varying circumstances as branches or subsidiaries.[56] But the attempt to impose social obligations at the international level also failed

[53] South African Company Law for the 21st Century op cit note 44 at 26.
[54] D Doane, op cit note 38 at 25. Calling this expectation a 'myth' of CSR, Doane says that 'the problem of assuming that companies can do well [financially, fulfilling their constitutive objectives] while also doing good [social responsibility] is that markets don't really work that way… [T]here's often a wide chasm between what's good for the company, and what's good for society as a whole.'
[55] Ibid.
[56] W Cragg 'Ethics, Globalisation and the Phenomenon of Self-Regulation: An Introduction' in W Cragg (ed) *Ethics Codes, Corporations and the Challenge of Globalisation* (2005).

with the rejection of the UN Norms as internationally binding on corporations. The UN Norms were seen to take the CSR deliberations from the national to international level, and to transcend the argument of permissible charity, making social responsibility a governance issue.[57] Through the Norms, CSR would have had a place in International Law as the scope of stakeholders to whom the corporation was expected to be subject would go beyond the suppliers, employees and community.[58] Under the regime of the Norms, non-governmental organisations (NGOs) would be tasked to carry out periodic monitoring and verification by United Nations in conjunction with other international and national mechanisms.[59] With the rejection of the Norms, the attempt to introduce binding social responsibility on corporations failed at another level, again giving credibility to the notion that the law has no place in regulating social behaviour in relation to corporations. Once more, the attempt to force charity and 'good neighbourliness' was rejected, giving further voice to the opponents of a legislated social responsibility.

Second, might not existing laws and contractual relationships be sufficient to regulate what is considered the social responsibility of business? Environmental law defines the company's obligation in maintaining a clean and safe environment; contracts with suppliers ensure their fair treatment; consumer protection laws exist to protect the consumer against any short changing by self-seeking businesses; the government is charged with the duty to collect taxes (from the company in form of corporate taxes; from its executives in form of income tax) and apply these for the provision of essential services to the communities, such as hospitals and schools. Consequently, it may be argued, adding another set of laws regulating the obligation of directors to the stakeholders will be introducing one law too many. Too much regulation stifles creativity and innovation.[60]

Third, it is the view of some that social responsibility cannot be imposed and has to be freely taken on. As one author opines:

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[57] Backer op cit note 35 at 298.

[58] Ibid. See Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Fifty-fifth session Agenda item 4 E/CN.4/Sub.2/2003/12/Rev.2 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (26 August 2003) para 22.

[59] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) para 16.

[60] Stephen Timms in advocating for a social responsibility that goes beyond 'mere regulatory requirements', said: 'But what I believe we need to avoid at all costs is moving corporate social responsibility into the realm of regulatory red tape, because that would merely stifle the creativity and innovation, which are the most valuable feature of CSR today.' See Stephen Timms MP, Corporate Social Responsibility Speech, IPPR, London, Monday, December 02, 2002 *http://www.dti.gov.uk/ministers/speeches/Timms*.

> I take responsibility to mean a condition in which the corporation is at least in some measure a free agent. To the extent that any of the foregoing social objectives are imposed on the corporation by law, the corporation exercises no responsibility when it implements them.[61]

The company needs to respond to the needs of the society in which it operates, and can only do this if it assesses the situation itself, as opposed to having duties dictated by statutes.[62] Responsibility places a greater obligation on the corporation not only to comply with the strict requirements of law, but to exercise its 'good sense' in recognising that it does not exist in isolation; it operates within certain boundaries and like any person who lives in society, it owes and should meet certain duties and responsibilities to those it interacts with in its operations even when these have not been strictly sanctioned.[63] Legislating social responsibility for the company can lead to a mechanical response where companies comply not because they recognise any obligation to society but merely to meet the minimum requirements of the law.[64] This will not serve the purpose intended by the legislation.[65] However, interestingly, it is the very lack of laws and regulations that has been blamed by others for lack of take up of socially responsible behaviour. Companies are said to be more inclined to act in a socially responsible manner if there are strong and well enforced state regulations, coupled with industry associations and independent institutions such as non-governmental organisations to monitor and enforce the rules.[66]

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[61] Manne H G & Wallich H C (1972) *The modern corporation and social responsibility* 40

[62] In Australia, there was a move to introduce CSR law that would force directors to comply with social obligations. The Business Council of Australia in responding to the proposed law argued that companies needed to engage with communities in order to establish the best way of co-operating, rather than having obligations imposed on it. S McMahon, '*BCA Fights Social Responsibility Law'* October 17, 2005. Article available at *http://www.theage.com.au/news/business/bca-fights-social-responsibility-law/2005/10/16/1129401144710.html*, accessed on 9 June 2016.

[63] See Ben W Heineman Jr., William F Lee & David B. Wilkins 'Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century' Harvard Law School Center on the Legal Profession, 26-7 – section on *Ethical Decision Making about Stakeholder Issues*.

[64] See Davis K, 'The case for and against business assumption of social responsibilities' (1973) *16 Academy of Management Journal*, 312, 312-313 who states: "For purposes of this discussion it [CSR] refers to the firm's consideration of, and response to, issues beyond the narrow economic, technical, and legal requirements of the firm… It is the firm's obligation to evaluate in its decision-making process the effects of its decisions on the external social system in a manner that will accomplish social benefits along with the traditional economic gains which the firm seeks… It means that social responsibility begins where the law ends. A firm is not being socially responsible if it merely complies with the minimum requirements of the law, because this is what any good citizen would do."

[65] CSR A View from the Law Society International Unit (September 2002) 15 available at *http://www.lawsociety.org.uk/documents/downloads/corporate%20social%20responsibility.pdf*.

[66] Muthuri and Gilbert op cit note 6 at 477.

Fourth, the market forces do place a check on the delivery of expectations. The failure to regulate social responsibility seems to underscore the fact that the function of government must be limited; its responsibilities must have bounds, and regulation of social responsibility should be left to other agents, such as market forces. The market response is a key factor in obliging companies to consider the interests of stakeholders naturally, for the survival of business, and if well applied the need for legislation would be eliminated. Customers want to buy from companies that care about them and the environment in which they operate; they seek the assurance that the company is not just concerned with meeting the basic legal requirements, no more. Employees are motivated to work for companies that meet and respond to their needs as opposed to just using them to make money. The company is concerned about its perception in society and would therefore ensure it is viewed in good light. However, it is debatable whether market forces alone are sufficient to force compliance with social obligations by companies. In circumstances for example where the consumer lacks an alternative option to obtain goods and services, he cannot exercise the option of ignoring the socially irresponsible company.

Finally, those who oppose the social responsibility of business argue that creating fiduciary obligations for directors towards the wider society transforms them from businessmen to unelected and unaccountable public servants,[67] a role best left to the political process. When directors are made accountable to many people, the system of checks and balances on the exercise of such powers as are accorded to them is diluted and they become, in the end, accountable to no one. Furthermore, the fact that the various stakeholders have conflicting interests[68] mars a feasible attempt at any expectation on the directors' part to fulfill the complex role play. Directors can use this vague commitment to justify any decision they undertake on grounds that it benefits one group or the other. If therefore a choice has to be made of a single line of accountability, it would have to be to the shareholder, having as he does an entrenched interest in the business which can be used to give direction or focus to the interest of the other stakeholders.

[67] Ibid 421-22.
[68] J R Macey and G P Miller 'Corporate Stakeholders: A Contractual Perspective' (1993) 43 *Univ of Toronto LJ* 401, 411.

4.5. Successful legislation of social responsibility

Despite the trend of apparent acceptance of corporate social responsibility by corporations which either develop their own CSR codes, or adopt suggested industry codes, this obligation remains voluntary in most jurisdictions.[69] In recent developments, India became the first country to have mandatory CSR spending by companies regulated in its Companies Act.[70] The Act requires that a directors' report be attached to the annual financial statements, and that the report contain details of the policy implemented by the company on CSR activities undertaken during the year. CSR activities are defined to include activities relating to eradicating poverty, promoting education, promoting gender equality and empowering women, reducing child mortality and improving maternal health, combating diseases such as malaria, supporting business projects and contributing to government funds set up to promote socio economic development.[71] In a less forceful manner, or in a way that offers management greater flexibility, corporate laws in some US states authorise corporations to donate money to charity, even when the donations do not benefit the shareholders in any way.[72]

After more than a decade of concerted attempts, the UK finally conceded to making social responsibility of corporations a legal requirement. A Corporate Responsibility Bill for the United Kingdom was drafted in 2003. Among other things, the Bill established and provided for the functions of a Corporate Responsibility Board, made provision for the environmental and social duties of directors and provided for remedies for aggrieved persons. This would have led

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[69] See Karin Buhmann 'Navigating from 'train wreck' to being 'welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) at 29-57.

[70] Companies Act of India of 2013, Section 135, operative from April 2014.

[71] In Schedule VII of the Act

[72] New York Code – Chapter on "Business Corporation Law", Section 202: General powers of the corporation: (12) To make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof.

New Jersey Statutes - Title 14A Corporations, General - 14A:3-4 Contributions by corporations: (1) Any corporation organized for any purpose under any general or special law of this State, unless otherwise provided in its certificate of incorporation or by-laws, shall have power, irrespective of corporate benefit, to aid, singly or in cooperation with other corporations and with natural persons, in the creation or maintenance of institutions or organizations engaged in community fund, hospital, charitable, philanthropic, educational, scientific or benevolent activities or patriotic or civic activities conducive to the betterment of social and economic conditions

California Corporations Code Section 207: Subject to any limitations contained in the articles and to compliance with other provisions of this division and any other applicable laws, a corporation shall have all of the powers of a natural person in carrying out its business activities, including, without limitation, the power to:

… (e) Make donations, regardless of specific corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic, or similar purposes.

to regulation of business activities on non-financial issues and an assurance that they are conducted in accordance with international human rights standards and responsibilities which were then verifiable in annual reports. However, the Bill was not passed into law.[73] In subsequent deliberations on company law reform that resulted in the Companies Act of 2006, discussions about the place of corporate social responsibility in the law continued. In a speech given by the Minister for e-Commerce[74], the UK position that characterised the UK Company Law Reform which resulted in the Companies Act 2006 is clearly stated:

> We can't afford any longer to see economic success as being necessarily in conflict with social and environmental goals, and we don't need to. We need to see how creating a fairer society and a dynamic economy go together.[75]

The corporate law review led to a new legislation, the Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) Regulations 2005, requiring quoted companies to prepare an Operating and Financial Review (OFR) as part of their annual report and accounts. The objective of the OFR was to complement reporting requirements at the time by providing "qualitative, non-financial and forward-looking" information on the performance of the company including social and environmental issues. The proposed law provided:

> The OFR is designed to address the need in a modern economy to account for and demonstrate stewardship of a wide range of relationships and resources, which are of vital significance to the success of modern business, but often do not register effectively, or at all, in traditional financial accounts.[76]

The intention of the provision was non-revolutionary – desiring to make corporations consider interests beyond the shareholders, but not doing so in a manner that disregarded the principal place of the shareholder. This fact would have made it more acceptable to both those who held the shareholder view, and those on the opposing end who preferred a pluralist view.[77] However, in a 'spectacular U-turn'[78] this reporting requirement was withdrawn in 2005 with the

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[73] See DFID, 'DFID and corporate social responsibility' (2003) available at *http://www.eldis.org/vfile/upload/1/document/0708/DOC13366.pdf*, accessed on 6 August 2014.
[74] Timmsop cit note 60.
[75] Ibid
[76] Modern company law for a competitive economy: Completing the Structure URN 00/1335, A consultation document from the Company Law Review Steering Group (November 2000) para 3.4.
[77] Andrew Keay, 'Stakeholder Theory in Corporate Law: Has it got what it takes?' (2010) 9(3) *Richmond Journal of Global Law and Business* 246 (22).
[78] Andrew Johnston 'After the OFR: Can UK Shareholder Value Still be Enlightened?' (2006) 7 *European Business Organization Law Review*, 817, 832.

repeal of the OFR on the basis that social responsibility is best not regulated but left to the discretion of the companies. In explaining its decision, the government said that:

> … the burden of statutory requirements should be proportionate and necessary and due consideration should be given to the impact of such requirements on the competitive position of UK businesses. With these Regulations, the Government is therefore streamlining directors' reporting requirements by removing the statutory requirement for quoted companies to produce an OFR for financial years commencing on or after 1 April 2005.[79]

In the Government's view, due consideration ought to have been given to the potential negative impact of such requirements on the competitive position of UK businesses. There was in place another requirement for companies to produce in their directors' reports a 'Business Review' setting out much of the information that was again separately required to be stated under the OFR, leading to the conclusion that upon reflection, the OFR was superfluous.[80] The burden of the additional statutory requirements was considered disproportionate and unnecessary.[81]

The desire to ensure that profit making was not seen as the ultimate or overriding end of business characterised the UK Company Law Reform of 2006.[82] Section 172 of the UK Companies Act 2006 is an outcome of this desire. Section 172 requires directors to act in the interest not only of shareholders but also of employees and the community.[83] It is a somewhat novel provision and has been considered revolutionary in broadening the outlook of companies

[79] Explanatory Memorandum to the Companies Act (1985) (Operating and Financial Review) (Repeal) Regulations 2005 2005 No. 3442, 3 available at *http://www.opsi.gov.uk/si/em2005/uksiem_20053442_en.pdf,* accessed on 28 September 2015. See also discussion on the reason for the repeal in Keay op cit note 77 at 246 (23).

[80] Explanatory Memorandum to the Companies Act (1985) (Operating and Financial Review) (Repeal) Regulations 2005 2005 No. 3442, 3 available at *http://www.opsi.gov.uk/si/em2005/uksiem_20053442_en.pdf,* accessed on 8 May 2014.

[81] Ibid. In the Explanatory Memorandum, the government expresses its 'strong commitment to strategic forward looking narrative reporting and its policy of not imposing unnecessary burdens on UK companies', 4(7. 9).

[82] In a Corporate Social Responsibility Speech, Stephen Timms MP, said "We can't afford any longer to see economic success as being necessarily in conflict with social and environmental goals, and we don't need to. We need to see how creating a fairer society and a dynamic economy go together." (See Timms, op cit note 60).

[83] Section 172 provides: A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to — (a) the likely consequences of any decision in the long term; (b) the interests of the company's employees; (c) the need to foster the company's business relationships with suppliers, customers and others; (d) the impact of the company's operations on the community and the environment; (e) the desirability of the company maintaining a reputation for high standards of business conduct; and (f) the need to act fairly as between members of the company.

and making them responsible for more than just profit making.[84] Section 172 makes provision for the duty of the directors to promote the success of the company as opposed to success of the shareholders, which would have been the assumption in the absence of the clear provision. The Explanatory note of the Section elaborates the duty of directors:

> This duty codifies the current law and enshrines in statute what is commonly referred to as the principle of "enlightened shareholder value". The duty requires a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.[85]

The discretion given to the directors can accommodate the inclusion of wider interests, including the human rights and other social impacts of the company on the community. However, Section 173 of the Act provides that the main aim of the directors should be the promotion of the company's success for the benefit of the members.[86] Therefore, although Section 172 introduces major alterations to the old law by extending the duty of directors to include the protection of social and environmental issues, the provision is merely theoretic and will not necessarily lead to protection of stakeholder interests.[87] Stakeholders' interests can be considered only to the extent that the directors think viable. There is nothing in the Act that specifically allows stakeholders to enforce the duty imposed upon directors to consider their interests.[88] The clause creates general obligations which, it is arguable, are not enforceable because the directors still have the discretion to make decisions as to what constitutes the social responsibility of the company.

The above interpretation of the provisions of Section 172 therefore also supports the assertion that the traditional role of the company reigns supreme; duties to shareholders must be considered before all others, and that these others will be considered only insofar as they do not undermine the shareholder's position. It was the intention of the UK law reform deliberations that despite the apparent liberal wording of Section 172 and the requirement for consideration of

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[84] See for example House of Lords Debates on the provision in Session 2005 – 06 Publications on the internet Standing Committee Debates Company Law Reform Bill [Lords] available at *http://www.publications.parliament.uk/pa/cm200506/cmstand/d/st060711/am/60711s01.htm* accessed on 31 August 2014.

[85] Explanatory note on Section 172 of the Companies Act 2006 available at *http://www.legislation.gov.uk/ukpga/2006/46/notes/division/6/2,* accessed on 31 August 2014.

[86] Ibid at 68.

[87] D Arsalidou 'Shareholder Primacy in Cl 173 of the Company Law Bill 2006' (2007) 28(3) *The Company Lawyer* at 67.

[88] Ibid.

other stakeholders in the decision-making, the "overriding interest of members" was the main concern. The major concern of members was central even in the concept of developing the OFR, considered a bold move to force directors to consider stakeholders in decision-making.[89] The primacy of the shareholder, previously accepted as a matter of principle as opposed to a legal provision, was thus legally mandated. It was this primacy that the OFR provisions were aimed at enlightening, creating a balance between the position directors hold, and a check on the discretion they would have to exercise in dealing with stakeholder interests. The statutory disclosure provided by the OFR was seen to be at the heart of the enlightened shareholder approach adopted by the UK Companies Act; the reporting provided under the OFR was to enlighten the shareholder approach. Repealing the OFR thus put in doubt the theory that the shareholder position could still be said to be enlightened.[90]

There was effort by the government to reinstate the OFR in 2010 in a bid to ensure that directors' reporting on social and environmental concerns of the company improved corporate accountability and transparency. Expressing its belief that business is the driver of economic growth and innovation, the Coalition Government at the time voiced its intention to "… reinstate an Operating and Financial Review to ensure that directors' social and environmental duties have to be covered in company reporting, and investigate further ways of improving corporate accountability and transparency."[91] The result was a revised Companies Act and accompanying it the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (the 'Regulations'). The consideration of a wider obligation for directors paved the way for a review of the traditional shareholder-centric theory of the corporation, eventually resulting in a requirement that directors consider human rights impact of company activities in decision-making.[92] The amended legislation among other things requires the directors to prepare a

[89] Modern Company Law op cit note 76 para 3.16.
[90] Johnston op cit note 78 at 832.
[91] See H M Government 'The Coalition: our programme for government' (May 2010) 10. Report available at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf, a*ccessed on 18 January 2015.
See *http://www.clientearth.org/company-law/company-transparency/perating-and-financial-review-873,* accessed on 31 December 2014.
[92] See Ruggie Report 2008 op cit note 1 at 10 where he observed that 'the recently revised United Kingdom Companies Act requires directors to "have regard" to such matters as "the impact of the company's operations on the community and the environment", and regulators are increasingly rejecting company attempts to prevent shareholder proposals regarding human rights issues being considered at annual general meetings.'

strategic report, which contains directors' report on human rights issues, in addition to social and community issues as was the case before the amendment.

Recognising the need for business entities to be socially responsible is a positive act, and every measure taken to create a culture of social responsibility that is entrenched in the systems of the business entity is laudable. However, as opponents of CSR would argue, corporate executives, while being 'trustees' for the owners of the business (shareholders) and thus mandated to act in their interest, are nevertheless 'not elected representatives of the people, nor appointed social guardians, and therefore lack the social mandate that a democratic society rightly demands of those who pursue ethically or socially motivated policies.'[93] If they are corporate executives versed in the affairs of a company, appointed or elected on the basis of their expertise in the particular business the company carries out: finance, or marketing, or mining, or banking consultancy, what criteria are they expected to apply in deciding on the needs of society at large? Whereas the shareholders are mandated to place a check on the exercise of directors' duties in matters related to the operation of the company's business, who checks on these extra discretionary powers of the directors to apply the shareholders' money? In pursuance of perceived social end, how is the executive to know what action of his will contribute to that end?[94] In the final analysis, the different roles in society had best be left to those most suited to execute them: allocation of taxes to the tax man, environmental concerns to the environment experts and community projects to the government since the company cannot 'acclaim itself the self-appointed representative of the global civil society'[95] believing that the economic, social, environmental and all other progress of society depends on it.

4.6. Social responsibility and the law

The consideration of the social responsibility of the corporation is not a pure legal engagement and many times revolves around economic or social and political concerns. One may fail to see the connection with the law when, for example, the anti-CSR proponents base their dissatisfaction with the principle on the fact that it is used to perpetrate public relations and marketing ends of the company rather than its social responsibility. A discussion of the morality

[93] Goodpaster & Matthews Jr op cit note 29 at 20.
[94] M Friedman op cit note 26 at 3.
[95] I Post 'Is CSR A-OK? Taking Corporate Social Responsibility Seriously' March 03,2006 available at *http://www.nationalreview.com/articles/216956/csr-ok/isaac-post,* accessed 9 February 2015.

of such a deviation is, in my view, outside the scope of concern of corporate law. Also, any justification for the adoption of a pure stakeholder concept, legit though it may be, is to be found 'not in legal theory but in economic performance.'[96] Berle & Means in questioning the application of the traditional logic of property in the modern corporation and whether the surrender of control by the owner of property may not have changed his interest in his wealth[97] also concluded similarly by saying that the answer to the question 'cannot be found in the law itself' but rather in the 'economic and social background of law.'[98] Another view also rejects the discussion of corporate social responsibility within the confines of the law of corporations:

> Corporate law is primarily about the relationships among shareholders, boards of directors, managers, and, occasionally, bondholders and other creditors; questions surrounding the role of corporations in society arise only at the periphery of the dominant narratives of corporate law, if at all.[99]

Because corporate law creates the corporation and defines it, it regulates the relationships between those viewed as central to its function, and this has traditionally not included the category of 'society' or the 'community'. To be valid, the demands of social responsibility of corporations therefore ought to find a place within the corporation law,[100] which, as noted above, seems to have rejected it prompting the question whether this persistent rejection of CSR says something of the nature of the corporation and the mechanics of its regulation that cannot be ignored.[101]

In assessing the attempts – and failure in most cases – to regulate the social responsibility of business, one is led to consider the relevance of the law; ought the law to be the solution for every social problem? The law is a system (of rules) or an institution, which like any other system or institution has a purpose,[102] and given its specific nature, it has bounds within which the powers of the legislator are valid and outside of which they are unjust, boundaries

[96] P Ireland 'Corporate Governance, Stakeholding and the Company: Towards a Less Degenerate Capitalism?' (1996) 23:3 *Journal of Law and Society*, 297, 298. Ireland talks of a 'radical' stakeholding model.
[97] Meaning that he stops being the sole focus of the business due to the change of concept from sole proprietorship to the 'modern' corporation, and with this the entry of other players in the relationship with their different interests and expectations.
[98] A Berle and C G Means *The Modern Corporation and Private Property* (Rev ed) [1932] 1967, 298.
[99] Kent Greenfield "There's a Forest in those Trees: Teaching About the Role of Corporations in Society" (2000) 34 *Georgia Law Review* 1011.
[100] Backer op cit note 35 at 305-6.
[101] That corporations in essence are intended to be profit making entities.
[102] Frederick Bastiat *The Law* 2 ed (1998) 14.

which if not respected result in inconsistency.[103] The law has been defined as a collective organisation of the individual (and natural) right to lawful defense of individual freedom, life and property.[104] These attributes of the person, his individuality, liberty, property, are not given to him by laws – they precede human legislation and therefore are superior to it; laws were created to protect or defend man's individuality, liberty, property and it would be an inconsistency that the same laws are used to take these away from man.[105]

The law's purpose has also been defined as maintaining justice[106] and justice is 'measurable, immutable, unchangeable' unlike charity and fraternity which are boundless and will always include concessions or deliberations to decide how much charity is enough; or how much fraternity is worth its name.[107] To avoid creating such a problem, the law ought to be used only for the administration of justice, and not to "force organisation, to create an artificial unity or fraternity or association which, to be valid, demands individual responsibility."[108] Unity and fraternity should be fostered, but freely, without need for the law. A law is a law because it must be respected, failure which sanctions or punishment will ensue: the lawful jurisdiction of the law therefore should be areas where the use of force is necessary, for example the defense of life, liberty, property or individual human rights, but not for charitable purposes such as the creation of brotherhood, charitable donations and other philanthropic ends.[109] Fraternity is a good thing; it should be an aim of society but should be sought by means other than the force of law.

The law has an objective purpose which cannot be twisted to favour any side; neither those who have nor those who lack. In many instances public opinion tends to be less favourable when the victim is the one who has (the presumption being that he ought not to complain of anything) and less condemnatory when it is the poor who suffer (people then look to the law to provide for him what life has failed to afford him). The law should be objective and favour neither the poor nor the rich, depending on the opinion of the legislator at any given time. If such were ever to be the case, the justice purportedly rendered for the poor against the rich would still

[103] Ibid at 21.Forced fraternity destroys liberty, a fundamental constitute of the dignity of the person.
[104] Ibid at 2 and x.
[105] Ibid at 1.
[106] Ibid at 25.
[107] Ibid at 69.
[108] Ibid at 28.
[109] Ibid at 68.

amount to an injustice, and any attempt to favour the poor at the expense of the rich, by forced re-distribution of property for example, should be prevented by the law.[110]

If the law is not directed to its proper function, it will be misused by legislators who, placing themselves above those they seek to represent, proceed to organise societal concerns according to their own criteria and in the process achieve what would be unlawful if done by individuals.[111] If an individual, moved by a desire to foster fairness, took what, in his view, was excess and unnecessary from one person, and gave it to another whom he considered more in need of it, he would be guilty of the crime of theft, and liable for punishment. This should be the case where the law permitted the "forceful" taking of the entrepreneur's property for charitable ends. Bastiat calls forced corporate responsibility "legal plunder" and observes that "when plunder is aided by the law, it does not fear your courts, your gendarmes and your prisons. Rather, it may call upon them for help."[112] If social responsibility, understood as philanthropy, was to be enforced by the law, corporations would be at a disadvantage, obliged to society in ways that are perhaps beyond their purpose. Problems exist, but their solution does not necessarily always lie in the realm of the law.

What is not right to do cannot be made right by mere proclamation of the law no matter the justification, whether poverty, inability to work or whatever other misfortune that could have befallen the other, nor for the sake of social responsibility. Philanthropy, which is what CSR in many instances amounts to, should be voluntary – if it is not, it is a false philanthropy, as no one should be forced to give what is his: this destroys justice.[113] One author does well in bringing out the amorphous nature of the responsibility that constitutes CSR, thus showing the near impossibility of crafting a law to enforce such an obligation. He notes:

> Perhaps the best way to understand social responsibility is to think of it as 'good neighborliness.' The concept involves two phases. On one hand, it means not doing things that spoil the neighborhood. On the other, it may be expressed as the voluntary assumption of the obligation to help solve neighborhood problems… Those who find neighborliness an awkward or coy concept may substitute the idea that social responsibility means the commitment of a business or Business, in general, to an active

[110] Ibid at 37.
[111] Ibid at 28.
[112] Ibid at19.
[113] Ibid at xii; 24.

> role in the solution of broad social problems, such as racial discrimination, pollution, transportation, or urban decay.[114]

Social responsibility seen as the altruism that leads one (the company) to 'give' back to society in things such as charitable donations, building of educational or social amenities for the communities and such other gestures is indeed 'good neighbourliness'. The law aims to achieve organisation in society; but the law follows the presumption that people are human beings, and not merely things or matter; they are capable of organising themselves and deciding on matters to do with their living together – they do not need the law to tell them how to be good neighbours or to solve problems which they can solve by their own effort.[115]

Expressing its position rejecting the imposition of law to regulate social responsibility on the basis that the need for the law had not been proved, the Australian Government expressed its view that:

> …guidelines for Corporate Social Responsibility (CSR) should be voluntary. The Norms represent a major shift away from voluntary adherence. The need for such a shift has not been demonstrated… We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging greater awareness of societal values and concerns through voluntary initiatives.[116]

Law requires the support of force; a law is law because if not respected there are consequences: punishment. Rather than promote some minimum level of duty or create fraternity,[117] the law should aim at meeting objective requirements, for example, the defense of individual human rights.[118] In any event, absent a concrete definition of corporate social responsibility, it would be difficult to determine what responsible behaviour is and regulation of the myriad facets attributed to the concept would require complex laws likely to be contradictory, a burden to corporations and impossible for the state to enforce.[119]

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[114] Eilbert H & Parket I R The current status of corporate social responsibility (1973, August) *16 Business Horizons* 5, 7.
[115] Bastiat op cit note 103 at 33.
[116] Comments by Australia in respect of the report requested by the High Commissioner for Human Rights by the Commission on Human Rights in its decision 2004/116 of 20 April 2004 on existing initiatives and standards relating to the responsibility of transnational corporations and other business entities in relation to human rights page 1. Available at *http://www2.ohchr.org/english/issues/globalization/business/docs/australia.pdf*, accessed on 18 January 2015.
[117] Bastiat op cit note 103 at 68.
[118] David Hess 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1999) 25 *Iowa Journal of Corporate Law* 58.
[119] Ibid.

The voluntary codes that characterise CSR have so far resulted in inconsistent and incoherent efforts.[120] As Dine observes, it is difficult to impose binding corporate social responsibility obligations because of the diversity of corporations, which, as creatures of legal systems are different from each other.[121] In the absence of binding social responsibility obligations of corporations, Dine queries and later rejects the thought that corporations can become responsible of their own accord, thereby not needing regulation.[122] To resolve this double-edged problem – of expecting corporations to be socially responsible and expecting them to regulate their responsibility of their own accord – Dine proposes a change in corporate structure, a move away from the primacy of profit-maximisation and traditional definition of the corporations, which she acknowledges will not be easy, before CSR can be embedded in the corporation, if at all.

At a time when the idea of corporate social responsibility (CSR) is widely acknowledged and proclaimed as the way forward for corporations and other business entities, the apparent failure of CSR proponents to pass laws that regulate the social responsibility and human rights obligations of business presents a curious observation. The view that the *raison d'être* of business is to make profits seems to have gained wide acceptance, arguably more by the failure of law reformers to successfully enact laws that impose a wider duty on companies. Ultimately, the age-old definition of a corporation as a profit-making entity seems to reign supreme, prefiguring what might be reasonably expected of Ruggie's Guiding Principles. His conclusion that there need not be binding laws at the international level can also be interpreted as affirming this view.

4.7. Corporate Social Responsibility and Human Rights

Most governments see their human rights responsibilities in relation to corporations from the point of view of the social responsibility of companies and not as an issue in its own right.[123] Despite the poor record of respect for human rights by corporations in Kenya, some of the big

[120] International Council on Human Rights Policy *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (February 2002) at 4.
[121] Dine Janet *Companies international trade and human rights* (2004).
[122] Ibid.
[123] Ruggie Report 2008 op cit note 1, 8. According to Ruggie, many governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box - kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance.

companies, both foreign and local, are involved in commendable corporate social responsibility initiatives in the communities where they operate, including running schools for the children of workers, offering scholarships to them, running health care facilities for the workers and their families.[124] Compliance with CSR is a positive move because it leads corporations to think beyond their profit-making goal. It is, however, not enough because it 'promises too much and leads to cynicism and box-ticking'.[125] A CSR conception of the corporation embraces the idea that company management should be concerned with human rights issues.[126] A formal acknowledgement of this conception would thus be a starting point, requiring the corporation to be concerned with persons beyond the shareholders thus helping to create a culture that goes beyond profit-maximisation. Many companies in Kenya have CSR policies, but these policies say very little, or nothing at all about human rights. The little that is said of human rights is categorised under CSR or environmental health and safety provisions. A review of a few listed companies in Kenya will illustrate the fact that human rights either are totally absent from their policies, or are otherwise seen purely as a CSR concern.[i]

Corporations can also acquire an impressive array of certifications on subjects such as ethics, social and environmental sustainability,[127] giving the impression in theory that they were doing very well in keeping up with the required standards in the relevant sectors of their operations. But there could be a disjoint between what the business entity believes itself to be, the image it projects to the world, and what happens in reality. It may have seemed important for the company to get all the certifications it received, giving information that was deemed 'proper' whereas the reality presented a very different picture. Additionally, the corporations may be content to spend much of their resources on what they consider their corporate social responsibility – charitable ends – without giving enough attention to the nature of its operations and the obligations it has to ensure respect for individual human rights.

From the attempts to define CSR which began as far back in the history of corporations as the debate by Berle and Dodd, or even before, the meaning of social responsibility has evolved with time. In the 1950s, the modern era of definitions began and was expanded in the

[124] KNCHR, A Comparative Study of the Tea Sector in Kenya, A Case Study of Large Scale Tea Estate, 28.
[125] Stu Woolman, *The Ruggie Principles, the UN Global Compact and Corporate Social Responsibility: The Risks of Overeach and Blowback*, presentation at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) International Conference, (January 23-24 2012) in Johannesburg.
[126] David Millon 'Human Rights and Delaware Corporate Law'(2012) 25 *Global Business & Development Law Journal* 173.
[127] Ibid at 28-31.

1960s and 1970s and although these definitions decreased in the 1980s there was more research on the subject, and alternative themes emerged, such as corporate social responsiveness, corporate social policy, public policy, business ethics, and stakeholder theory/management.[128] Whereas before social responsibility was interpreted to mean taking care of workers, charitable giving, provision of health care and such other social concerns, it has evolved and now concerns a wider consideration of issues, taking note of the complex nature of the relationship between corporations and the communities they operate in or produce goods and services for.[129] The disclosure requirements of social responsibility reporting and participation of stakeholders promotes transparency and can serve to improve the culture of the business entity making it more mindful of the impact of its activities. But for all the good that it promises, corporate social responsibility still falls far short of a universal ideal. Who monitors the impact of the corporations' socially responsible contributions to society, given their voluntary nature? And against which benchmark is the impact measured?

A scholar argues "CSR *and the human rights guarantees it encompasses* must be 'something central to the corporation's business, not something the corporation does in addition to businesses" (emphasis added).[130] But CSR and human rights are not synonymous. CSR is relevant to the human rights debate insofar as it represents the existing corporate culture or understanding by business entities of a role that goes beyond profit-making or mere concern for shareholders. The KNCHR seemed to acknowledge this fact when in meetings convened in September 2009 bringing together stakeholders from the public sector and business, the Commission aimed to dialogue on ways through which the duty of businesses to respect rights could be seen not as a cost, a constraint or a charitable deed but instead as a source of opportunity, innovation and competitive advantage.[131] In an inquiry into corporate violation of human rights by salt manufacturing companies in Kenya, Corporate Citizenship, which is a synonym for CSR, was perceived by the KNCHR not as a legal requirement, but nonetheless a

[128] See elaborated analysis of definitions of CSR through the decades in Archie B. Carroll 'Corporate Social Responsibility: Evolution of a Definitional Construct' *Business & Society*(September 1999) 38(3) 268-295.
[129] Peter Utiing UN Research Institute for Social Development, 'CSR from a Development Perspective: Trends, Debates and Policy Implications available at *http://www.unrisd.org/80256B3C005BD6AB/%28httpAuxPages%29/7A2FAD29DD049C1AC125754C0039375D/$file/CSRfromaDevPers.pdf*, accessed on 23 January 2015.
[130] Lawrence Mitchell 'The Board as a Path Towards Corporate Social Responsibility' in McBarnet et al (eds) *The New Corporate Accountability* at 280 quoted in David Kinley *Civilizing Globalization: Human Rights and the Global Economy*(2009) at 202.
[131] Kenya National Commission on Human Rights, Report for 2009/10, 42-3.

good indicator against which respect for human rights by non-state actors may be assessed.[132] This was an acknowledgement that CSR or corporate citizenship and human rights were not synonymous.

In an apparent contradiction to its observation, the Inquiry at the same time set about assessing whether the companies in question had made "meaningful" investment in host communities.[133] It went on in its findings to distinguish between what it classified as CSR and what in its view amounted merely to "patronisation of the local administration" where apparent benefits were seen as directed to relevant local administrators, such as fueling of vehicles needed to patrol the area and address security concerns.[134] In outlining the problems found in the investigations, no distinction is made between what is strictly CSR and what amounts to human rights violations.[135] Findings of fault against the salt mining corporations included issues such as unsatisfactory investment in education and healthcare in the communities or mutual suspicion between the companies and the communities. The solutions to these kinds of problems would lack clear benchmarks: what would constitute "satisfactory investment": many schools? And by schools would school buildings suffice, or would the corporations also be expected to provide and oversee the work of teachers? What was the company to do to diffuse the suspicion with the communities? It is unlikely that any action towards this end would be enforceable under any laws but rather be matters of discussion and implementation according to the availability of resources and the goodwill of the companies.

In the same list of grievances the KNCHR outlined valid human rights concerns: poor working and hygiene conditions, forceful evictions from ancestral land to give way to company operations: these constitute human rights violations and must be redressed as such. When no distinction is made between human rights and other societal concerns, valid though they may be, it is difficult to address them, or to see the role the corporation can legitimately be expected to play.

In an assessment of the improvements in the communities following the recommendations made by the KNCHR to the salt manufacturing companies, an interesting issue

[132] Kenya National Commission on Human Rights, Economic Interests versus Social Justice: Public Inquiry into Salt Manufacturing in Magarini, Malindi District, A special report submitted to the President and the National Assembly under section 21 of the KNCHR Act 2002 (The Malindi Inquiry Report) 164.
[133] Ibid at 172.
[134] Ibid.
[135] Ibid at 166-7.

arises in the quest to give corporations a role to play in addressing the purported negative social effects in the communities. The problems associated with the salt works were said to include increased immorality, school dropouts, alcoholism and child delinquency.[136] These allegations may be difficult to prove, or directly attribute to the corporations. Whereas the companies can be expected to contribute to their resolution, any expectations would be dependent on the goodwill of the company and are not synonymous with the human rights obligations of the company.

CSR and human rights responsibilities only find a nexus in as far as both call for the corporation or business to be concerned about more than its profit making objective. The nature of the obligation differs under the respective fields. Human rights are aimed at maintaining the level of dignity of the person below which it is not morally acceptable to live or let others live when one is in a position or has an obligation to do something about it. CSR is vague and calls on the business to exercise responsibility or judgment, while respect for human rights demands that businesses in carrying out what they were formed to do, be mindful and not in any way violate or contribute to the violation of the rights of individuals; the former appeals to the sense of responsibility of the business, while the latter appeals to a sense of justice, requiring businesses to act not as a matter of choice but one of duty.

The effort by companies to reach out to the communities, building schools and health facilities, or providing water and such other amenities, is many times done by the very same entities that disregard the environment within which they operate, or the rights and living standards of people they displace to set up projects, or such other wrongs which they seek to justify by projecting the good things they do for the communities.[137] The corporate responsibility to respect has been described as a baseline duty, which cannot be off-set with the implication that negative effects of human rights in one place can be offset or compensated by positive effects of any nature in another place.[138]

Promoting social giving or corporate philanthropy cannot be confused with the need to create a culture of human rights, and to make direct reference to human rights in the systems and processes of the business. If a corporate culture of human rights is to be successfully developed,

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[136] Gordon Ocholla et al, Environmental Issues and Socio-economic Problems Emanating from Salt Mining in Kenya: A Case Study of Magarini District (2013) 3(3) *International Journal of Humanities and Social Science*, 219.
[137] Ruggie Report 2008 op cit note 1, 55.
[138] Institute for Human Rights and Business 'The State of Play of Human Rights Due Diligence: Anticipating the Next Five Years', 7 available at *http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf*, accessed on 6 August 2014.

explicit use of the term human rights and human rights language in the operations of the business is necessary.[139] Corporations need to be forced to see these differences, and should be required to adjust their corporate policies and practices accordingly. As evidenced in the variety of approaches highlighted in the sample above, CSR is management driven, corporate determined and ultimately geared towards promotion of the company's good.[140] Human rights on the other hand are an expression of the dignity of the person, centered on his person and therefore not voluntary; they are universal and transcend the corporate setting and have compliance mechanisms that apply across the board. An acknowledgement of the importance of human rights, seen as human rights and not merely a part of the bigger social or environmental concerns, must be done both at the level of the business and at the level of the state. Taken as an issue in its own right rather than considering it as part of a wider societal problem, human rights take on a significance, which takes it beyond the shareholder versus stakeholder deliberation.

4.8. Conclusion

CSR reflects the idea of businesses serving the common good; that the benefits of private ownership ought to be shared with the entire society. However, the nature of CSR has made it impossible to agree on a common set of rules or expectations that would be applicable and acceptable by all businesses as binding on them, as it is the owners of business entities who determine what should be given to society. Differences in culture make it impossible to agree on adequate levels of benevolence. In the United States for example, a culture of extensive community programs exists which offer different services to the communities in the name of social responsibility; from access to health, to "creations of beauty and philanthropy"[141] such as universities, philharmonic orchestras and schools of music.[142] In the United Kingdom, a different culture exists. Owing to the culture of government that provides to a basic and extensive infrastructure needed by communities as part of its (government's) social responsibility, the "volunteerism" common in the US is absent.[143] Such cultures define the needs of the

[139] Ibid.
[140] Robert McCorquodale Corporate Social Responsibility and International Human Rights Law (2009) 87(2) *Journal of Business Ethics* 385, 391.
[141] Transcript - Corporate Social Responsibility: Paradigm or Paradox? The Cornell Club New York City November 6, 1998, also (1999) 84 *Cornell Law Review* 1282, 1289.
[142] Ibid.
[143] Ibid.

communities and thus what is needed in particular contexts. For some, social responsibility amounts to philanthropic giving and is purely about the corporation sharing profits made with persons or entities other than shareholders.[144] This is not the case with human rights: human rights are objective and thus provide an unwavering or unchanging guide to direct the actions of corporations.

In the CSR debate, competition is pitted against benevolence; the argument seems to be whether businesses should be concerned only about making profits, or whether they should also be concerned about the needs of society. These two ends are not mutually exclusive. Social responsibility is concerned with relieving suffering (which is what the principle of the common good calls for) as opposed to calling for the ordering of the products of business to achieve justice in society (which is impossible and raises questions that are completely outside the purview of businesses to determine or address). The expectation that businesses ought to give back to society in a manner that relieves the injustice or inequalities that exist, or that businesses should spend their earnings in building schools, repairing roads, feeding the poor and such other ends, seems political rather than economic, and thus have not taken on a universal acceptance in the world of business. These concerns are also not necessarily human rights concerns.[145]

Unlike social responsibility, issues of human rights are issues of law and may be considered in their own right. The analogy between social responsibility and human rights only goes so far and cannot hold true beyond a given point. Direct reference to human rights in corporate governance codes and guidelines remains rare[146] leading to the conclusion that such omission of reference to human rights in corporate law and policy is more by design than default. Business entities fail to make any reference to the obligations they have for human rights directly, seeing this as an external issue rather than an issue concern that should be their concern.[147] This attitude is well supported by the long-standing assumption that human rights were a concern of the state and not of private entities.

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[144] See Panel Discussion (II) on Human Capital Investment and Societal Interest: Social Responsibility as Corporate Philanthropy, Transcript - Corporate Social Responsibility: Paradigm or Paradox? The Cornell Club New York City (November 6, 1998).

[145] The State of Play of Human Rights Due Diligence, op cit note 138 at 4.

[146] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' (9 April 2010) A/HRC/14/27 [Ruggie Report 2010] 3.

[147] The State of Play of Human Rights Due Diligence op cit note 138 at 55.

[i] **CSR INITIATIVES OF SOME COMPANIES LISTED ON THE NAIROBI STOCK EXCHANGE**

Williamson Tea (http://www.williamsontea.com/our-way/our-foundation/) runs a foundation, the Williamson Foundation which funds projects aimed at improving its farms. It offers homes to thousands of its farmers and their families, provided clinics for them and a good education for their children. The Foundation cares about the people who grow our tea and the land on which it grows. It states that its farmers work in good conditions and earn a decent living. The company also ascribes to environmental conservation.

Kakuzi (http://www.kakuzi.co.ke) has an ambitious social responsibility program that incorporates what would be tantamount to human rights considerations alongside its community-contributing activities. It seeks to understand how its activities can most effectively support the needs of the local communities and contribute to local programs and initiatives. The company provides accommodation and medical facilities to all employees through dispensaries offering medical services and care to employees (free of charge), their dependents and other people from surrounding areas. It also offers day care centers for employees' children and encourages employees to have village kitchen gardens as a means of improving employee food security. The company has a comprehensive occupational health and safety program. In what would be tantamount to measures considered to safeguard human rights, the company consults the local communities affected by its businesses and undertakes to respond to and act upon all issues raised. It undertakes to ensure the social effects of major investments are assessed and monitored at the planning stage; this would help to mitigate any negative potential negative impacts before they occur. The company undertakes to provide basic services to the employees including access to food and water, primary healthcare, education and adequate housing. Kakuzi further undertakes to identify the environmental impacts of all its activities and manage them in a responsible manner to minimise the impact of our activities. It also seeks to comply with all environmental laws and to train its employees in the relevant areas.

Car and General (https://www.cargen.com/society.php) has CSR initiatives that include the construction of dams in a poor part of the country in a bid to alleviate poverty. It partners with other organizations in this. It also runs free eye checkup, surgery operations for cataract cases, glasses and medication. In collaboration with institutions of learning, C&G donates learning equipment and trains students and offers attachment to the students and 'general support' to the institutions.

Sameer Africa (https://www.sameerafrica.com/index.php/about/responsibilities) has a section on their website on "Responsibilities" which refers to an Environmental Policy that focuses on 3 main objectives: Continual Improvement of clearly defined objectives and targets, which are communicated to employees, suppliers and other interested parties; Pollution Prevention of the air, water, and land and Legal Compliance with requirements that affect how the company manages its environmental aspects. In all the provisions of the company's responsibility, nothing is said about human rights.

Marshalls EA Ltd (http://www.marshalls-ea.com/about-kia/enviroment.html), a car manufacturer, has as one of its goals the pursuit of meaningful corporate activities for consumers. Its effort to be seen as considerate

citizens of the world leads it to make exemplary and sustainable contributions to the environment. CMC Holdings runs CSR activities including charitable donations to needy organizations.

Barclays Bank (http://www.barclays.co.ke/citizenship/index.html) has a section on Citizenship, where it defines its primary stakeholders to include its customers, employees and 'the community'. If focuses on Economic Development – through exercising good governance and community investment in areas such as small business growth and entrepreneurship. Barclays partnered with other institutions (CARE and Plan International) to launch a community-based savings and loan model with the goal of reducing poverty, and enhancing income opportunities for households in rural districts. Further, the company promotes environmental stewardship in its operations, as well as in the community. Its employees, management and board are strong supporters of environmental initiatives and are fully involved in conservation and awareness efforts in the community.

I&M Bank (https://www.imbank.com/about-us/corporate-social-responsibility/) has a Social and Environmental Management Policy with CSR projects that serve diverse causes ranging from education, health care, children welfare and environment. Diamond Trust Bank has a CSR program that seeks to improve the quality of living conditions and opportunities for the disadvantaged in communities in which its employees and customers live and work. CSR activities include support to children homes, tree planting, book donations to primary schools, food support to victims of HIV/AIDS among other such activities. Housing Finance Company Kenya Ltd considers it an obligation to support and be part of the community in which it conducts its business. The company's CSR theme is "Assisting less fortunate individuals and communities to access decent shelter" and itscore Corporate Social Responsibility program is run in partnership with Habitat for Humanity Kenya, a non-profit, non-governmental ecumenical Christian organisation dedicated to eliminating poverty housing and homelessness in Kenya through provision of low-cost housing to low income families. The numerous activities supported by the company include sponsorship to sportsmen to attend training programs, sponsoring a golf tournament in aid of diabetes, food donation to charities, donation of computers to a school, support to a project that promotes the rights of children and the needs of children with special needs. KCB runs a Foundation whose main focus is enterprise development through support of projects that reduce poverty and increase income for communities and individuals including training programs, mentorship and provision of business development grants for entrepreneurs. The Foundation also supports environmental activities including tree planting, waste management, recycling and protection of ecosystems; the right to education of children through scholarships, learning materials and construction of classrooms; improvement of healthcare through provision of hospital equipment and treatment services and provision of emergency relief supplies to communities in times of natural calamities.

Another example is given here of one agricultural company in Kenya which is representative of other companies within the industry, the biggest in the Kenyan economy. Considering itself as a responsible corporate entity, the company invests heavily in a number of projects as a way of giving back to the community. In the area of education, the company supports various learning institutions, a primary school, a secondary school and two pre-unit or nursery schools. In health it offers free voluntary counseling and HIV/AIDS testing at a Centre run by the company to the neighboring communities as a means of combating

the pandemic. The Company also maintains a vast network of roads infrastructure within the sugarcane zone. It nurtures agro-forestry nurseries where seedlings are sold to farmers at subsidized costs. Additionally, the Company has constructed several boreholes to provide clean drinking water to neighboring schools and communities.

The ideal these companies have set for themselves cover important areas such as health and education and are undoubtedly impressive, a clear measure of concern for the community. However, one may rightly question whether this is the kind of responsibility anticipated in Ruggie's corporate responsibility to respect pillar. Are not the managers, by committing themselves to such a rigorous CSR program, diverting the resources of the company, both human and financial, to a general purpose and plan to benefit mankind? Social responsibility is seen by some as corporate giving, measured in terms of how much money a corporation gives to charity. Additionally, if the philanthropic giving increases the value of the firm, it is acceptable, if it does not, it amounts to an unfair distribution of the shareholders' wealth and is not acceptable. What motivates the corporate giving is the effect that giving has on the image of the company and how consumers react to it. Charitable foundations are set up within the corporation, and many corporations express their pride in "helping others and making them more productive". Others referring to third parties out there who in no way make a contribution to nor are affected by the activities of the corporation. Is this not going a bit too far and diverting from the aim of the corporation in significant way?

Failure to delineate the boundaries of social expectations creates unenforceable obligations. It is not the same to say that they have a responsibility to "give back" to society as in the terms of corporate philanthropy, as to say that corporations have a responsibility to respect human rights. Coming from a situation where corporate responsibility has been widely interpreted as CSR, effort will have to be made at the corporate level to clarify the difference between CSR and human rights obligations and to pursue the latter in appropriate and most effective ways. From having a pure profit motive, seeing itself as owing a duty to make profit for their owners perceivably at any cost, many corporations have grown to embrace a corporate social responsibility, accepting as it were that they owed a duty to other stakeholders. The task of the moment is to raise the duty of the corporation to a higher level and to give human rights obligations of corporations greater specificity so that they may be more effectively implemented.

CHAPTER FIVE

5. PILLAR I: THE STATE DUTY TO PROTECT

5.1. Introduction

The mandate given to the Special Representative of the Secretary General of the UN on Business and Human Rights, John Ruggie, in 2005 required him to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights.[1] In his research findings presented in the ‘'UN Protect, Respect Remedy Framework’ (the UN Framework) and the ‘UN Guiding Principles’, Ruggie shows that the state has a central duty to play in the business and human rights debate.[2] Ruggie settled for a state or national focus as opposed to an international approach to dealing with the question of business and human rights: he points to the domestic sphere as the ideal place to articulate grievances and to apportion liability for human rights violations by corporation

Pillar I of the UN Framework on Business and Human Rights elaborates on the legal duty of states to protect against human rights violations, showing that this duty includes an obligation to ensure that third parties do not violate human rights. In the UN Guiding Principles, Ruggie translates the existing obligation of states into accessible Guiding Principles, giving details of what it means for the state to have an obligation to ensure that third parties such as corporations do not violate human rights.[3] This chapter discusses the human rights duty of the state and sums it up in a three-fold obligation. First, the state should take preventive measures including enactment of legislation to avert violations through control and regulation of private actors. The Constitution of Kenya which was adopted in 2010 binds corporations to the Bill of Rights. This expresses more concretely the awareness of the state of its duty to protect human rights and its commitment to ensure that third parties do not violate them. The Constitution further mandates the Government to enact laws that will aid its implementation. In the mix of possible approaches, law making will therefore constitute a central means to bring about a realisation of the corporate

[1] Office of the Commissioner for Human Rights Human Rights Resolution 2005/69: Human rights and transnational corporations and other business enterprises, 1(b).

[2] David Kinley notes that they constitute the most appropriate, accessible and powerful forum within which to generate suitable regulatory responses. See David Kinley *Civilizing Globalization: Human Rights and the Global Economy*(2009).

[3] Knox John H ‘The Ruggie Rules: Applying Human Rights Law to Corporations’ (August 16, 2011) *Wake Forest Univ. Legal Studies Paper*, also available in In Radu Mares (ed) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2011) 51-83.

obligation for human rights. Second, the state can offer guidance through having clear regulatory and monitoring mechanisms including reporting standards to track the effort made by corporations to establish the impact of their activities and address any negative concerns. Third, the state can, as reactive measures in the event that violation has already taken place, provide adequate means to investigate the violations, prosecute and punish violators and offer means of effective access to remedy for the victims where the business entities fail to respect their human rights.

Execution of the State Duty will involve multiple approaches, applying both legal and non-legal measures to create a corporate culture respectful of human rights through a seamless interweaving of business and human rights at all levels. The chapter proposes the use of laws to require corporations to uphold human rights, and further recommends means to ensure that national and sectoral policies and strategies that regulate business are aligned with the provisions of the Constitution and international human rights obligations.

5.2. State responsibility in international law and State Duty to protect against human rights violations

International human rights law has historically been essentially state-centered and seems poised to remain so at least in the near future.[4] State responsibility is one of the fundamental principles of international law.[5] It entails the general set of rules governing the legal consequences of violations by States of their international legal obligations.[6] States have the primary responsibility to promote, secure the fulfillment of, and ensure respect for human rights.[7]

[4] Manisuli Ssenyonjo 'Non-State Actors and Economic, Social, and Cultural Rights' in Mashood Baderin and Robert McCorquodale *Economic, Social, and Cultural Rights in Action* (2007) 133. In his work, Ruggie acknowledged the reality that international law holds states primarily responsible for protecting against human rights violations, and his proposals do not seek to alter international law as it is (as the Norms attempted to do), but rather to propose guidelines to be applied by states in their national contexts.

[5] Malcolm N Shaw *International Law* 7 ed (2014) 566. See also Danwood Mzikenge Chirwa 'The doctrine of state responsibility as a potential means of making private actors accountable for human rights' (2004) 5(1) *Melbourne Journal of International Law* 1, 4.

[6] John H Currie, Craig Forcese, Valerie Oosterveld *International Law: Doctrine, Practice, and Theory* (2007) 467

[7] Committee on Economic, Social and Cultural Rights, General Comment No. 14, Paragraph. 42. See also Paragraph 39 directing states to use legal or political means to prevent violation of the right to health in other countries and General Comment No.15, Paragraph 33 which enjoins states to prevent abuse of the right to water by both citizens and companies.

Conventional international law[8] for long assumed that the state, as the principal subject of International Law and as party to the international treaties that codify human rights, has a monopoly of power[9] and thus should be solely held accountable for violations of human rights.[10] But a practical understanding of the primary duty of the state extends the obligation to include oversight over the activities of non-state actors to ensure they do not violate human rights. It is the considered view of some that the principle of state responsibility, well established and accepted in international law, can be used to ensure that private actors respect human rights.[11]

There is no convention or treaty stating the internationally accepted rules of state responsibility, but general applicable rules can be found in specific human rights treaties, customary international law, decisions of courts and tribunals, and the International Law Commission Daft Articles on State Responsibility (2001) (the Draft Articles), much of which reflects custom. The conventions of the UN on human rights (for example the ICCPR and ICESCR) and the comments of the UN interpreting the conventions place the blame for violations of human rights by third parties (such as business) on the state. The European Convention on Human Rights and Fundamental Freedoms assigns the obligation of securing to everyone the rights and freedoms defined in the Convention to the contracting parties - which are states.[12] The Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that every natural or legal person is entitled to the peaceful enjoyment of his possession offering to corporations the same protection under the protocol as individuals.[13] The American Convention on Human Rights offers a general provision for states to respect the rights and freedoms recognised in the convention and ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.[14] The African Charter on Peoples and

[8] As shown in the wording of the international human rights instruments.
[9] Power here is used to mean the ability to influence the lives of individuals negatively; for the state, power has been interpreted as giving rise to violations such as torture, termination of life and the violation of the right to property and other civil and political rights considered to fall under the monopoly of state protection. This power to influence does not only lie with the state; businesses employ people who spend most of the day working and earning their living and therefore naturally exert considerable power over them.
[10] John Knox in 'The Horizontal Human Rights Law' (2008) 102(1) *American Journal of International Law* 1 at 19 says that the common belief that treaties were drafted were for states as subjects which, if ever it was true, is not true now.
[11] Chirwa considers the doctrine of state responsibility as an 'under-utilised devise for ensuring that private actors respect human rights'. See Chirwa op cit note 5 at 1.
[12] Article 1 read with the Preamble of the Convention.
[13] Article 1 of the Protocol.
[14] Article 1.

Human Rights states that parties to the Charter, which are states, shall recognise the rights enshrined therein and shall undertake to adopt measures to give effect to them.[15]

The International Law Commission Draft Articles on State Responsibility (ILCASR) began the process of codifying international rules on state responsibility in 1949. The draft code of international rules was completed in 2001 and adopted by the ILC in 2011 but there is as yet no treaty, so the Articles are not binding. However, as the Draft Articles contain opinion of experts, highly recognised publicists in international law, it carries authoritative force in giving guidance on what state responsibility for internationally wrongful acts entails. Article 1 of the ILCASR provides that 'Every internationally wrongful act of a State entails the international *responsibility* of that State.' The Draft Articles define an internationally wrongful act as an act that constitutes a breach of an international obligation, and which action is attributable to the state.[16] Under the Draft Articles**,** the conduct of the private actor must qualify as an act of the state for the state to be responsible. The Articles outline a number of situations where the conduct of the private actor will be attributable to the state. The conduct of the private actor would qualify if it exercised elements of governmental authority.[17] This would cover activities of corporations which offer services that are normally considered the preserve of government, for example private security companies that may be tasked to exercise powers of detention and discipline pursuant to prison regulations; or private airlines that may have to exercise immigration control powers usually exercised by the government.[18] The conduct of a non-state entity directed or controlled by a State would also be attributable to the state: a state corporation would be an example of such an entity.[19] Only in circumstances where businesses concerned are

[15] Article 1.
[16] Article 2 of the ILC Draft Articles on State Responsibility.
[17] Article 5 of the Draft Articles.
[18] See United Nations 'Yearbook of the International Law Commission 2001, Report of the Commission to the General Assembly on the work of its fifty-third session' (2007) A/CN.4/SER.A/2001/Add.1. The Commentary by the ILC on Article 5 of the Draft Articles on State Responsibility elaborates on what would amount to an exercise of governmental authority by providing that: 'The article is intended to take account of the increasingly common phenomenon of Parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatised but retain certain public or regulatory functions'. (Part 2), 42.
[19] Article 8 of the Draft Articles.

state-owned will the obligation of the corporation not to violate human rights have a direct meaning.[20]

The International Law Commission in the Draft Articles on State Responsibility expresses the view that state responsibility in international law can apply to violations of human rights.[21] This can be implied from the ILCASR provision that "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character*."[22] (emphasis added). The Draft Articles draw precedence from the *Rainbow Warrior (New Zealand/France) case*[23] where the Arbitral Tribunal emphasised that any violation by a State of any obligation, of whatever origin, gives rise to state responsibility – and therefore the duty of reparation.[24] The state will be thus responsible when the violation is of a human rights nature.[25] The same rules of state responsibility for international law generally can therefore apply to international human rights law.[26] International human rights law and international law form one body of law and ought to be seen as mutually reinforcing,[27] although international law is more general, and international

[20] Dine Janet *Companies international trade and human rights* (2004), 175 et esq. It is noted however that the development of this jurisprudence is in its infancy and ultimately there is yet no enforcement mechanism at the international level. Another direct link is to be found where international treaties grant rights to corporations, as when the European Convention on Fundamental Rights grants corporations freedom of expression.

[21] In the Commentary on the Draft Articles on State Responsibility, numerous references are made to international human rights instruments, and the decisions of regional human rights courts to elaborate on aspects of state responsibility. Lessons are drawn from the application of human rights obligations, and it can therefore be said that lessons from international law apply likewise to the field of international human rights law.

[22] Article 12 of the ILC Draft Articles on State Responsibility.

[23] *UNRIAA*, vol. XX, p. 217 (1990) 251, para 75.

[24] Cited in United Nations Legislative Series, Book 25: Materials on the Responsibility of States for Internationally Wrongful Acts, Chapter III. Breach of an International Obligation, Commentary on Article 12 of the Draft Articles on State Responsibility, p 100 available at http://legal.un.org/legislativeseries/book25.html accessed on 24 September 2015.

[25] In the *Gabčikovo-Nagymaros Project* case, (International Court of Justice, Reports of Judgments, Advisory Opinions and Orders Case Concerning the *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* Judgment of 25 September 1997, P 38/35) the ICJ was of the view that the responsibility of the state for breach of an obligation of 'whatever nature' was well established (in international law). The internationally wrongful act could be of a human rights character, and the state will bear responsibility for its violation.

[26] Although there is a school of thought that supports the view that general rules of international law on state responsibility cannot be appropriately applied to international human rights law, I support the view that it does, based on the reasons discussed immediately above. See Chirwa op cit note 5 at 9.

[27] Chirwa ibid at 10.

human rights law more specific; in the event of a conflict, the specific human rights law provisions will prevail.[28]

In making provision for state responsibility, the Draft Articles establish a caveat that the Articles do not purport to specify the content of the primary rules of international law or the obligations created for particular states.[29] Noting that there is no breach of international obligation in the abstract, the Commentary outlines the object of the Draft Articles as highlighting the primary responsibility of the state, without particular concern for questions of evidence and proof of breach.[30] As such, the draft articles can only play a secondary role in determining whether or not there was a breach.[31] Much will depend on the facts of the case, and more factors than the theory of state responsibility will be necessary to determine the cases. Save for those differences between international law in general and human rights law, which are attributable to the specific nature of the field of international human rights law, and for the reason that international human rights law operates in the sphere of international law, rules of state responsibility in international law will be applicable for human rights law subject to the caveat the commentary elaborates as explained in the Commentary to Article 12 of the Draft Articles. The existence of the state responsibility in international law therefore means that private actors can be accountable at the international level for human rights violations, and that they can also be held responsible at the domestic level, when the state puts in place practical measures to execute its international obligation.[32]

If responsibility arises for breach of an international obligation, what amounts to breach of an international obligation? The Commentary on the Draft Articles goes further to highlight the different scenarios that can give rise to a breach of state responsibility for an internationally wrongful act. Based on decisions of the decisions of the ICJ, breach of international obligation can arise from: incompatibility of the act of the state with its international obligations;[33] actions

[28] In the view of the American Law Institute, the two fields are similar and are increasingly converging in spite of the differences in their origin and jurisprudence. See American Law Institute Restatement of the Law Third, The Foreign Relations Law of the United States cited in Chirwa ibid, fn 58.
[29] Commentary on Article 12, Book 25 p 97.
[30] Ibid.
[31] Ibid.
[32] Chirwa, op cit note 5 at 4.
[33] The Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (ICJ Reports 1980, 3) was brought by the USA against the Islarnic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals. The Court found that 'Iran, by cornrnitting successive and continuing breaches

of the state contrary to or inconsistent with a given international rule;[34] failure to comply with obligations of treaties it has signed on to.[35] All these different scenarios can be applied to establish breach of an international human rights obligation.

5.3. State responsibility and the duty to ensure non-state actors do not violate human rights

Although corporations by themselves cannot be held liable for violation of international human rights,[36] governments, through their constitutions and laws, are expected to and can hold corporations accountable and responsible for violation of human rights. The duty on the state would necessarily include putting in place measures to ensure that human rights are respected by others, including third party non-state actors. Article 21 of the Kenyan Constitution refers to the state, organs of state and public officers as the duty bearers in the implementation of rights and fundamental freedoms. Although it may at first appear to be a limitation of duty bearers and is based on the assumption that these are the exclusive duty bearers, this is not true in view of Article 20 of the Constitution, which places a duty on private actors. One possible justification for Article 21 could be that the state is charged with the ultimate task of ensuring that all the rights are observed and none is violated even when it is not itself the perpetrator.[37] The duty of the state therefore presumes an oversight role over individuals and other entities, including business entities, to ensure that human rights of individuals are not violated by anyone.[38]

At the international level, the state's primary obligation for human rights has been interpreted to include a duty to ensure that third parties have regard for human rights.[39] Article 2

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of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States.'[33] The Court further held that the responsibility thus incurred entailed an obligation on the part of the Iranian State to make reParation for the injury caused to the United States.[33]

[34] See International Court of Justice Reports of Judgments, Advisory Opinions and Orders Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*), Judgment of 27 June 1986.

[35] See International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 'Case Concerning the Gabcikovo-Nagymaros Project (*Hungary v Slovakia*)' Judgment of 25 September 1997.

[36] See discussion under section on 'Are corporations subjects of international law' in Section 2.5.6 above.

[37] The court in the case of xx highlighted the overall duty of the state by noting that: 'The very *raison d'etre* of the State is the welfare of the people and the protection of the people's rights and it is its obligation, under international and national laws, to ensure that human rights are observed, respected, and fulfilled, not only by itself but also by other actors in the country.'

[38] Section 40(3) of the Irish Constitution places on the government this oversight role.

[39] John Ruggie 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties' (February 2007) available at

of the International Covenant on Civil and Political Rights provides that "Each State Party to the present Covenant undertakes to respect and *to ensure to all individuals* within its territory and subject to its jurisdiction the rights recognised in the present Covenant…" (emphasis added). Ensuring to all individuals rights under the Covenant will entail going beyond checking its own conduct to ensuring that others, non-state actors, do not violate human rights. The Human Rights Committee in General Comment 16 on the Right to Privacy has expressed its view that the right to privacy is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.[40] The obligations imposed by the right to privacy therefore require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right.

The ICESCR imposes obligation on states to prevent violation of economic, social and cultural rights by both state and private actors. In saying that "Every State has the primary responsibility to promote the economic, social and cultural development of its people",[41] the UN General Assembly implies that the end of economic, social and cultural development is the goal, and the state is expected to ensure this by whatever means. The obligation of the state should be understood as conferring on it the responsibility to ensure that private persons within their territory respect and do not violate or contribute to the violation of human rights. The UN Committee on Economic, Social and Cultural Rights (the Committee) directs states to use legal or political means to respect the enjoyment of the right to health and to prevent third parties from violating the right to health in other countries. General Comment 14 reads:

> While only states are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, *as well as the private business sector* (emphasis added) have responsibilities regarding the realisation of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.[42]

The provision contemplates responsibilities of private actors in realising the right to health, and it also speaks to the duty of states to ensure that this happens. Because states are the main subjects of international law, human rights law aims at strengthening their obligations

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http://www.humanrights.ch/upload/pdf/070410_ruggie_2.pdf, accessed on 5 August 2014.

[40] Human Rights Committee, General Comment No. 16 on the Right to Privacy..

[41] UN General Assembly Resolution No. A/RES/29/3281on the Charter of Economic Rights and Duties of States para 7.

[42] Committee on Economic, Social and Cultural Rights, General Comment No. 14, para 42.

thereby making them better able to ensure that private persons and entities in their jurisdictions respect human rights.[43] This duty contemplates legislative, administrative and judicial measures by the state to guide businesses in respecting human rights and contributing towards their realisation.[44] In drafting the laws and policies necessary to effect the corporate obligation for human rights, the state will clearly set out the expectation that all businesses domiciled in the state should respect human rights.[45] In the same General Comment 14, the Committee attributes violation of the obligation to protect to the failure of the state to prevent infringement of the right by third parties.[46] In General Comment 15, the Committee enjoins states to prevent abuse of the right to water by both citizens and companies.[47] In General Comment 12, the CESCR further observed that "… while only States are parties to the Covenant and are thus ultimately accountable for compliance with it, *all members of society* - individuals, families, local communities, non-governmental organisations, civil society organisations, as well as the private business sector - have responsibilities in the realisation of the right to adequate food".[48] The state is expected to provide an environment that facilitates implementation of the responsibilities of the different persons, non-state actors, who have an obligation under the ICESCR to realise the right to food.[49]

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights makes the duty of the state even clearer.[50] It reads:

> The obligation to protect includes the state's responsibility to ensure that private entities or individuals, including transnational corporations, over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are

[43] Ineta Zimele Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies (2009) *EUI Working Paper AEL* 2009/8.
[44] Human Rights Council 'Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13 [Ruggie Report 2009] 14. See further discussion on the legislative duty of the state in Section 5.4.1 below.
[45] Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'A/HRC/17/31 **(**21 March 2011) [UN Guiding Principles] 7 para 2.
[46] Ibid para 51.
[47] Paragraph 33.
[48] ICESCR General Comment 12
[49] Ibid.
[50] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were the outcome of a workshop conducted in 1997 to get a better understanding of the concept of violations of economic, social and cultural rights and to develop a set of guidelines to further assist in the monitoring of economic, social and cultural rights.

> responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.[51]

Both the state on the one hand and corporations on the other have roles to play in promoting human rights, none taking the role of the other. What is expected rather is an increase in awareness by companies of the need to include human rights considerations in decision-making, and application of means to enforce the obligation. The primary role of states in protecting human rights does not mean that business entities have no obligation. The state is expected to ensure that corporations and other business entities are placed in check, but corporations also have a role to play, a role that is different from that of states. In support of the fact that business entities are different from states, Ruggie noted in the UN Framework that:

> [W]hile corporations may be considered "organs of society", they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of states.[52]

Defining the interrelation between the role of the state and the business and clarifying the character of the complementarities of this relation will allay the fears of the opponents of human rights obligation of business that imposing human rights duties on business reduces the human rights obligation of the state.[53] The effort to create successive codes of conduct to regulate the conduct of business with regard to international human rights, culminating in the Protect Respect Remedy Framework and the UN Guiding Principles on Business and Human Rights is an attempt to remedy the gap or lack of clarity as to the exact nature of corporate accountability for human rights violations.[54] Ruggie considered his task to identify the distinctive responsibilities of corporations distinguishing them from those of the state.[55] In making this distinction, he came up

[51] Section 18, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.
[52] See Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie'[Ruggie Report, 2007] 16.
[53] See André Nollkaemper 'Concurrence between Individual Responsibility and State Responsibility in International Law (2003) 52(3) *The International and Comparative Law Quarterly* 615-640 where the author makes the case for a concurrent state and individual responsibility, moving away from the traditional state-only responsibility.
[54] Developments in the Law: International Criminal Law - Corporate Liability for Violations of International Human Rights Law (May, 2001) 114(7) *Harvard Law Review* 1943, fn 38.
[55] Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (7 April 2008), 4 (7) [Ruggie Report 2008] para 53.

with the protect-respect categories of obligations, which have nonetheless been subject of criticism.[56]

Although the state has a duty over non-state actors, it will not be responsible for all human rights violations that take place in the private sphere. The case of *Velasquez Rodriguez v Honduras*[57] offers guidance in understanding the obligation of states and elaborates what the State Duty to uphold human rights entails. The case against the state of Honduras was that it ordered, supported or tolerated the forced disappearance of persons, including the deceased on whose account the petition was filed. The decision of the court reiterated the fact that the state has a duty to protect the human rights of everyone from abuse, including from abuse by third parties (corporations would fall in this category). However, violation of human rights of itself does not mean that the state failed to take the necessary preventive measures.[58] The court in this case set the standard for determining the responsibility of the state for non-state actors, holding that the state obligation will arise only if the state failed to exercise due diligence to prevent or to respond to violations.[59] A human right violation not directly imputable on the state (for example a violation committed by private persons) can give rise to an international responsibility if there was lack of due diligence to prevent violation (through having adequate laws in place) or to respond to it.[60] The court was of the view that a failure to seriously investigate the acts of private parties operating in the states parties to the Convention would be tantamount to aiding the perpetrators and thus make the state responsible at the international level.[61]

The state can take steps of a legal, political, administrative or cultural nature as considered reasonable bearing in mind the violation in question and the context of each state's

[56] See discussion in Chapter 2 above. In the deliberations of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG), a distinction between the terminology used by Ruggie and that used in ordinary international law parlance was noted, particularly with the interpretation of the corporate responsibility to respect. It was recommended that should the responsibility be so framed in the proposed treaty, the term should be well explained to avoid confusion between the legal duty as understood in international law, and the social norm as intended in the UN Framework and Guiding Principles. See UN General Assembly (Draft) Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (10 July 2015) para 68-9.
[57] Inter Am Ct.H.R (Ser. C) No. 4 Judgment of July 29 1988.
[58] Supra.
[59] Supra.
[60] Supra. The court held that 'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'
[61] Supra para 177.

circumstances, to prevent violations, to investigate them when they occur, to identify and punish perpetrators and ensure victims are adequately compensated as soon as possible.[62] In the case of violations by a private person, which therefore are not directly attributable to the state, the state will nonetheless be responsible by reason of failing to exercise due diligence to prevent the violation or by acquiescing in the perpetration of the violation through failure to take steps to redress it and punish the perpetrators.[63] In the present case it was held that allowing private actors to act freely and with impunity would amount to a failure of the state to comply with its obligation under the Convention (American Convention on Human Rights) if it led to violation of human rights recognised in the Convention.[64] This decision was affirmed in subsequent cases of the regional human rights bodies and in particular the African Commission on Peoples and Human Rights and the European Court of Human Rights.[65]

The landmark SERAC case was brought before the African Commission of Peoples' and Human Rights by the Social and Economic Rights Action Center (SERAC) on behalf of the Ogoni people of Nigeria, accusing the Government of Nigeria of violating their rights, of civil and political, and economic, social and cultural nature.[66] The Nigerian Military government was involved in oil production through a state oil company, which was the majority shareholder in a consortium of oil companies with the Shell Petroleum Development Company.[67] In the Communication, it was argued that the government did not monitor the operation of the oil companies to ensure compliance with established regulations; and that there were numerous omissions on the part of the state in keeping with international human rights and environmental protection standards.[68] The Commission held that the government has a duty to protect its citizens not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts by private parties. In making the decision, the Commission referred to

[62] Supra para 172, 174 – 5.
[63] Supra para 172 – 3.
[64] Supra para 176.
[65] International Law Society 'The Ruggie Guiding Principles on Business and Human Rights: What Do They Mean for Lawyers?' (Panel discussion, 5 July 2011) available at http://international.lawsociety.org.uk/files/Ruggie%20panel%20discussion%20summary.pdf, accessed on 21 September 2013.
[66] *Social and Economic Rights Action Center & the Center for Economic and Social Rights vs. Nigeria* (Communication No. 370/09).
[67] Ibid.
[68] Ibid para 1-10.

the *Velasquez* case [69] determined in the Inter American Court of Human Rights where it was held that failure to control private actors and letting them act with impunity resulting in violation of rights amounts to violation of the duty of the state to protect its citizens.[70]

The African Commission in the SERAC Case also referred to the decision in the case of *Commission Nationale de Droits de l'Homme et des Libertes v Chad.*[71] Chad was in a state of civil war; journalists were attacked and harassed by unidentified individuals whom the victims believed to be government agents, a fact which the government denied.[72] The complainants alleged that the government failed to protect their human rights under the African Charter from violation by other parties; the government argued that no violation was committed by its agents, and it had no control over other parties especially in the country's state of civil war.[73] The Commission held that under the African Charter (Article 1), the State was not only required to recognise the rights under the Charter, but also to give effect to them, and therefore the failure to ensure the protection of the complainants' rights would constitute a violation, even if neither the state nor its agents were the immediate cause of the violation.[74]

The case of *Young, James and Webster v The United Kingdom*,[75] brought before the European Court of Human Rights in 1981 is illustrative of the state obligation to ensure protection of individual human rights by everyone. The applicants refused to join trade unions which all employees were required to join following the signing of an agreement between the employer and three trade unions. The applicants argued that the action of their employer dismissing them from employment was a violation of their human rights under the European Convention on Human Rights. The question arose whether the responsibility for the unfair dismissal could be attributed to the respondent state, the United Kingdom. The finding of the court was that the state had an obligation to ensure everyone's rights as provided in the Convention were secured. The Court held:

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[69] Supra note 57.
[70] SERAC Case para 57.
[71] Comm. No. 74/92 (1995), (2000) AHRLR 66 (ACHPR 1995).
[72] Supra.
[73] Supra para 18.
[74] Supra para 20.
[75] Case of *Young, James and Webster v The United Kingdom*, Application no. 7601/76; 7806/77 Strasbourg (13 August 1981).

> … if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.[76]

Even though the applicants were private persons, and their employer was also a private person, the applicants could seek protection of their rights from the state, which by virtue of the Convention had an obligation to enact laws to ensure that everyone's rights were protected and it had failed in this duty.

In the case of *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v the United Kingdom*,[77] the applicants brought the matter before the European Court claiming that taking away of ownership of their land due to adverse possession provisions of the UK's Limitation Act 1980 amounted to a violation of their right to property provided under Article 1 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No. 1). In determining whether the matter could be brought against the United Kingdom, the court made reference to the decision in *Young, James and Webster v The United Kingdom* cited above where it was held that the existence of the law that made it possible to dismiss the applicants was what gave rise to the State's liability under the Convention. In the *Pye* case, the court held:

> The responsibility of the Government in the present case is therefore not direct responsibility for an executive or legislative act aimed at the applicant companies, but rather their responsibility for legislation which is activated as a result of the interactions of private individuals: in the same way as the law in James and Others was applied (and the Government were responsible for it) because private individuals had requested enfranchisement, in the present case the law was applied to the applicant companies only when the pre-existing conditions for the acquisition of title by adverse possession had been met.[78]

In the final analysis, the court in the above cases held that the state had an obligation in the matter of rights of the private parties, even when it (the State) was not the violator of the rights. In what can be considered a matter of good conscience, the state ought to be responsible for what

[76] Ibid.
[77] European Court of Human Rights, Application no. 44302/02.
[78] Supra para 59.

it creates:[79] if it gives a corporation the right to exist, it must ensure that the corporation operates within the legitimate parameters it set out to operate at its creation. Woodrow Wilson made this observation at the turn of the 20th Century, concerned about the spiraling of corporations and the change in their nature of operations, which in his view called for new approaches and modification of laws to suit their new form.[80] What was true then holds true even now, that the changing structure of society demands vigilance on the part of the state in devising means and ways of keeping the evolving corporations in check.

A duty exists therefore on the part of the state, to be responsible for the protection of human rights, and this duty, as explained above, includes an obligation to ensure that private entities such as corporations do not violate human rights. But how may this duty be understood? The section below attempts to outline the various facets which will constitute the duty.

5.4. Defining the State Duty to Protect

The ultimate aim of the state should be to ensure that all companies come to an objective understanding of their human rights obligations, and that measures are put in place to monitor compliance with the obligations, and to punish those who fail to live up to their obligations. Ruggie's Guiding Principles present a common global platform for action, an authoritative focal point that can be referred to as a point of reference to direct efforts geared at understanding the corporate obligation for human rights. Moral obligations[81] as those that ensue from Ruggie's findings and Guiding Principles have to be institutionalised through the state[82] because it is such institutionalisation that will give them legitimacy and make them enforceable. Short of imposing direct obligations for human rights violations in international law on business entities,[83] the most effective measures to effect corporate obligation for human rights will be the means each state adopts in fulfilling its obligation to protect against violation of human rights.

[79] Woodrow Wilson's Inaugural Address as Governor of New Jersey (17 January 1911) 2, available at *http://www.kean.edu/~NJHPP/proRef/wilson/pdf/wilsonDoc4.pdf*, accessed on 30 August 2014.
[80] Ibid.
[81] Contrasted with legal obligations; the UN Guiding Principles do not give rise to any legal obligations.
[82] See Surya Deva 'Treating Human Rights Lightly: A Critique of the Guiding Principles' Complicity in Undermining the Human Rights Obligations of Companies' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 78-104.
[83] This is what the UN Norms attempted to do, and it resulted in much criticism and their ultimate rejection.

In his 2010 Report, Ruggie gives a list of what he sees as priority areas through which states can work to ensure corporate responsibility for human rights.[84] However, these priorities must be seen as tasks for states and not solutions in themselves; states must review them in order to arrive at a comprehensive means of ensuring respect for human rights in their specific contexts. It will be the duty of the state to take upon itself the guidelines and make them practical for its specific circumstances. The ideal position is that human rights violations are avoided at all costs, that the state ensures that it does not, and no other person or entity violates individual human rights. If human rights are violated however, effort must be made to provide remedy for the victims, first at the domestic or national level, and only when this fails will recourse be made to the international dispute settlement mechanisms: this is what the principle of subsidiarity dictates.[85]

In the course of his work, Ruggie observed the need for further refinement of the legal understanding of the State Duty to protect by authoritative bodies at national and international levels.[86] How exactly may the primary obligation of states to prevent human rights violation be interpreted? Ruggie's definition of the State Duty to protect is two-pronged: a negative duty to refrain from violating human rights, and a positive duty to ensure the enjoyment or realisation of those rights.[87] Chirwa considers it settled that international human rights law generates three

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[84] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and Human Rights: Further steps toward the operationalization of the 'protect, respect and remedy' framework' (9 April 2010) A/HRC/14/27 [Ruggie Report 2010] 5.

[85] Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, (Skopje, 1-2 October 2010) 'Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice' 2. In the European Court of Human Rights case of *Scordino v Italy, (No. 1)* (Application no.36813/97), the Court held that:

> 'Under Article 1 of the Convention [Convention for the Protection of Human Rights and Fundamental Freedoms], which provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention', the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention [for the Protection of Human Rights and Fundamental Freedoms].'

The Court interpreted Articles 13 (on Right to an effective remedy) and 35(1) (on Admissibility criteria) to mean:

> 'The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights.' *Parenthesis omitted.*

[86] Protect, Respect, Remedy Framework, Ruggie Report 2008 op cit note 55 at 21.

[87] Ruggie Report 2009, op cit note 44.

levels of duty for the state – to respect, protect and fulfill human rights.[88] He is also of the view that the duty to protect[89] entails an obligation to prevent violations of human rights in the private sphere, to regulate and control private actors and to investigate violations, punish perpetrators and offer effective remedies for the aggrieved.[90] The African Commission in the SERAC Communication brought on behalf of the Ogoni people against the Nigerian government outlined four levels of government responsibility for human rights, which in its view were reflective of the internationally accepted duties of governments.[91] At the primary level, the state was expected to respect human rights, which it would achieve by refraining from interfering in the enjoyment of rights of individuals and peoples.[92] This obligation will be applicable in the case of corporate human rights violations when the corporation in question is a state entity. The Commission then specified a duty of the state to protect human rights at the secondary level; this duty entailed implementing an effective interplay of laws and regulations and other relevant means to protect individuals and other subjects from violation of their rights.[93] This duty is discussed further below.[94] The state also had a duty to promote human rights, which it would do by actions such as building awareness of human rights, promoting tolerance and building infrastructure.[95] The duty to fulfill human rights requires the state to live up to the responsibilities it freely undertook in signing onto various human rights regimes by taking practical means to make the attainment of the rights a reality.

Considering the positive nature of the duty of the state, the question may be asked whether the reiteration of the State Duty to protect translates into an obligation for governments to provide houses, food and other such material necessities for their citizens. The example given by the Commission in the SERAC case of how the state can effect its obligation to fulfill human rights is by providing direct food aid or social security to ensure attainment of the right to food.[96] Can the government, any government, reasonably and realistically place on itself such an

[88] Chirwa op cit note 5 at 11.
[89] Which he considers relevant for the purposes of his analysis of general international principle of state responsibility (see p 11).
[90] Chirwa op cit note 5 at 4.
[91] SERAC Case para 45-7.
[92] Ibid para 45.
[93] Ibid para 46.
[94] Section 5.4.1 below.
[95] This duty could be fulfilled by offering guidelines, giving effect to state duties in policies and through activities of National Human Rights Institutions.
[96] SERAC Case para 47.

obligation? In the effort to execute the State Duty, a further concern arises: how much faith can we have in the duty of states to protect human rights in situations where states themselves are incapable or unwilling to tame powerful business enterprises, as may be argued to be the case in many developing countries such as Kenya? In circumstances such as these, the power or duty given to the state will not lead to the desired end in reality. Nevertheless, the responsibility of the state is not diminished by virtue of its inability or unwillingness to fulfill its obligations.[97]

The principle of subsidiarity will offer a useful guide in answering these questions and assisting the state to understand its role. The principle proposes that every action in society should be carried out by the persons or entities best suited to the task, without either usurping the duties of smaller entities, or relegating to higher authorities what can be done by lesser entities.[98] In situations where the most ideal entity is unable or unwilling to execute its duty, the principle of subsidiarity exhorts the higher entity to step in and assist, not leaving the subjects in distress. If the state is unable or unwilling to protect or promote human rights in its jurisdiction, the international community will be entitled to intervene and work to ensure that the individual human rights are upheld despite the failure of the state to play its role in securing individual human rights.[99] Subsidiarity thus makes it possible for national and regional human rights systems to work together.[100]

As envisaged in the principle of subsidiarity,[101] and as Ruggie seems to have conceded in taking the position that he did with regard to the Guiding Principles, the international legal system ought neither to usurp the authority of states nor to take its place but rather to 'create an environment in which the public authorities of each state, its citizens and intermediate associations, can carry out their tasks, fulfill their duties and exercise their rights with greater

[97] UN Guiding Principles op cit note 45 at 11. See also Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Deva & Bilchitz op cit note 82 at 155, citing GP No. 3.

[98] Ibid. The author alludes to a 'concept of complementarity' among different levels of intervention at the international, regional and national levels being necessary to effectively address multinational enterprises' responsibility for human rights. The different levels of responsibility in his view should not be considered as contradictory or mutually exclusive, and different measures – binding/non-binding and mixed should be considered together.

[99] Ibid, from 45 onwards. Referring to the higher authority, it presupposes the view – 'do not totally control them (or desire to), do not do everything for them but on the other hand do not be so detached from them as to deny them help when it fails to come from expected sources.'

[100] Paolo G Carozza 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97(1) *American Journal of International Law* 38, 79.

[101] The structural principle of subsidiarity accords respect for the personal and familial, ensuring that larger collectivities do not concern themselves with issues that are within the competence of the smaller collectivities, or the individual. (See Carozza op cit note 40 at 45).

security.'[102] Looking at the duty of the state in similar light, the state ought not to take over the duties that rightfully belong to other entities, for example the duty of individuals to provide for their needs through their work. The Irish Constitution provides a classic application of the principle of subsidiarity where it states in Article 42:

> (1) The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

The same provision goes to provide that …

> (5) In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

The obligation of the state to ensure that individual human rights are protected and respected will not translate into a duty to provide education, food or housing freely as sometimes is the expectation. If the state takes upon itself obligations or responsibilities that are impossible to attain, if it set to do all things that are demanded of it, such as to build houses for the poor or to give free education to all, the government would set itself up to be blamed for all misfortune that befalls man.[103] The state ought to and should step in to alleviate any needs that individuals are unable – for whatever reason – to meet, but it cannot take on this task as its own in a manner that replaces the duty that rightfully belongs to others: parents of families, for example.

Having set out a general outline of the State Duty for human rights, the study now turns to consider what this duty entails. The State Duty to protect as defined by Ruggie is not a standard of result, but rather a standard of conduct.[104] As held in the *Velasquez* case,[105] not every violation of human rights will give rise to the responsibility of the state.[106] The government will exonerate itself if it can show that it has put in place means to prevent violations by corporations and other business entities, and to investigate offences if they occur, punish offenders and redress

[102] John XXIII, *Pacem in Terris* ['On Establishing Universal Peace in Truth, Justice, Charity and Liberty'] (April 11, 1963) 141.
[103] Frederick Bastiat *The Law* 2nd Ed (1998), 71. In Bastiat's view, when the boundaries of the government's functions are clear, we would not think of blaming the government for our misfortune 'any more than farmers would blame the state for hail or frost' (see p 4).
[104] Ibid para 14.
[105] Supra note 57.
[106] Supra para 175. The Court held that '…while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures.'

victims. To achieve this end, the government ought to and should take the requisite steps to create a framework that ensures that the political and economic environment encourages business operations and investments and at the same time ensures that all business entities conduct themselves in an acceptable manner, respecting human rights. The duty of the state will take the following forms, taking into consideration the different attempts made to give meaning to the duty.[107]

5.4.1. The duty of the state to regulate corporations and monitor compliance with corporate obligations

a) The duty to make laws requiring corporations to respect human rights

The duty of the state in relation to oversight over the activities of corporations is both preventive and reactive in nature. The preventive duty involves making laws to guide corporate activity and to prevent harm befalling individuals or groups by the action of corporations. The UN Framework and the UN Guiding Principles on Business and Human Rights provide a foundation where both legal and voluntary measures have a "relevant and reinforcing" role to play in directing the behaviour of corporations and other business entities.[108] Ruggie acknowledges that the state has regulatory and policy functions and in exercising them it is expected to enforce and assess the adequacy of laws that require business enterprises to respect human rights.[109]

Kenya has ratified a number of international human rights conventions.[110] It is assumed that in signing these agreements, the state acknowledges its obligations and undertakes to be

[107] See notes to fn 87-97 above.
[108] Mark B. Taylor 'The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility' (2011) 5 (1) *Nordic Journal of Applied Ethics* 9, 10.
[109] In the Guiding Principles, Ruggie outlines operational principles that elaborate or help to clarify the guidelines proposed and contribute to a socially sustainable globalisation (Annex (under General Principles). Through the Principles states are encouraged to enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; to ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights; provide effective guidance to business enterprises on how to respect human rights throughout their operations; and encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.(Guiding Principles, op cit note 45 Annex, under Operational Principles, No. 3).
[110] List of ratified instruments available at *http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex3.pdf*, accessed on 9 August 2014. ICCPR (International Covenant on Civil and Political Rights, ratified in 1976) (Adherence date 01.05.1972/accession 23.03.1976), ICESCR (International Covenant on

bound by them and to exercise all the measures necessary to realise them. In the past, such ratification by itself was not enough to make the obligations signed onto applicable in the country because Kenya followed the dualist system, which required the government to pass laws for international law to apply in the country. Under the 2010 Constitution, Kenya became a monist state and any treaty or convention ratified by the government will form part of the law of Kenya.[111] The duty of the state would thus include the enactment or amendment of laws necessary to implement the international obligations. In defining the role of states parties, the ICESCR provides that:

> Each state Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[112]

The provisions of both the Guiding Principles and the ICESCR encourage the use of legislative measures, which are perhaps given more importance, although they are not considered the only means of achieving the desired end. The Committee on Economic Social and Cultural Rights has established that violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States.[113] In General Comment 14 on Right to highest attainable standard of health, the Committee on Economic Social and Cultural Rights expounds on the state's obligation to *protect* the right to health under the ICESCR to include, *among others,* the duties of States to adopt legislation ensuring equal access to health care and health-related services provided by third parties.[114] The state is also given the duty to ensure that the privatisation of the health sector does not constitute a threat to the availability, accessibility and quality of health facilities, goods and services.[115] The General Comment further details the obligation of the state to include controlling the marketing of medical equipment and medicines

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Economic, Social and Cultural Rights, ratified in 1976) (Adherence date 01.05.1972), CEDAW (Convention on the Elimination of All forms of Discrimination, ratified in 1984), CERD (Convention for the Elimination of Racial Discrimination, ratified in 2001), CRC (Convention on the Rights of the Child, ratified in 2000) and CAT (Convention Against Torture, ratified in 1997); African Charter on Human and People's Rights (1992) and the African Charter on the Rights and Welfare of the Child (ratified in 2000). Kenya has also ratified 49 International Labour Organization (ILO) Conventions.

[111] Section 2(6) of the Constitution.

[112] Article 2(1).

[113] ICESCR General Comment 12.

[114] ICESCR General Comment 14.

[115] Ibid.

by third parties and ensuring that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.[116] To perform its obligations under the Convention, the state needs to enact laws, regulations and other measures to ensure that the services provided by the private sector do not violate the right to health.

Redress for violation of human rights by corporations can be availed through a creative reading of the domestic laws of countries in which the corporations operate.[117] Legislation will help to create a hierarchy of measures to be applied and thus give a sense of direction to the means applied by the government to ensure that businesses are attuned to human rights.[118] The current Kenyan Constitution, promulgated in 2010, has a Bill of Rights, which contains a wider scope of rights compared to the old Constitution. The Constitution, coupled with the completion of Ruggie's work and the proposal of the UN Guiding Principles, creates an ideal environment for a review of the state's effort to ensure businesses respect human rights. As Ruggie points out, the 'failure to enforce existing laws that directly or indirectly regulate business respect for human rights' is a 'significant legal gap in state practice'.[119]

If laws in Kenya relating to companies and company operations are read in light of the 2010 Constitution, the need for corporations and other business entities to safeguard human rights becomes explicit because its provisions on human rights apply directly to juristic persons. The 2010 Constitution of Kenya binds business entities under Article 20, and also requires states to ensure that human rights are observed by all. To attain this end, the Government has to ensure that its laws and policies reflect international standards and that they are in keeping with the international obligations it has signed onto. The exercise of vertical coherence will serve to make sure that the 'corporate laws and such other agencies that directly shape business practices are informed by the government's human rights obligations and agencies'.[120] This can only happen when there is a conscious effort on the part of the State to make the desire expressed in signing human rights instruments trickle down and guide the operations of all its departments, especially those whose activities are related to the obligations assumed.

[116] Ibid.
[117] Knox op cit note 3 at 2.
[118] Kinley op cit note 2 at 186.
[119] Guiding Principles op cit note 45, Commentary on Operational principle No. 3.
[120] UN Guiding Principles op cit note 45, see Operational Principle No. 3 on general state regulatory and policy functions.

Having laws gives more direction to companies in their quest to understand and respect their obligations.[121] In the course of his research, Ruggie carried out a Corporate Law Project which involved exploring what laws existed and how corporate regulators and courts applied the law to require corporate respect for human rights.[122] Going by the findings of the Report and the approaches outlined following the analysis of the country's laws, it appears that there is no coordinated response to the question of human rights and business in Kenya. Regulation of responsibilities for business, even what may amount to human rights obligations, exists to a large extent in the form of labour laws, environmental laws and laws and regulations on occupational health and safety which have thus far helped to shape the understanding by businesses of their obligations.[123]

The question may be asked whether corporations more easily abide by labour and environmental obligations because laws exist that deal explicitly with labour and environmental issues and punitive sanctions for violation are imposed. It is probable that Kenya's environmental law contained human rights regulations for corporations because this particular law is relatively new and therefore up to speed with the developments in the area of human rights. All environmental laws in Kenya were put together in one Act, the Environmental Management and Coordination Act 8 of 1999 (the Act).[124] The Act requires companies to carry out Environmental Impact Assessment to establish the impact their proposed activities will have, thus ensuring that the company only undertakes activities that will not harm the environment. If companies have been moved to acknowledge their role in protecting the environment because of the laws that provide clarity on expectations, they ought equally to be moved or motivated to recognise and respect their responsibility for human rights if the expectations were clarified in corporate laws. Because corporate laws shape what corporations do and how they do it, they can and should be used to offer a guide to corporations on human rights expectations.

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[121] Discussions on 60th anniversary celebrations of the UDHR available at *http://videolectures.net/isbhr08_paris/*, accessed on 9 September 2011. The emerging field of human rights and business could draw from the environmental laws and treaty modalities of monitoring and evaluation, to see how companies conduct environmental due diligence and establish if there are any lessons which can be applied in the area of human rights and business.

[122] United Nations 'Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Overarching Trends and Observations of the Corporate Law Tools Project (CLTP)' (July 2010), paper based on findings of surveys of over 40 individual jurisdictions.

[123] Ibid at 11.

[124] Date of commencement of the Act - 14 January 2000.

Where environmental impact policies exist in a company, they can be referred to to provide a guide for checking the human rights impact of the company's activities.[125] The National Environment Management Authority (NEMA) is established under the Act as the principal instrument of government in the implementation of all policies relating to the environment.[126] The existence of structured institutions that deal with environmental matters makes it easier to deal with environmental concerns and make the requirements of the Act understandable by companies; the same would apply if structured institutions existed to deal with corporate obligation for human rights. The 2010 Constitution also provides for National Human Rights Institutions that will offer guidance to the state in living up to its human rights obligations in all areas, including in the area of business.[127]

Before the 2010 Constitution was promulgated, it was foreseen that with an enhanced Bill of Rights, parliament would be mandated to enact appropriate implementing laws.[128] Similarly, courts would be bound to provide remedies for violations and certain rights could be protected by innovative use of the legislative framework.[129] To this end, the Constitution of Kenya requires the government to 'enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.[130] Corporations in Kenya are governed mainly by the Companies Act.[131] The Act makes no direct reference to any corporate obligation for human rights. The Commission for the Implementation of the Constitution (CIC) has been working with the Kenya Law Reform Commission to ensure that the laws identified as pertinent to the implementation of the Constitution are drafted and presented in Parliament for debate and

[125] Paragraph 99 of the Addendum to Human Rights Commission 'Protect, Respect and Remedy: a Framework for Business and Human Rights' 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)) reads:

> 'In addition, a large number of environmental harms are now linked to alleged abuse of human rights. Given current global scale environmental concerns, corporations with poor environmental records are alleged to contribute to impacts on a range of rights in the communities surrounding their operations and, in some cases, the global community. Business is also scrutinised for its management of environmental impact assessment processes, viewed as a means to prevent impacts on both the environment and human rights.'

[126] See the NEMA website *http://www.nema.go.ke/index.php?option=com_content&task=view&id=28&Itemid=37* (Accessed on August 9 2011).

[127] The role of the KNCHR is elaborated further in Chapter Seven.

[128] Annual ICJ Parliamentary Human Rights Workshops Report (2005).

[129] Ibid.

[130] Section 21(4).

[131] Chapter 486 Laws of Kenya.

adoption. However, none of the selected laws had anything to do with business entities and the expectation of the obligation the Constitution confers on them to uphold human rights.

The Companies Act of 2015 (the Companies Act) attempts to give wider obligation to directors than the previous Companies Act which had been in operation from the time of independence over five decades ago, requiring them to consider "social and environmental" issues in decision-making.[132] Section 655 of the Companies Act has some provisions similar to Section 417 of the UK Companies Act which, it is foreseen, may be interpreted in the future to require compulsory reporting on human rights.[133] The provision does not talk about reporting on human rights directly, but it may be interpreted to include them among the environmental matters, or social and community issues that are required to be reported on. Though it is arguable that the provision can be used to require respect for human rights, it is vague, and should be further amended to clarify the expectation and make it align with the provision of the new constitution that binds companies to the Bill of Rights. In addition to Section 655, Section 704 gives the relevant Minister the power to determine the form and content of financial statements, in effect offering the state the opportunity to give a comprehensive guide to companies on what

[132] See specifically section 371 (5) (b). Section 371 in its entirety reads:
(1) Unless the company is subject to the small companies regime, the directors' report shall contain a business review.
(2) The purpose of the business review is to inform members of the company and assist them to assess how the directors have performed their duty under section 104.
(3) The business review under subsection (1) shall contain—
(a) a fair review under subsection (1) of the company's business; and
(b) a description of the principal risks and uncertainties facing the company.
(4) The review required is a balanced and comprehensive analysis of—
(a) the development and performance of the business of the company during the financial year; and
(b) the position of the business of the company at the end of that year, consistent with the size and complexity of the business.
(5) In the case of a quoted company, the business review shall, to the extent necessary for an understanding of the development, performance or position of the business of the company, include—
(a) the main trends and factors likely to affect the future development, performance and position of the business of the company;
and
(b) information on—
(i) environmental matters, including the impact of the business of the company on the environment;
(ii) the employees of the company; and
(iii) social and community issues, including information on any policies of the company in relation to those matters and the effectiveness of those policies.'(emphasis added)

[133] See summary of Panel discussion by International Law Society: 'The Ruggie Guiding Principles on Business and Human Rights: What Do They Mean for Lawyers?' available at *http://international.lawsociety.org.uk/files/Ruggie%20panel%20discussion%20summary.pdf*, accessed on 21 September 2013. The Discussion was held at the Law Society on 5 July 2011.

they are expected to report on in order to meet their human rights obligations.[134] The issues which the Minister may outline in offering a guide for businesses to report on and therefore to implement in the operation of the business will be considered in in more detail below.

Under the Companies Act, a person who claims to have been, to be or to be about to be adversely affected by the conduct or contemplated conduct, by the failure, or by a threatened refusal to do what is required under the Act, may apply to court for an injunction restraining the concerned person from engaging in the undesirable act, or forcing him to do what is required under the Act.[135] This provision can be applied by third parties to institute proceedings against the company for violations or impending violation of their human rights. A more extensive proposal for use of the Act's provisions together with proposed amendments necessary to effect corporate respect for human rights are discussed in Chapter Eight below.

b) Corporate reporting as a means to offer guidance to corporations in executing their human rights obligations

Once laws have been put in place laying down what corporations must do to uphold human rights, adequate reporting requirements must be applied to give further guidance to corporations on how to execute their obligations. An ideal way of ensuring awareness and action by corporations is to require mandatory reporting by corporations on their human rights obligations. Human rights reporting will ensure that corporations go beyond financial considerations and concern themselves with all aspects that affect stakeholders in a systematic manner. This will be a practical means of monitoring efforts made by business entities to live up to their human rights obligations and will help to foster corporate cultures respectful of human rights.[136]

[134] 'Section 407 The Minister may by regulations provide for—
(a) the financial statements that companies are required to prepare;
(b) the categories of companies required to prepare financial statements of any description;
(c) the form and content of the financial statements that companies are required to prepare;'
However, this provision applies to quoted companies only. Why? Justify this, argue that it should be applied to all companies? Why should some requirements be only for quoted companies and not the rest?

[135] Section 1004 of the Companies Act 2015.

[136] Guiding Principles op cit note 45, Operational principle 3 (d). In the Guiding Principles, Ruggie proposes that the State encourage, and where appropriate require business enterprises to communicate how they address their human rights impacts. See also Nicola Jagers 'Will Transnational Private Regulation Close the Governance Gap?'in Deva & Bilchitz op cit note 82 at 319. See also Overarching Trends and Observations, op cit note 122 at 5. See also Ruggie Report 2009, op cit note 44.

In the Corporate Law Project carried out by Ruggie,[137] only in a few of the more than 40 jurisdictions studied did the existing corporate reporting requirements consider human rights related risks as factors determining materiality and therefore worth reporting on.[138] The previous Companies Act of Kenya which had been in operation for over six decades had no clear requirement for reporting on the social impact of the company and its activities or aspects that may have a bearing on its human rights obligations. The repealed Companies Act made provision only for financial reporting; section 157 of the repealed Act required the directors to submit a directors' report which dealt with the state of the company's affairs (usually interpreted as financial affairs), the dividends and reserves recommended. An Auditor's report was required in terms of the provisions of the Seventh Schedule of the Act which also only attests to the financial situation of the company.[139] However, the position has changed in the Companies Act of 2015, which provides for reporting on non-financial issues which can be interpreted to include human rights concerns.

Ruggie proposes in the UN Guiding Principles that the company should be able to communicate its human rights impact through formal public reporting.[140] The Guiding Principles propose that the state should encourage and require such communication, and that financial reporting should clarify whether human rights impact is material or significant, and that corporations should consider having integrated financial and non-financial reports.[141] For this proposal to be workable, there may be need for incentives for business to genuinely engage with human rights. Realistically, corporations exist to make profits and have done so for a long time; to move them out of this mind-set, they may need incentives that make business sense. These are more likely to work for the benefit of both parties, as opposed to using laws for a merely punitive role, demanding that businesses get out of the traditional perception of their role at the risk of punishment.

[137] See section 5.3.1 above
[138] Ruggie Report 2010 op cit note 84 para 9
[139] The Corporate Governance Guidelines issued by the Capital Markets Authority of Kenya offers guidelines and best practices for public listed companies to enhance self-regulation of these entities. The listed companies are expected to disclose annually the extent to which they comply with the stipulated requirements and give reasons for non-compliance, while non-listed companies are encouraged to adopt the guidelines, with no sanctions for non-compliance. However useful these guidelines are, they are voluntary and corporations apply them at will. To be effective across a wider spectrum and indeed the majority of businesses, laws are needed encompassing these guidelines.
[140] Guiding Principles op cit note 45 at 9.
[141] Guiding Principles, Commentary on 'Operational Principles: General State regulatory and policy functions' (No. 3).

As an incentive for reporting, Ruggie suggests that the State could promise to give weight to self-reporting in judicial and administrative proceedings against the company.[142] He also proposes that the state passes laws to clarify what and how business should communicate. This proposal is met to a certain extent under the proposed Companies Act 2015 of Kenya, which elaborates what a directors' report should look like. As an incentive for business, and for practical purposes, the principle of progressive realisation can be applied to implement the corporate responsibility for human rights at the level of the corporation if immediate realisation is not reasonable or feasible.[143] The implementation of corporate policies that will incur costs the company is not able to offset in a year for example can be required to be spread over several years, with particular targets for each year. A reporting and audit system can be put in place to check the implementation over the audit period.[144] Progressive realisation should allow for capacity building and institutional change.[145] The implementation of systems to implement and monitor compliance with human rights at the corporate level may require enhancing the capacity of company staff to understand human rights. Allowance may need to be made to enhance corporate features such as the risk and audit systems to factor the human rights risks and impacts. Clear principled means to assess reasonable burdens and time frames applicable in specific contexts should be put in place so that the provisions of the law on human rights are practical and corporate policies implemented have an effect and lead to meaningful change in corporate behaviour.[146]

5.4.2. The duty of the state to investigate, punish and redress human rights violations

In addition to enacting legislation to ensure that third parties conform to international human rights standards, the duty of the state includes a reactive obligation to put in place accessible

[142] Ibid at 9 (No.3).
[143] Haines Fiona, Macdonald Kate & Balaton-Chrimes Samantha 'Contextualizing the business responsibility to respect: How much is lost in translation?' in *The UN Guiding Principles on Business and Human Rights: Foundations and implementation* (2011) 107-128 (7).
[144] Ibid. For example, specify the obligations of business when faced with given barriers; propose an audit over a number of years, offering progressive expectation of different aspects of the obligation; offer cumulative points system that allows for success in one area to make up for deficiency in another area. However, progressive realisation provisions can be ambiguous in a practical sense – it may not consider the risks, costs and capacities of the specific entities concerned.
[145] Ibid.
[146] Ibid at 11.

means of redress in the event of violation.[147] The state will therefore be in breach of its duty not only by making a positive contribution to the violation of human rights, but also by failing to take steps to prevent violation, or if it occurs, by failing to investigate the incident, punish the perpetrators and redress the victims.[148] The duty to react or respond to violations was also stressed in the *Velasquez* case,[149] where the Inter American Court of Human Rights held that the state would be considered as having acquiesced and therefore be guilty of human rights violations even when it was not itself the perpetrator if it failed to take steps to redress the violation and punish the perpetrators.[150]

Investigation into allegations of violation of human rights must not only be undertaken as an initiative of private actors or the families of victims but rather by the state, as its legal duty.[151] The Inter American Court of Human Rights in the *Velasquez* case held that the standard set for carrying out an investigation is not that it must produce efficient results, but rather that 'it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective'.[152] The state will meet its obligation not because the result of a rights-violation-free society is achieved, but because it puts adequate measures in place to offer the necessary guidance, and to ensure that any violation is redressed.[153]

At its present stage of development, Kenya is not too far from that dark history where the state contributed to the violation of human rights with impunity. The culture of human rights violations and disregard for the rule of law by state officials in Kenya had taken root over many years, and it will not be surprising that even with a new Constitution, the attitude behind violation of rights may take a long time to root out. Kenya ratified the ICCPR in 1972. Despite

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[147] See '25 Questions & Answers on Health and Human Rights' (July 2002) 1 *Health and Human Rights Publication Series* 15.
[148] Ruggie Report 2008 op cit note 55, 6-7.
[149] Supra note 57.
[150] Supra note 57 Para 172 – 173. This duty of the state also follows the principle of international law what violation demands reparation. In the *Chorzow Factory* (Jurisdiction) case decided in 1927 in the Permanent Court of International Justice, the Court held that 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself.' (See Publications of the Permanent Court of International Justice *Series A* No. 9 July 26th, 1927 (Collection of Judgments) Case Concerning the Factory at Chorzow (Claim For Indemnity), p21) The ILC Draft Articles on State Responsibility also provide that 'the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'. (Article 31of the ILC Draft Articles on State Responsibility).
[151] Supra note 57 para 172 – 6.
[152] Supra note 57 para 177.
[153] Supra.

this fact, the country was saddled with numerous human rights atrocities especially in the years when a single political party ruled the country. As a result of a coup attempt in 1982, Kenya was transformed into a *de jure* one party state and detention laws previously suspended were reinstated.[154] Numerous constitutional amendments were made unopposed by parliament, aimed at strengthening the presidential powers, such as removal of the security of tenure for the Attorney General, the Controller and Auditor General and judges, effectively placing the judiciary under the control of the executive and reducing the legislature to the role of rubber stamping the decisions of the executive. The president of the country at the time resorted to centralisation and personalisation of power, and any attempt to criticise his leadership or engage in competitive politics was criminalised.[155] In the view of some, political power in the country revolved around the president. The State was seen as a preserve of those in power, and for a long time it was known and seemingly accepted, even by the other arms of government, that despite the existence of laws, the executive made the final decisions.[156]

Such an authoritarian style of leadership characterised the first president of the country and patronage came to be accepted as the reward for blind loyalty.[157] For many years, persons considered political dissidents were held in infamous underground cells in a government building within the capital city and tortured because of the views they held, or on the basis of unsubstantiated claims they were alleged to have made.[158] Being a power unto itself, the State was able to disregard human rights contained in its very Constitution, and to do so repeatedly because the Executive had unchecked powers and no one questioned what it did. For lack of independence, the Judiciary also failed in its role as a guardian of the rights of the people. To

[154] Through Constitutional amendment no. 7 of 1982; see Korwa G Adar & Isaac M. Munyae 'Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001' (2001) 5(1) *African Studies Quarterly* 1. Laws such as the Chief's Authority Act, the Public Order Act, the Preservation of Public Security Act and the Penal Code gave the President power to suspend individual rights recognised in the Constitution.

[155] See Adar & Munyae ibid. See also discussion in G K Kuria & A M Vasquez 'Judges and human rights: The Kenyan experience' (1991) 35 *Journal of African Law* 145, 142 and the Report of the Commission of Inquiry into the Post-Election Violence (CIPEV) [The Waki Commission] Chapter on *'Personalization of Presidential Power and the Deliberate Weakening of Public Institutions'.*

[156] Summarised Version of The Independent Review Committee (IREC) (The Kriegler Commission) and The Commission of Inquiry into the Post-Election Violence (CIPEV) (the Waki Commission) 2009 (Kriegler and Waki Report).

[157] Adar and Munyae op cit note 155.

[158] See Citizens for Justice *We Lived to tell the Nyayo House Story* Friedrich Ebert Foundation, Chapter 7 and generally available *at http://library.fes.de/pdf-files/bueros/kenia/01828.pdf*, accessed on 29 July 2015.

effectively move away from this past demands a concerted effort on the part of the state to understand and play its role in advancing human rights.

The principal role of the courts in punishing and redressing human rights violations

In the absence of constitutional limitations to competing human rights, the judiciary will be faced with an arduous task for which it has no corresponding constitutional guidance.[159] The courts will be faced with the difficult mission of deliberating and deciding the place of human rights in business. The exercise of political power must be subject to the provisions of the Bill of Rights whose administration is entrusted to the courts.[160] In the 2010 Constitution of Kenya, the courts are given the authority to uphold and enforce the Bill of Rights.[161] They are expected to "develop the law to the extent that it does not give effect to a right or fundamental freedom"[162] and thus ensure that human rights are accorded the importance that is due to them through a proper interpretation of laws.[163] The judges come in between the legislature that makes the laws, and the people on whose behalf they are made, to keep the legislature within its assigned authority and to interpret the given laws.[164] This is an important task that the courts play and it demands independence and the ability to weigh up the different and at times numerous factors arising in the analyses.[165] In dealing with the question of corporate accountability for human rights, what has the attitude of the Kenyan courts been?

The conduct of the Kenyan Judiciary has had a long history of ineffectiveness and corruption, and has thus not always inspired the confidence of the people. Following a constitutional amendment in 1988, high court judges held tenure 'at the pleasure of the

[159] Aharon Barak 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez, (eds) *Human Rights in Private Law* (2003).
[160] Gerard Brennan 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective' in P Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 453.
[161] 2010 Constitution, Section 23.
[162] Ibid Section 20(3)(a).
[163] In the case of *Marbury v Madison*, a prominent case which has shaped Kenyan constitutional law, the court held that in the face of the multiplicity of views arising from an interpretation of the Constitution, it is the 'duty of the judicial department to say what the law is…' Quoted Kuria & Vasquez op cit note 155.
[164] As opposed to re-making them. See Ian Loveland *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* 5ed (2009), 18.
[165] The South African Constitution similarly provides for a unique and novel position directing private bodies to conform to the Bill of Rights. Under the South African Constitution, businesses have human rights responsibilities just like natural persons, in so far as is applicable to them.

president'.[166] Persons who openly criticised the leadership or policies of the ruling party were detained without trial and under inhuman conditions.[167] Judges who disagreed with the decisions of the ruling party were dismissed.[168] In the 1980s, British judges were seconded to the Kenyan government on contracts that were renewable at the pleasure of the Government.[169] This fact made the British judges susceptible to manipulation by an executive that was bent on doing exactly that, and which did not hesitate to issue directives to the judges in matters in which it had an interest.[170] In 1990, following an outcry over the lack of independence that the lack of security of tenure would give rise to, the Government relinquished the tenure to a disciplinary tribunal appointed by the President and charged with the discipline of judges.[171] Although in a less direct manner, the executive interference in judicial function continued.

With no means to assert their constitutional rights, censure of political opposition and use of rogue means to silence those not in the ruling party became the norm. The State interfered in political cases[172] and judges refused to hear cases by the opposition against the ruling party.[173] There were no institutions in the country responsible for the enforcement of human rights[174] and the judiciary which could have played the important role of giving life to the otherwise lifeless rules on paper was too compromised to offer effective guidance, owing to its lack of independence. Under the old Constitution of Kenya, it was established law that in matters of constitutional rights, the court could be approached in any manner and that in such cases the substantive issues raised ought not to be defeated by negligence or omissions in procedure.[175] Disregarding this fact, in a case of breach of fundamental human rights brought before it, the High Court absurdly held that it had no jurisdiction to hear and determine the matter because no rules had been enacted to enforce the Bill of Rights as required.[176] In a subsequent case,[177] this

[166] Kuria and Vazquez op cit note 155 at 146.
[167] Adar and Munyae op cit note 154.
[168] Ibid.
[169] David P. Forsythe (*ed) Encyclopedia of Human Rights: Vol. 1* (2009) 315.
[170]Adar and Munyae op cit note 154. Expatriate judges, including Justices Derek Schofield and Patrick O'Connor resigned on account of a system that 'blatantly contravened by those who are supposed to be its supreme guardians'.
[171] Kuria and Vazquez op cit note 155 at 146.
[172] Adar and Munyae op cit note 154.
[173] Ibid.
[174] 1993 Report on Kenya to the UN by the Committee on Economic, Social and Cultural Rights. As of 1993, Kenya had not submitted even a single report to the UN, despite having been a member since 1976.
[175] Kuria and Vasquez op cit note 155.
[176] *Kamau Kuria v Attorney General* (1989) 15 Nairobi Law Monthly 33. The Bill of Rights was thus inoperative. See Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (October 16, 2014) University of Fort Hare, Inaugural Distinguished Lecture Series.

decision was upheld, and the court dismissed the case on procedural grounds, declaring inoperative the constitutional provision that gave it original jurisdiction to enforce fundamental rights and freedoms.[178] The courts thus, following these precedents, refused to hear cases on breach of fundamental rights and freedoms because in their view, jurisdiction could only be conferred by statute and could not be assumed from the constitutional provision.[179] In making these decisions and charting a course to be followed in later cases, the court went against precedents it had set in earlier cases.[180] In earlier cases, *Ooko v Republic*[181] and *Madhwa v City Council of Nairobi*[182] the court had applied the Constitution to grant the claimants' rights. The court's decisions were further entrenched in the case of *Felix Njagi Marete v The AG*[183] where it was held that 'The Constitution is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and those teeth and in particular are to be found in Article 84'.[184] To have later refused to apply the same Constitution to grant the rights claimed was a clear contradiction of the courts' own decisions.[185]

The advent of multi-party politics in the country in 1992 brought an apparent transformation of the judiciary. With the change of government and a more transparent judiciary, many victims of the human rights violations of the single party era got courage to seek redress in the courts, and they were compensated for the human rights violations they had suffered.[186] This

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[177] *Maina Mbacha v Attorney General* (1989) 17 Nairobi Law Monthly 38.

[178] Section 84 of the old constitution – stated in Cited in Kuria & Vasquez op cit note 155. Section 84(1) *(6)* reads '… if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.'

[179] Section 84.

[180] This was recognised by the court in the case of *Stanley Munga Githunguri v Republic* (1987) 3 Nairobi Law Monthly 7. In a number of cases decided earlier, the court had assumed jurisdiction in constitutional matters, even without the rules later assumed to be mandatory.

[181] High Court Civil Case No. 1159 of 1966.

[182] [1968] E.A. 406. The court in this case enforced the right not to be discriminated against.

[183] [1987] KLR 690.

[184] Cited in Kuria & Vasquez op cit note 155 at 151.

[185] P L O Lumumba & Luis Franceschi *The Constitution of Kenya 2010: An Introductory Commentar*y (2014) 137

[186] See for example Misc Application No. 1185 of 2003, *In the Matter of a Constitutional Reference under Section 84 of the Constitution between Cyrus Muraguri and the Attorney General*. The Plaintiff was awarded damages on account of general damages and malicious prosecution. In reaching the decision that it did, the Court relied on other similar cases of torture which had been tried before the courts and for which damages had been awarded; for example General Misc Application No. 1408 of 2004, Rumba *Kinuthia and Others v Attorney General* where the plaintiffs were held at the same chambers and tortured and later arraigned in court on false charges. Another case of torture was *Harun Thungu Wakaba and Others v the Attorney General* where 21 people were arrested and tortured in similar circumstances. In all these cases, the Plaintiffs had been awarded damages for violation of their human rights under the State's Constitution.

would appear to give a certain level of confidence in the judicial system and its ability to ensure protection and respect for the human rights of all, at least in theory. Nonetheless, by 2003, almost a decade into the multi-party Kenya, the Judiciary was still facing many challenges and was far from the ideal.

Following continuous complaints of corruption, the Judiciary Committee on Reforms and Development was revived and a subcommittee established, headed by a High Court judge, to investigate allegations of corruption in the Judiciary, to identify its forms and identify the corrupt members.[187] A number of judicial officers were implicated in corruption, misbehaviour or want of professional ethics, a list of shame published and those mentioned advised by the Chief Justice to resign.[188] While some of those named opted to resign or were retired in the interest of the public, others decided to face disciplinary tribunals.[189] This exercise was dubbed a 'radical surgery' of the Judiciary; it was given much publicity and seen as what the country needed at the time to manage the corruption scourge. However, yet another decade on, corruption and inefficiency in the Judiciary were topics still very much talked about in the country. In a bid to change this perception, a competitive and transparent selection process was introduced and all judges required to re-apply for their jobs.[190]

Upon taking office in 2011, the new Chief Justice described the judiciary as "so frail in its structure, so low in its confidence, so deficient in integrity, so weak in public support that to have expected it to deliver justice would have been wildly optimistic".[191] Despite the progress made with the advent of democracy, and the transformation pursued with the radical surgery of an inept institution, the Judiciary was still described as an institution 'designed to fail'.[192] Power was centralised in the person of the Chief Justice, accountability mechanisms were weak and reporting requirements were non-existent.[193] In an environment such as this, it would be unrealistic to expect delivery of justice or for the Judiciary to act as the guardian of the rights of

[187] P Mbote & M Akech, *Kenya: Justice Sector and the Rule of Law* (March 2011) 110.
[188] Ibid.
[189] Ibid at 111. Of these, two were found guilty and six were acquitted and reinstated in their jobs.
[190] Institutions of all the arms of government played a part in the selection process of the judicial officers, and the general public also played a role. (See Mbote & Aketch op cit note 187).
[191] J Willy Mutunga, 'Progress Report on the Transformation of the Judiciary', Speech delivered to mark the first 120 days in office (19 October 2011) available at *http://www.judiciary.go.ke/portal/assets/downloads/speeches/SPEECH%20ON%20THE%20PROGRESS%20REPORT%28120DAYS%29%20ON%2019.10.2011.pdf*, accessed on 5 August 2014.
[192] Ibid.
[193] Ibid.

the people and institutions as it was expected to be. More than two decades into a multi-party democracy in Kenya, the search is still ongoing for a judiciary that upholds the rule of law, dispenses justice fairly and effectively, validates and enforces human rights.

It is worth noting that in spite of the challenges it continues to face, a change in attitude of the Judiciary cannot be denied. In the multi-party democratic era, the Kenyan courts became clear on the question of access to courts on issues of fundamental rights without the need to exhaust all other available alternatives,[194] thereby giving human rights their due importance. In the 2010 Constitution, the right of access to courts is given further clarity in a provision that talks about the enforcement of the Bill of Rights, which is liberal on the question of who may institute court proceedings, and the importance to be given to procedural technicalities in matters that are brought to court on the issue of fundamental rights and freedoms.[195] Article 22 of the Constitution allows every person to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Additionally, proceedings may be instituted by a person acting on behalf of another person, a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.[196] The role of the courts in ensuring access to remedy for victims of corporate human rights abuse is discussed further in Chapter Seven below.

5.4.3. The duty of the state to ensure policy coherence

In creating the *Protect, Respect Remedy Framework* and the *UN Guiding Principles on Business and Human Rights* to operationalise it, the Special Representative of the Secretary General of the UN for transnational corporations and other business enterprises, John Ruggie, established that the duty to protect was understood by the states.[197] In his view, what was what is less understood in his view is the different policy options the state can employ to fulfill this duty with respect to business activities.[198] He noted that even within existing legal principles, the policy dimensions of the duty to protect would require increased attention and more imaginative approaches from

[194] *Kibunja v AG & 12 Others* (No. 2) KLR [2002] 2 at 6.
[195] 2010 Constitution Section 22.
[196] Ibid.
[197] Ruggie Report 2008 op cit note 55 para 27.
[198] Ibid.

states.[199] In his 2008 Report, Ruggie pointed out a few specific areas which in his view required policy alignment.[200] He talked of vertical incoherence (when the state fails to implement the human rights obligations it agrees to take on by signing international treaties) and horizontal incoherence (when different government departments work at cross purposes or fail to work with one mind to promote the human rights obligations the state has agreed to take on in theory). He highlighted the need to ask the question how the different government departments could work together to foster the state's human rights obligations and the agencies charged with implementing them. He also pointed out the need to balance investor interests and the human rights obligations of host states as seen in the contents of trade agreements.[201] Ruggie further proposed as an urgent priority for government the task of formulating policies to guide corporations to manage the risks they could not manage on their own, including the dynamic social risks arising from interactions of communities with businesses.[202]

In Kenya's latest development policy, Vision 2030 (the Policy), the government pledges its commitment to the supremacy of the constitution and respect for the Bill of Rights and individual human rights of the citizens[203] and at the same time underscores its willingness to respect the property rights of investors, both local and foreign.[204] In meeting the numerous but focused objectives of the strategy, the government pledges its commitment to 'the rule of law applicable in a modern market based economy in a human rights-respecting state'.[205] As a specific objective, the government goes further to express its aim to 'align the national policy and legal framework with the needs of a market-based economy and national human rights and gender equity commitments'.[206] Although initially criticised for not having undergone a human rights audit,[207] the Government is said to have requested the help of the United Nations Development Programme (UNDP) to support the integration of human rights into the national development blue-print, with the aim of shifting its focus from economic growth and

[199] Ibid at 8.
[200] Ibid at 33.
[201] Ibid at 38.
[202] Ibid.
[203] Government of the Republic of Kenya 'Kenya Vision 2030' [Popular Version] (2007) at 23.
[204] Ibid at 9.
[205] Ibid.
[206] Ibid.
[207] FIAN International 'Land grabbing in Kenya and Mozambique: A report on two research missions – and a human rights analysis of land grabbing'(April 2010).

infrastructure to reducing disparities caused by poverty and inequality. This move is commendable as it embraces the human rights approach heralded in the 2010 Constitution.[208]

The Commission for the Implementation of the Constitution (CIC) worked with the Ministry of State for Planning, National Development and the National Stakeholder's Forum to give a constitutional focus to the development of the 2nd Medium Term Plan for implementing the Policy.[209] The 2nd Medium Term Plan lays out the development agenda for the country, including the implementation of the Constitution.[210] The Ministry of Planning developed human rights-based indicators to ensure that the development championed under the Policy is guided by human rights.[211]

However, notwithstanding the good will expressed in the Policy, abiding by the high ideals set will require a more concerted effort by the government agencies and departments concerned with trade. Government initiatives have so far fallen short of the standards idealised in this forward-looking overall Policy. In the Government of Kenya, Ministry of Industrialisation and Enterprise Development, Strategic Plan (2013-2017) the Government outlined its plan for attracting local and foreign investment; none of the proposed measures were directed at the requirements the investors would be expected to meet. This was the same case in the Kenya Private Sector Development (KPSD) Strategy, a policy tool developed to deliver the Economic Recovery Strategy for Wealth and Employment Creation of Vision 2030, Kenya's development blueprint.[212] The KPSD Strategy which was developed to enhance private sector growth and competitiveness states that the aim of the government was to create a conducive business environment by alleviating major constraints. The improvements targeted included simplification and elimination of licenses and the creation of an e-registry to operate as a point of reference for investors to find information on the licenses they needed to operate a business in the country.

[208] UNDP Report, Translating Kenya's rights-based constitution, 23. See also Quarterly Report of the Commission for the Implementation of the Constitution Report for January to March 2013, 18.
[209] (MTP II) 2013 -2017.
[210] Quarterly Report of the Commission for the Implementation of the Constitution Report for January to March 2013, 18.
[211] UNDP Report, Translating Kenya's rights-based Constitution, 27.
[212] James Njuguna Mugo Investment Support Services and Institutions: Shortcomings and Deterrents to Investment Flows in the ACP Countries (21 May 2007) Commonwealth Secretariat, Marlborough House, London.

The regulatory improvement exercise undertaken by the government was geared solely at making the licensing conditions favourable for investors.[213]

Following the experience in other areas that showed that central oversight units within government are essential to coordinate reform efforts, a Business Regulatory Reform Unit (BRRU) was established.[214] The purpose of the BRRU was to monitor all regulatory regimes to ensure that new regulatory requirements did not create unnecessary burdens on businesses.[215] The regulatory reform exercise was completed with considerable success.[216] The BRRU was established, an e-registry set up, a number of licenses eliminated and a single business permit introduced, making it easy for businesses to commence operations. Nevertheless, nothing was mentioned in the reform efforts about the obligations the investors were expected to meet; nothing was highlighted about the need to ensure that the private sector played its part in upholding and not violating human rights. The KPSD Strategy notes the promotion of rights as a function of the political pillar of Vision 2030, but does not itself make any reference to human or fundamental rights or the need of their promotion by the private sector. Throughout the Strategy reference is made to deliberations on intellectual and industrial property rights, but nothing of human or fundamental rights.

Balancing interests between business and human rights in the 2010 Constitutional context will involve balancing the quest for investors against human rights of individuals; this presents no easy task. As a robust and growing economy, Kenya must be concerned to minimise negative impacts of human rights, a goal that requires the incorporation of efforts to recognise and demand respect for human rights in its national policies and strategies. One of the measures that the state can take to ensure corporate responsibility for human rights is making demands on investors to have a human rights policy.[217] It is proposed that the United Nations Conference on Trade and Development (UNCTAD) National Investment Policy Guidelines (the Guidelines) be applied as a guide for national policymaking. Application of the UNCTAD Guidelines will

[213] While the tendency was to use licensing as a revenue collection tool, the reform efforts sought to make them serve regulatory ends, reducing regulatory requirements as much as possible to make it easier for investors to invest. See Better Regulation for Growth 10. A Working Committee for Regulatory Reform was formed in 2005 with a mandate to review all business licenses and advise the government on measures to create an electronic registry of all business licenses; establish a BRRU and prepare a medium term reform strategy.
[214] Ibid at 13. Experience was drawn from OECD countries on the characteristics of effective central oversight units.
[215] Ibid. Proposal to establish BRRU with this objective made in 2006/2007 Budget Speech.
[216] African Development Bank and Government of Kenya, The State of Kenya's Private Sector (2013) 41.
[217] See Ruggie Report 2010 op cit note 84 at 5 on Sweden/Dutch Governments requirements.

enable the government to effectively play a guiding role, helping it to align government practices with its human rights obligations.

The Guidelines consist of a set of core principles for national investment policy-making. The Guidelines, which are applicable as a policy framework, propose that states include investor obligations in the investment agreements, in addition to the treatment and protection of investors, which is what most states focus on.[218] The Guidelines propose that host governments require investors to comply with its laws and regulations, and that they adhere to international standards of responsible investment, including standards set by the UN Guiding Principles on Business and Human Rights.[219] The UNCTAD Guidelines propose that governments encourage compliance with high standards of responsible investment and corporate behaviour, through incorporating existing standards into regulatory initiatives, and/or turning voluntary standards (soft law) into regulation (hard law).[220] Investment policies should be grounded on a country's overall development strategy. They should have a balance of rights and obligations for the state and the investors.

A conscious effort to ensure coordination between government departments that deal with business, trade or investments and those that are directly concerned with the promotion of human rights will contribute to the development of a consistent response to human rights concerns by government, and this will make it easier to demand the same of business.[221] The Investment Promotion Act 6 of 2004 makes provision for the Kenya Investment Authority. The Authority can play the role of coordinating all agencies responsible for investment to ensure that there is coherence at the national level on the procedures and expectations of investors and that these ascribe to international best practice, including human rights standards. The powers of the Authority are all directed in favour of the investor, to assist investors in obtaining license and exemptions, to review the investment environment and propose changes that would promote and facilitate investments among other duties.[222] None of the obligations give the Authority power to ensure that investors respect the laws and institutions of the country. Granting of an investment certificate and license under the Investment Promotion Act should be predicated on business

[218] UNCTAD 'The Investment Policy Framework for Sustainable Development (IPFSD), National Investment Policy Guidelines'.
[219] Ibidat 29.
[220] Ibid.
[221] Kinley op cit note 2 at 179.
[222] Section 15 of the Investment Promotion Act.

entities having a human rights policy, whose implementation will be monitored through reporting obligations as proposed under the Companies Act, and the renewal of the license be subject to successfully meeting its human rights obligations including measures taken to mitigate or redress any negative impact arising from their activities. It should further be a requirement through an agreement between the concerned ministries[223] that an investment license will be retracted if companies are found to be in continual breach of their human rights obligations.

5.5. The need for an action plan for business and human rights

Unlike other countries in Europe and elsewhere that have built upon the UN Guiding Principles to develop national plans, there appears to be a lack so far of concrete national action plans on business and human rights in African countries.[224] This failure to devise national action plans or lack of interest in doing so both within governments and among business entities could be attributed to an ignorance of the existence of initiatives following Ruggie's extensive research and proposals at the conclusion of his mandate.[225] In fulfilling their obligation to protect against human rights abuse, states are expected to provide effective guidance to businesses to enable them respect human rights through their operations.[226] Governments should work to ensure that companies and other business entities are alive to the impact of their operations so that they can adequately prepare to prevent or mitigate them.[227] The process of developing a national framework will raise awareness of the pertinent issues in all the relevant sectors and amongst the stakeholders and provide the necessary guidance to government departments and agencies, civil society and rights holders.[228]

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[223] Ministry of Trade, Commerce and Industry, Ministry of Labour.

[224] See *http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx*, accessed on 29 July 2015. The only African country initiatives – for Ghana, Nigeria, Tanzania and South Africa are spearheaded by civil society or National Human Rights Institutes (NHRIs).

[225] This was the general view expressed by African representatives at the African Civil Society Dialogue held in Accra in November 2013. See African Civil Society Dialogue on the National Action Plans Project in Accra, Ghana (25 November 2013) Summary of Participants' Observations at 1, available at *http://accountabilityroundtable.org/wp-content/uploads/2013/12/African-Civil-Society-NAPs-Dialogue-Summary.pdf*, accessed on 10 August 2014.

[226] UN Guiding Principles op cit note 45 at 8, on the general state regulatory and policy functions.

[227] Ruggie Report 2009 op cit note 44 para 120.

[228] The Danish Institute for Human Rights (DIHR) and The International Corporate Accountability Roundtable (ICAR) 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (June 2014) at 16.

The 2010 Constitution makes a clear case for the application of the Bill of Rights to companies: companies are thus expressly required to respect and uphold all the rights contained in the Constitution. The effort to implement the Constitution must therefore include proposals of what will be done to actualise Article 20(1) which binds corporations to the Bill of Rights. Without a conscious effort on the part of the government to find application of the provision binding legal persons to the Bill of Rights, if juristic persons are left unpunished for the human rights violations they commit or contribute to, the bill as espoused in the Constitution will in a considerable part remain good theoretical ideas confined to the boundaries of the paper they are written on. Without an effort on the part of government to ensure that corporations abide by the Bill of Rights as the Constitution provides, it will have failed in its duty to protect against the violation of human rights.

Despite the failure by government to consider the human rights obligation of business as an important topic in its own right, there have been efforts in other quarters to highlight this issue. The organ of state tasked with ensuring compliance with its human rights obligations, the KNCHR,[229] in 2011 outlined proposals that the state and business entities should put in place to operationalise the Constitution.[230] The proposals were contained in a report, the first of a series of reports intended to review the operationalisation of the Bill of Rights and offer proposals to aid policy makers and implementers in implementing the Constitution.[231] The Commission acknowledged the binding nature of Article 20 of the Constitution on business enterprises, noting that it "unequivocally brings to all businesses operating in Kenya new constitutional responsibilities in respect of human rights."[232]

The KNCHR observed that the Framework prepared by Ruggie on Business and Human Rights, and the UN Guiding Principles enjoined the Government to provide a roadmap for the application of the Bill of Rights to businesses.[233] To this end, the Commission proposed the review of business laws such as the Companies Act and Partnership Act to infuse in them human rights principles and ensure that they complied with human rights requirements.[234] It was noted

[229] Section 59 (2)(g) of the 2010 Constitution.
[230] See Kenya National Commission on Human Rights 'Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations' *Occasional Report* (2011) Chapter 9.
[231] Ibid, xi.
[232] Ibid at 22.
[233] Ibid at 106.
[234] Ibid at 106, 109.

that the Companies Act was already under review and some improvements had been made, for example inclusion of a requirement for directors to consider the interests of employees, suppliers, customers and other stakeholders in decision-making.[235] It was further proposed that the Government be cognisant of its duty to protect human rights when considering investment agreements, for example in the Export Processing Zones (EPZs) investment transactions where tax and labour law exemptions were given to attract foreign investors in the EPZs.[236] In spite of the proposals given, the Government's ultimate strategy and action plan to implement the 2010 Constitution did not include any of the suggestions made.[237] Had the proposals made by the Commission been considered by the Government, they could have made a useful contribution in efforts to implement Article 20 of the Constitution.

The Commission for the Implementation of the Constitution (CIC) was set up under the 2010 Constitution to monitor the implementation of the Constitution and ensure that the spirit of the Constitution is respected.[238] The CIC was mandated to "monitor, facilitate, coordinate and oversee the development of legislation and administrative procedures necessary to implement the Constitution".[239] Following a meeting between the CIC and the Ministry of Justice, National Cohesion and Constitutional Affairs on 15 June 2011, it was agreed that a National Policy and Action Plan for Human Rights be drafted to offer a guide to implementers of the Constitution.[240] The Office of the Attorney General and the Department of Justice, which is the Ministry in charge of human rights, developed a National Policy and Action Plan for Human Rights[241] in

[235] Ibid at 106.
[236] Ibid at 108.
[237] Nothing in the Policy and Action Plan referred to the obligation that business enterprises would play in upholding the Constitution.
[238] Article 262 Section 25 (1) of the Sixth Schedule of the Constitution on 'Transitional and Consequential Provisions'.
[239] The Commission for the Implementation of the Constitution Act, 2010 (No. 9 of 2010) Section 4 (a)
[240] See 'The Kenya Gazette' Vol. CXIV—No. 14 Nairobi, 17 February, 2012 Gazette Notice No. 2054 'The Commission for the Implementation of the Constitution Second Quarterly Report on the Implementation of the Constitution (June 2011) 487. It is reported that 'CIC held a meeting with the Ministry of Justice, National Cohesion and Constitutional Affairs on 15th June 2011 to discuss the roadmap for the implementation of human rights as provided in the Constitution. The meeting agreed that the National Policy and Action Plan on Human Rights will be the guiding tool for implementers and in the final stages need to take note that human rights are cross-cutting and therefore applicable to all implementers. In this regard, the National Policy and Action Plan on Human Rights needs to be designed to ensure consistency with the Constitution and involve all implementers and be the reference tool on human rights in all sectors.'
[241] Office of the Attorney General and Department of Justice 'National Policy and Action Plan for Human Rights' Unnumbered Sessional Paper of 2013 available at *http://justice.go.ke/images/downloads/Sessional-Paper-National-Policy-and-Action-Plan-For-Human-Rights.pdf*, accessed on 7 August 2014. (Document on file with author)

consultation with the KNCHR[242] to operationalise Chapter 4 of the 2010 Constitution, with the objective of making the wide array of human rights it contains accessible to all.[243]

The National Policy and Action Plan on Human Rights was developed following consideration of best practice examples from other countries and wide consultations with stakeholders such as civil society, Faith Based Organisations and government agencies. The public expressed their views on what was of importance to them and the National Policy and Action Plan was seen as genuinely reflecting national priorities.[244] The document provided a "comprehensive and coherent framework that elaborates broad human rights principles to guide government and other actors in carrying out programs, strategies and plans that will enhance the realisation and enjoyment of rights by the people of Kenya".[245]

Development of the Action Plan for human rights was motivated by the realisation that the inability to attain the desired human rights impact in the past was caused by the lack of a "comprehensive framework [that would] create cross-sectoral and cross-agency collaboration".[246] The Action Plan thus purported to offer a comprehensive and coherent framework bringing human rights principles into national development, planning and implementation across all sectors.[247] The Action Plan highlighted the priorities of the state for the following five years and was to guide government ministries and departments, the law makers and the Judiciary in their actions and decisions relating to human rights.[248] The National Policy and Action Plan was expected to provide the basis for the people to evaluate the national and county governments and hold them accountable for the realisation of their human rights.[249]

The identification of priority areas of focus for the Action Plan was further premised on a baseline survey on the status of human rights in Kenya, conducted in 2005.[250] The Survey highlighted gaps in the effective realisation of human rights and made recommendations of what

[242] The UNDP was also involved in the consultations to develop the Policy and Action Plan. See UNDP – Mainstreaming Human Rights in Development: Stories from the Field (June 2013) Chapter on Kenya: Translating Kenya's Rights-Based Constitution into Practice.
[243] Refer to CIC 2nd Quarterly Report p21. See also the UNDP Report, ibid, at 21.
[244] UNDP Report op cit note 167, 27.
[245] Ibid at vi.
[246] Ibid.
[247] Ibid at vi – vii.
[248] Ibid at 1.
[249] Ibid at 2.
[250] Ibid at 8.

could be done to remedy the situation.[251] The responsibility of business for human rights was not one of the recommended areas. Perhaps a reason for the omission to say anything of the obligation of business is because the baseline study was conducted in 2005, prior to emergence of the heightened international debate and deliberations on business and human rights via the United Nations Special Representative's mandate, which only began in that year. Of interest also regarding the attitude of Government is the fact that in a 2014 report highlighting the State's compliance with the ICESCR, the only reference made of compliance by business with human rights is the signing by many businesses of the Code of Ethics for Business, pursuant to the provisions of the Global Conduct.[252] Nothing is said of the efforts made to implement the UN Guiding Principles on Business and Human Rights which were operational by that time.

In the quarterly report for the period after the decision to draft the Action Plan, the CIC noted that the National Policy and Action Plan was one of the policies set to be audited by the Commission in 2012 to ensure that it complied with the "letter and spirit of the Constitution as well as the integration of human rights."[253] When the Action Plan came for review in the CIC, it was rejected.[254] The main reasons given for its rejection were its failure to reflect the rights-based approach contemplated in the Constitution, and that the methodologies adopted in preparing it gave precedence to international instruments over the Constitution.[255] It was also rejected for not giving importance to the new structure of government where counties were expected to play a critical role in the implementation of human rights.[256]

Among the recommendations given to the Commission for the revision of the Action Plan were that it outlines all the rights enumerated in the Constitution and provide the Government position regarding their implementation; that the Action Plan be cross referenced to the Vision 2030 Development Policy as a guide to implementers of the Policy; that it outlines the approaches the national and county levels of government would pursue to uphold each right; also

[251] Ibid.
[252] United Nations Committee on Economic, Social and Cultural Rights 'Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' Combined second to fifth periodic reports of States parties due in 2013 E/C.12/KEN/2-5 (26 February 2014) para 27.
[253] The Kenya Gazette' Vol. CXIV—No. 14 Nairobi, 17th February, 2012, Gazette Notice No. 2055 the Commission for the Implementation of the Constitution third Quarterly Report on the Implementation of the Constitution (July–September 2011) 514.
[254] Ibid at 550.
[255] Ibid.
[256] Ibid.

required was an elaboration by the Government, as the bearer of the "bulk" of the obligations relating to human rights, of what it perceives the Bill of Rights demands of it, including expected standards to be met.[257] On the basis that the Constitution binds all state organs, it was proposed that the Action Plan should identify the state actors that bear the duties for the different rights; it was further proposed that the Action Plan incorporate the underlying fundamental constitutional values and principles and other values highlighted in the Constitution.[258] Additionally, the CIC directed the Ministry to consider: the need for (i) broad formulation of the government's position and what is to be pursued with respect to each right; (ii) Constitutional obligations and international obligations relating to the rights; (iii) relevant legislation in [listing] relevant laws and a plan for legal reform; (iv) designated implementers; (v) broad statement on challenges and how these are to be addressed; (vi) resources (including institutional and human) and budgetary requirements.[259]

Nothing is mentioned in the subsequent reports of the CIC about the progress made, if any, to the proposed amendment of the National Policy and Action Plan. In the Quarterly Report for the Period April to June 2012, under the sub topic "Engagements with Ministries on the effective implementation of the Constitution" the Commission merely noted that:

> [The] Ministry of Justice, National Cohesion and Constitutional Affairs is the Ministry in charge of constitutional matters and a partner with CIC on implementation matters including procedures and deadlines for enactment of Bills under the Constitution. The Ministry is also coordinating the national civic education programme on the Constitution and is also the ministry in charge of human rights having spearheaded the development of the National Policy and Action Plan on Human Rights.[260]

No further work on the Policy and Action Plan was brought to light. The conclusions/recommendations formulated during the interactive dialogue during the periodic review of Kenya held by the HRC 19-30 January 2015, make numerous repeated calls for Kenya to finalise the process of adoption of the national policy and action plan for human rights, and to ensure its full operationalisation.[261] However, assuming that the Policy and Action Plan will be

[257] Ibid.
[258] Ibid.
[259] Ibid
[260] The Kenya Gazette Vol. CXV—No. 73, Nairobi, 10th May, 2013 Gazette Notice No. 6465 Quarterly Report for the Period April to June 2012, p 2701
[261] See A/HRC/WG.6/21/L.7 Human Rights Council Draft report of the Working Group on the Universal Periodic Review – Kenya (26 January 2015) Working Group on the Universal Periodic Review Twenty-first session Geneva. Note repeated recommendations by different parties in paras 5.6, 5.13, 5.14, 5.22, 5.23 and 5.25.

amended and re-drafted following the indications of the Commission, the critique of the policy document for failure to consider business and human rights as a field to monitor and ensure compliance with the Constitution still stands. Nothing of the Commission's elaborate recommendations for the revision of the National Policy and Action Plan touches upon business entities and their obligation under the Constitution to uphold human rights. Although the reality remains to be seen, it is unlikely that a revised draft of the Policy and Action Plan would include provisions on the role of business entities in the implementation of the Constitution.

5.6. Conclusion

Following the observation that countries generally and Kenya in particular lacks a coordinated response in dealing with the question of business and human rights, this Chapter has proposed the application of the UN Framework and the UN Guiding Principles on Business and Human Rights to guide the state in executing its duty to protect against corporate violation of human rights. Only when rights are not only rhetorically asserted but can be demanded as legal entitlements will human rights law become an effective system for protection of human dignity. It makes no sense to assert rights which cannot be claimed or guaranteed; existence of a right means there is a duty holder who bears the responsibility of ensuring the right is secured.[262] The Human Rights Council in a Resolution dated 23 June 2014 recognised the role that national legislation can play in the protection, promotion, fulfilment of and respect for human rights, at the same time expressed concern that weak national laws and implementation could not serve to mitigate the negative impact that human rights can have.[263] Corporate laws shape what corporations do and how they do it – because of this, corporate laws can and should be used to offer a guide to corporations on human rights expectations. The Companies Act of Kenya can be applied to give guidance and hold corporations accountable to their human rights obligations if applied as proposed in more detail in Chapter Eight.

[262] Referring to the obligation of states with regard to rights generally, before the internationalisation of the concept of human rights and the use of the phrase as we know it now, it was decided in the *Spanish Zone of Morocco Claims* case that: …responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met. See Reports of International Arbitral Awards (Recueil Des Sentences Arbitrales) Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) 1er mai 1925 Volume II pp. 615-742 – Report in French; also cited in Manfred Lachs 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law' *Syracuse Journal of International Law and Commerce* [1983] 10(2) fn 44, referring to state responsibility for reParations as a well settled principle of international law.

[263] Human Rights Council in its Draft Resolution A/HRC/26/L.1 dated 23 June 2014.

The National Policy and Action Plan for Kenya was drafted after the release of the UN Guiding Principles, and it would have been expected that reference would be made in to the effort being made to comply with the Guiding Principles. Considering the size of the business sector, in terms of revenues generated, people employed, livelihoods sustained and the immense power that this sector has to impact individuals' human rights, it is a grave oversight not to include any directives relating to business entities in a national Policy and in the accompanying Action Plan devised to guide the implementation of the Constitution for a period of five years. Such oversight lends itself to the real possibility that human rights in the business sector will be relegated to a secondary position, and this may lead to continued incidences of violation, at times serious violation, as has happened in the past. Within the context of a new constitutional order and the quest to give the most sublime meaning to life, human rights, which are founded on the dignity of the person, ought to find application in the lives of people and not merely be presuppositions that remain in laws and constitutions. Human rights are principles (as opposed to mere rules)[264] and must be considered as the guiding directives for the formulation of all government policy, laws and decisions including those relating to businesses.

The state has the primary duty to uphold human rights, but the corporations and other business entities also have a role to play. The next chapter seeks to define the obligation of the corporation in upholding human rights.

[264] R. Dworkin *Taking Rights Seriously* (1978) at 23-28 and 71-80.

CHAPTER SIX

6. PILLAR II: THE CORPORATE RESPONSIBILITY TO RESPECT

6.1. Introduction

Pillar II of the UN Protect, Respect and Remedy Framework on Business and Human Rights provides for the corporate responsibility to respect human rights. The primacy of the duty of the state to protect against human rights violation does not in any way preclude the responsibility of business for its actions.[1] Many issues that directly touch on human rights are no longer the exclusive concern of the state, as might have been the case in times past. The right of access to many of the economic, social and cultural rights is dependent on private actors; private companies for example play a major role in the pharmaceutical industry, determining the ease or otherwise of medicines and thereby affecting the realisation of the right to health. The provision of services such as security, water, electricity and the building of public amenities like roads are no longer the exclusive concern of governments. The harm envisioned as likely to befall individuals by the action of the state in providing for these basic human needs can arise from the private actors, which must also therefore be required to uphold international human rights standards and be held responsible for any violations they cause or contribute to.

The duty of the state to protect against human rights violations is a traditionally accepted obligation of states in International Law;[2] but the corporate responsibility to respect lacks universal acceptance at the international level and is seen by some as a 'new' precept developed by Ruggie.[3] Though initially defined in a broad and general manner,[4] Ruggie later describes the

[1] The corporate responsibility to respect exists independently of States' duties. See Human Rights Council 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (7 April 2008) A/HRC/8/5 [Ruggie Report 2008] Para 55 The corporate responsibility to respect exists independently of States' duties.

[2] As discussed in Chapter 2 above (Section 2.2), the conventions of the UN on human rights and the comments of the UN interpreting the conventions apportion the blame for violations of human rights by third parties on the State, the state because it is states that are party to conventions. However, there was a notable shift over time when international instruments began attesting to the apparent change of thinking and assigning of duties to businesses in their own right. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (entered into force in 1999) and talks of responsibility of the 'legal person'.

[3] See Carlos Lopez 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 58 at 64-5.

[4] Ruggie first uses the "corporate responsibility to respect" in his 2008 Report in a broad and general manner which could give rise to varied interpretations. He however clarifies the corporate responsibility in the 2009 Report.

corporate responsibility to respect as a 'well established and institutionalised social norm'.[5] The norm he contemplates has "near-universal" recognition by all stakeholders and requires businesses to avoid causing or contributing to human rights violations, to address them when they occur and to seek to prevent or mitigate adverse impacts directly related to their operations.[6] The duty thus defined is not law and with no legal basis and even if it had wide acceptance, it would at best be soft law. Ruggie further defines the corporate responsibility to respect as the baseline norm for all companies in all situations, but he does not say how the duty he proposes for corporations and businesses is to come about, or who should recognise it – this creates an important gap.[7] Ultimately, the corporate responsibility to respect would appear to be inspirational, binding no one; it would seem only a social or ethical expectation as was the case before Ruggie's intervention.[8]

In so far as he distinguishes the human rights obligations of states from that of corporations, arguing that the former's position in international law is more certain than the latter's, one would appreciate Ruggie's argument. International law, under which international human rights law falls, looks at states as subjects, and international treaties, conventions and other instruments which embody these laws place obligations for the fulfilment of the laws on the state. This cannot be said, at the international level, of corporations. However, business entities, keen to be good corporate citizens, have abided by labour and environmental laws, and strove to create CSR policies to govern their relations with the communities around them. In doing this, they integrated human right principles in their operations perhaps without expressly calling them human rights. The argument therefore that the obligation of corporations with regards to human rights is only a social norm is therefore not accurate. The Constitution of

[5] Human Rights Council 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' [Ruggie Report 2009] A/HRC/11/13 at 48.

[6] Ibid at 46. See also Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' **(**21 March 2011) A/HRC/17/31 [UN Guiding Principles] 13.

[7] Lopez op cit note 3 at 65 notes that in defining the responsibility to respect, Ruggie does not appeal to any substantive source as the basis for the corporate obligation. See also David Bilchitz 'A chasm between 'is' and 'ought'? A Critique of the Normative Foundations of the UN Framework and Guiding Principles' in Deva & Bilchitz op cit note 3 at 109-123 where he presents a critique of the normative foundations of the Framework and the Guiding Principles.

[8] See Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' (9 April 2010) A/HRC/14/27 [Ruggie Report 2010].

Kenya states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[9] In seeking to preserve the dignity of the person therefore, the Constitution secures the protection of human rights outlined in its Bill of Rights, and binds all persons to it, including juristic persons such as corporations. Contrary to Ruggie's allusion of a mere social norm, there is therefore, at the very least, a legal obligation on corporations to respect all human rights, which this chapter will attempt to define.

In further defining the corporate obligation for human rights, this chapter supports a move away from the shareholder supremacy concept. Whereas the shareholder can be said to be the main stakeholder in the corporation, around whom the corporation revolves and without whom it would not exist, without the other stakeholders who make an input to the operations of the corporation as suppliers, employees, customers or the wider community, the corporation would not function optimally. This chapter reviews the positive aspects that Ruggie devices to make the corporate responsibility to respect human rights effective: the requirement for corporations to carry out human rights due diligence; and the expectation that corporations will integrate human rights policies throughout their operations. The chapter also addresses the question which human rights are relevant to business, whether corporations can be held accountable for a limited list of rights, or whether they can violate and be held accountable for violation of any human right.

Ruggie considers the remediation part of the corporate responsibility to respect. This is well noted, but this study will review remediation at the corporate level under the chapter on access to remedy which consolidates all the different means available to provide access to remedy for victims of human rights abuse.

6.2. Defining corporate obligation for human rights

Ruggie defines the responsibility to respect as comprising responsibility to do no harm: to 'avoid causing or contributing to adverse human rights impacts' and to 'seek to prevent or mitigate adverse human rights impacts'.[10] He describes the corporate responsibility to respect as a baseline responsibility to comply with national laws, and to respect human rights; a

[9] Section 19 (2).
[10] UN Guiding Principles op cit note 6 at 14 (13).

responsibility owed by the corporation as part of a social license to operate.[11] Defining the corporation's obligation as a social expectation is restrictive.[12] What happens when social expectations change? In addition, social inconsistencies arise because the enforcement of the responsibility is dependent upon the 'courts of public opinion'.[13] The duty of corporations is defined in the UN Guiding Principles as a 'global standard of expected conduct' and not a legal obligation as in the case of states.[14] Unlike obligations whose breach will subject the state to legal courts, breach of expected social conduct will subject the corporation only to 'courts of public opinion' which includes employees, communities, consumers, civil society, or investors.[15] If this conclusion is accurate, it begs a further question: can social expectations provide a sufficient grounding for corporate obligations for human rights?[16]

In defining the responsibility to respect vaguely, Ruggie uses language that makes it difficult to enforce and can leave room for corporations to get away with not fulfilling anticipated duties. If the obligation is founded on a social license to operate as Ruggie argues, it is highly unlikely that those who give this license, the very people whose rights the corporation can violate with impunity, will have the power to revoke the license. The possibility of an effective court of public opinion is even less in a developing world context where consumers might not be informed, or may lack sufficient or affordable options to ignore the corporation that violates human rights.[17]

Lack of a legal basis of enforcement implies that corporations can look at their role in the question of human rights as a matter of choice, charity or beneficence and not as something they are obliged to live up to.[18] Some attribute the consensus achieved in the Human Rights Council with regard to Ruggie's work to the fact that the corporate responsibility to respect he crafted is

[11] Ruggie Report 2008 op cit note 1 para 54.
[12] Lopez op cit note 3. See also Bilchitz, ibid at 118-123. In his view, the rationale for the obligation for business to respect human rights appears to be the need for a "social license to operate".
[13] John G Ruggie 'Prepared Remarks at Clifford Chance, London' (19 February 2007) 4, available at *http://www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf,* accessed on 24 September 2013.
[14] UN Guiding Principle op cit note 6 para 11.
[15] Ruggie Report 2008 op cit note 1 para 54.
[16] Bilchitz op cit note 7 at 112 et esq.
[17] Robert McCorquodale 'Corporate Social Responsibility and International Human Rights Law' (2009) 87(2) *Journal of Business Ethics* 385, 392.
[18] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Deva & Bilchitz op cit note 3 at 157 attributes the consensus achieved in the Human Rights Council to the fact that the corporate responsibility to respect is not a traditional or formal legal obligation.

not a traditional or formal legal obligation[19] and therefore there was no need to object to them as legal obligations. This non-binding definition of corporate responsibility was perhaps opted for as part of the compromise strategy to achieve maximum consensus from all states and business enterprises and steer away from the methodology applied in developing the previous attempts to create binding international obligations, which had failed.[20] The UN Norms on Business and Human Rights attempted to create binding obligations on corporations, giving the impression that human rights law applied directly to corporations. At the start of his work, Ruggie reviewed the Norms and rejected them on grounds that they made exaggerated legal claims – that human rights law applied to corporations directly – and for what he called conceptual ambiguities and doctrinal excesses.[21] The difficulty he then faced in his task was to avoid creating direct legal obligations of corporations for International Law (as the Norms had tried to) and yet at the same time come up with corporate obligations that have an impact in preventing corporate violation of human rights.[22]

The question of corporate obligation requires an appraisal of corporate ownership and purpose. Who are the owners of the corporation? And what is the basis for determining that they are owners?[23] The traditional definition of a corporation is a profit making entity owned by shareholders and run by management on their behalf, and whose major if not exclusive concern is the shareholders, the suppliers of capital who are often justified as the primary stakeholders.[24] The shareholder provides capital for the business and needs profits to be made in pursuance of a given goal; he (principal) cannot do it himself, so he gets and agent (directors/management) to do

[19] Ibid.
[20] See section 1.2.1 in Chapter 1 above.
[21] Human Rights Council Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (22 February 2006) E/CN.4/2006/97 [Ruggie Report 2006] para 59
[22] Knox John H 'The Ruggie Rules: Applying Human Rights Law to Corporations' (August 16, 2011) *Wake Forest Univ. Legal Studies Paper 1916664* 14, *a*vailable at *http://ssrn.com/abstract=1916664*, accessed on 9 June 2015. Knox expresses the challenge as '… whether Ruggie could draw on human rights law to develop stronger standards for corporate behaviour without making claims (as the drafters of the Norms had) that exceeded the bounds of the law or threatened to develop it in ways that governments would not accept.'
[23] Transcript (Blair) – 'Corporate Social Responsibility: Paradigm or Paradox?' November 6, 1998, (1999) 84 *Cornell Law Review* 1282.
[24] See A Berle 'Corporate Powers as Powers in Trust' (1932) *Harvard LR* 1049; M Friedman 'The Social Responsibility of Business is to Increase Its Profits' New York Times Magazine 13 September 1970 at 1; J R Macey and G P Miller, 'Corporate Stakeholders: A Contractual Perspective' (1993) 43 *University of Toronto Law Journal* 401; E Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 8 *New York University Law Review* 733.

it for him.[25] The main party to the contract has always been perceived to be the shareholder, and this perception has tended to make everything revolve around the shareholders' interests, usually interpreted as profit making.

The traditional principal-agent model of the corporation thus provides a general overview of the corporate entity and how it ought to be run, and any proposal that sought to offer a more inclusive description of the relationship has been resisted on grounds that it stands the danger of giving managers who are custodians of the contract more leeway to use the residual resources of their principal for purposes they did not approve. Seen in this light, the concerns of other stakeholders such as human rights concerns of employees and communities affected by the corporations' activities are seen as marginal, and thus ignored. However, a human rights due diligence exercise should lead the business entity to note its impact on its stakeholders, seeing its duty as owed to a wider audience than shareholders, and comprising of more than a duty to 'give back' to the community.

In addressing the subject of corporate accountability, it is noted that many companies define their human rights obligations in terms of CSR.[26] This research has dealt with the question of CSR in Chapter Four above, discussing the fact that corporate social responsibility is not the same as human rights responsibility, making the case for an unambiguous adoption of human rights language in corporate policies. The problems of the stakeholder debate (justifying shareholder supremacy) which include the lack of a benchmark to measure directors' performance and what weight to give to the different stakeholder groups[27] take on a different turn if human rights, rather than social responsibility are the concern. Human rights are objective and the question of compromise between competing interests ought not to arise. In distinguishing corporate social responsibilities from human rights, one writer says that "rights are not mere gifts or favours, motivated by love or pity, for which gratitude is the sole fitting response. A right is something that can be demanded..."[28] The challenge lies in making all human rights obligations of business universal; so that business entities are obliged to uphold human rights not as a matter of charity but rather a question of commitment and enforceable responsibility. The Constitution of Kenya, in providing for the horizontal obligation of juristic persons to respect human rights creates a legal obligation

[25] Blair Margaret M & Stout Lynn A 'A Team Production Theory of Corporate Law' (1999) 85(2) *Virginia Law Review* 248, 259.
[26] Ruggie Report 2008 op cit note 1 para 47.
[27] Dine Janet *Companies international trade and human rights* (2004).
[28] Joel Feinberg *Social Philosophy* (1957) quoted in Bilchitz op cit note 3 at 120.

for corporations to respect all human rights. What the new push for business and human rights (expressed in the provision for horizontality) demands however is that human rights language be made explicit in the operation of business and be referred to as such. This will be a challenge, especially because human rights language was initially phrased referring to the state, and now has to be applied to non-state entities. This requires contextualising of the rights to give them meaning and to provide for their redress.[29]

The substantive content of the corporate responsibility to respect directs companies to draft human rights policies and ensure they are well integrated in the company's operations. The UN Guiding Principles direct corporations and other business entities to follow the International Bill of Human Rights and the human rights principles contained in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work to determine the scope of their responsibility.[30] This requirement gives a more grounded focus to the corporate responsibility to respect, guiding corporations as to the level of expectations placed on them. As part of their responsibility to respect, business entities are required to carry out impact assessments, track their performance and outline any preventive or mitigation measures they put in place to prevent, manage or reduce negative human rights impact. Companies can make use of existing systems for assessing financial risk, modifying them where necessary to assess and report on the human rights risk of its activities. The a fusion of the demands of the Constitution together with the Guiding Principles offered to be applied in the particular contexts of each state can give rise to proposals for amendments to the laws regulating companies in Kenya, in order to create enforceable human rights obligations for corporations.

6.3. Challenges in defining a corporate obligation for human rights

One of the challenges in defining a corporate duty for human rights arises from the long history of state-only obligation for human rights. The general view has been that states and not non state actors have responsibilities for human rights in international law.[31] Conventional international

[29] Aharon Barak 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez, (eds) *Human Rights in Private Law* (2003) 3.
[30] UN Guiding Principles, op cit note 6 at 13.
[31] Geraldine van Bueren 'Deconstructing the mythologies of international human rights law' in Conor Gearty and Adam Tomkins (eds) *Understanding Human Rights* (1996) 597.

law[32] for long assumed that the state as the principal subject of International Law and as party to the international treaties that codify human rights has a monopoly of power which it could use to the detriment of individuals.[33] The state was thus to be solely held accountable for violations of human rights and be a sufficient guarantor of human rights protection for individuals.[34]

In the recent past, the question of human rights and business has received more attention, and different reactions have arisen seeking to address the concern.[35] In the broad field of international law, several attempts to codify corporate obligations for human rights have been made, mainly indirect efforts through voluntary codes.[36] Additionally, numerous initiatives are made to create internal codes of conduct either company-specific, designed specifically for a company in its particular context, or as part of a number of industry-level private initiatives promulgated to offer guidance to corporations in the area of human rights or general social responsibility.[37] In these initiatives, businesses take on proposed guidelines or create guidelines specific to their entities and incorporate them in their activities out of their own volition. As a result of the multiplicity of initiatives, there has been for a long time the lack of a focal point in the business and human rights debate and a confusing environment[38] that does not make it easy to establish clear duties and obligations for business. The intersection between human rights and business has been described, and arguably remains 'chaotic and unclear'.[39] Navigating the existing initiatives and making a place human rights within the popular but arguably different policies on CSR will not be easy.

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[32] The European Convention in Article 1 assigns the obligation of securing to everyone the rights and freedoms defined in the Charter to the contracting parties. The American Convention on Human Rights (Article1) offers a general provision for states to respect the rights and freedoms recognized in the convention and ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. The African Charter on Peoples and Human Rights (Article 1) states that parties to the Charter shall recognize the rights enshrined therein and shall undertake to adopt measures to give effect to them.

[33] John Knox in 'The Horizontal Human Rights Law' (2008) 102(1) *American Journal of International Law* 1, 19 says that the common belief that treaties were drafted were for states as subjects which, if ever it was true, is not true now. Power here used to mean the ability to influence the lives of individuals negatively; for the state, power has been interpreted as giving rise to violations such as torture, termination of life and the violation of the right to property and other civil and political rights considered to fall under the monopoly of state protection. This power to influence does not only lie with the state; businesses employ people who spend most of the day working and earning their living and therefore naturally exert considerable power over them.

[34] Steven R. Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2002) 111(443) *Yale Law Journal* 443.

[35] Voluntary codes by companies, increases emphasis on corporate social responsibility which has been taken up in different levels.

[36] See discussion in Section 1.2.1 above.

[37] Some of these private initiatives include the Sullivan Principles and the MacBride Principles.

[38] Ruggie Report 2008 op cit note 1 at 4.

[39] R Sullivan (ed) *Business and Human Rights Dilemmas and Solutions* (2003) 2.

Although both states and corporations can be argued to have a duty to uphold and respect human rights, the corporate human rights obligations differ from the duty of the state. The entities are fundamentally different in nature; corporations are profit making entities created to serve the interests of shareholders, and states are public democratic entities elected to serve the interests of citizens. Because business entities are specialised organs of society, their duties cannot mirror those of states.[40] State duties are better understood, but may not provide relevant lessons for corporate application. Clarifying the duties of states and corporations will ensure that there is no fear of corporations taking over state human rights obligations or falling short of the ideal in providing for them.[41]

Another challenge for business will be defining the extent and scope of expectations owing to the wide variety of corporate obligations identified, and the level of expectation to place on the state in terms of guidance for this task. Following his work and findings, Ruggie ultimately only offers guidelines for states and businesses based on existing standards and practices,[42] but he leaves it up to the states to apply the principles as befits their context and circumstances.[43] So far, no institutional mechanism exists to enforce the principles formulated by Ruggie, raising concerns about how they will be implemented. Jurisdictions that have attempted to enforce the corporate obligation for human rights have not been as successful as would have been imagined, with practical challenges leading to less than optimal court decisions on the meaning of corporate obligation for human rights.[44] This apparent set back raises the question whether the limitation of human rights law as a means to ensure corporate obligations for human rights are upheld seems much more than its potential.[45]

Three categories of human rights obligations for corporations have been identified; direct obligations which exist and are defined in international criminal law and whose enforcement is in international law, for example the obligation not to be complicit in perpetration of crimes against humanity such as genocide; direct obligations defined in International Law but whose

[40] Ruggie notes that corporations are special organs of society whose duties therefore cannot simply mirror the duties of states. See Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' [Ruggie Report 2007] 16.
[41] See discussion in Carlos Manuel Vázquez 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43 *Columbia Journal of Transnational Law* 929.
[42] UN Guiding Principles op cit note 6.
[43] Ibid para 15.
[44] See discussion in Chapter 3 above, at 3.4.
[45] Nolan op cit note 19 at 138.

enforcement is left to states; and a third category, indirect obligations which corporations have a duty to ensure but whose exact nature is left to states to define, and whose enforcement is to be carried out by states.[46] For practical and political reasons, the direct obligations with enforcement in International Law are the fewest (crimes against humanity), and the indirect obligations the majority.[47] It is argued that for administrative reasons, it is not very practical to entrust to the international order the obligation to adjudicate and redress numerous violations.[48] Yet again something of such a grave nature as crimes against humanity should not be limited to the jurisdiction of the state alone: in the event that the state is unwilling or unable to come to the aid of victims of such serious claims, the victims ought to find a means of redress through the intervention of others.

Once determined, the corporate obligation for human rights will be implemented with the guidance of state governments. Under the indirect responsibility, states have an obligation to put measures in place to ensure corporations in their jurisdiction do not violate human rights, and therefore are responsible for any corporate violations that may occur.[49] Following the proposals for governments to provide clear, practical actions that business entities must take in order to discharge their human rights obligations, one may ask whether it is in the place of government to offer such practical directives. The size of the corporation and the industry in which it operates determine the human rights it is likely to impact, and therefore the obligations it will be expected to uphold. It may therefore be unreasonable for corporations generally to expect clear, practical guidelines from the state as such and it may be more reasonable that corporations come up with these guidelines themselves. What then is the silver thread that links what needs to be done, what corporations can or should do, and what role the government should play? Government cannot do everything, it should not, and it should not do what corporations by themselves can do.[50] To be effective, any corporate obligations for human rights with respective duties for the state and corporations must be effectively defined and understood by the state, by the business entities it regulates and by the individuals it seeks to protect.

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[46] See discussion in Carlos Manuel Vázquez 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43 *Columbia Journal of Transnational Law* 927-959. See also Surya Deva 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in Right Direction?' (2004). *bePress Legal Series* Paper 112, 20-31.
[47] Knox op cit note 33 at 2.
[48] Ibid.
[49] Dine Janet *Companies international trade and human rights* (2004).
[50] Respecting the principal of subsidiarity discussed in Chapter 2 above.

Codes of conduct or other regulatory provisions that make unrealistic demands which go beyond the capability of the business entity or its nature as a profit making entity would reduce their regulatory effectiveness.[51] It would be undesirable to place excessive obligations on business entities as they could lead to inordinate dependencies between employers and workers, reproducing paternalistic relationships.[52] An example would be the expectation that business entities ought to provide for the socio economic rights of employees, for rights such as education and housing. Despite constitutional provisions binding the corporation to the Bill of Rights, the South African courts have been conservative in holding that corporations have a positive obligation to provide for human rights. The courts have been reluctant in applying the Constitution horizontally to juristic persons, despite the provision of Article 8(2) of the Constitution which binds corporations to the Bill of Rights. The reason given for the reluctance of the courts to make radical decisions holding that corporations are bound by the Bill of Rights was that Article 8(2) did not directly extend to economic, social and cultural rights (which generally are more directly linked to corporations than civil and political rights) owing to their inherently limited nature; ie their subjection to availability of resources and progressive realisation. If they are by nature limited, economic, social and cultural rights cannot be demanded of corporations unconditionally.[53] If such an attempt were ever made, it would not be implementable.

A challenge in defining the corporate obligation for human rights may arise with regard to claims referred to as rights but which do not feature in conventional human rights categories, namely civil and political rights or economic, social and cultural rights. One example relevant to corporations in a direct way is consumer rights. Consumer rights are in the list of rights and fundamental freedoms in the 2010 Constitution of Kenya.[54] An attempt has been made to justify consumer rights as human rights for a number of reasons, including the ground that it contributes to the right to dignity (sic).[55] Consumer rights have been said to fall into a third

[51] Haines Fiona, Macdonald Kate & Balaton-Chrimes Samantha 'Contextualizing the business responsibility to respect: How much is lost in translation?' in *The UN Guiding Principles on Business and Human Rights: Foundations and implementation* (2011) 107-128 at (10).
[52] Ibid at (11).
[53] Aoife Nolan 'Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland' (2014) 12(1) International *Journal of Constitutional Law* 61, 79. See notes to fn 192 in Section 3.3.4 above.
[54] Article 46.
[55] Sinai Deutch 'Are Consumer Rights Human Rights?'(1994) 32(3) *Osgoode Hall Law Journal* 537 at 550, fn 59. But human dignity is the foundation of human rights, a normative concept; dignity may thus be better understood as

generation/category of rights which have not been recognised internationally as human rights, but which have been approved by the various organs of the UN.[56] It has also been said that consumer rights are economic rights, and therefore will find protection under economic and social rights.[57] The right to consumer protection has also been found to exist under the UDHR by extrapolation or indirect association: that consumer rights are aimed at protection of the consumer's health and well-being.[58] Making reference to the constitutions of Portugal, Spain, Brazil and Switzerland which have consumer rights protected in the constitution, one author argues that their being placed in the constitution enhances their status and places them at par with other human rights.[59]

If consumer rights and other emerging rights not found in the international Bill of Rights were to be considered human rights, a greater challenge will be faced by corporations to define their activities in light of these new or emerging rights as and when they emerge.[60] Their recognition in some constitutions and not others goes against the notion of universality of human rights, and may present a problem when recognised in the constitution of a host state for example, but not the parent state of a trans-national corporation. Enforcing such rights may result in different results in the different countries.

With the growth of the corporation, there is recognition that a purely shareholder-centric concept of the company, which may have held some truth at the founding of the corporation, is now only a one sided and incomplete perception of the modern day corporation. In reality, there is much more to the corporation than the principal and agent. In an analysis of the sale of a corporation which was offered at much more than the value of its assets and shares, it was found that the difference in value between the selling price and the asset value was attributed to the value of "human capital".[61] There is an undeniable aspect of intellectual capital, the knowledge and experience of employees without which production would not be optimal; these too need to

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a basis for the rights rather than a right. See Oscar Schachter 'Human Dignity as a Normative Concept'(1983) 77 *American Journal of International Law* 848. (See Preamble of the International Covenant on Civil and Political Rights, Article 13 of the ICESCR and Article 5 of the American Convention).

[56] Ibid at 555.

[57] Ibid at 558.

[58] Ibid at 559. At 558, he notes that none of the international instruments makes reference to consumer rights as economic rights, but he argues there is evidence in the documents to support the claim for indirect acknowledgement.

[59] Ibid at 559.

[60] The old Constitution of Kenya did not provide for consumer rights.

[61] Transcript (Blair) op cit note 23.

feature in an accurate definition of the corporation.[62] If this is the case, it would be imprecise to continue talking about the owner as if he were the shareholder only.[63]

A further challenge will be defining the obligation of business entities within the unlimited scope they have to undertake whatever objects are desired. Over the years, corporations have grown in size, social function and the attendant power to impact society. Initially, the operations of the company were limited to its objects clause which was thought necessary for purposes of protecting the shareholders on the one hand, and creditors on the other hand.[64] The objects of a company were drafted to make it clear what precise object the company sought to fulfil. If the company transacted in objects beyond those specified in its objects clause, the transactions would be declared ultra vires, which means 'beyond the power'. Companies, being creatures of law, can only engage in activities that the law expressly allows them to [65] and anything beyond that is considered ultra vires or beyond the capacity of the corporation. In the early stages of its application, the ultra vires doctrine was meant to do away with the assumption that companies, being persons, had the same powers and capacity as natural persons. Unlike an individual who could do anything, corporations were held to be legally able to carry out only the activities it was created to carry out as prescribed in its memorandum of association[66] and implied powers to do all things necessarily incidental to or consequential upon the attainment of the specified objects'.[67] This position was given judicial credence in the case of *Ashbury Railway and Carriage Company v Riche*.[68]

Realising the limitation of the objects clause on the capacity of a company to carry out certain activities, company lawyers were quick to navigate this predicament and articles were subsequently drafted to include all possible activities a company could undertake or participate in. From the initial corporation which was formed for a specific and limited purpose, the modern

[62] Ibid.
[63] Ibid.
[64] *Ashbury Railway and Carriage Company v Riche* (1875) L R 7 H L.
[65] Ibid.
[66] This was acknowledged it the case of *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T).
[67] J S Mc Lennan 'The Ultra Vires Doctrine and the Turquand Rule – A Suggested Solution' *South African Law Journal* (1979) 329.
[68] (1875) LR 7 HL.

corporation has evolved into an entity with unrestricted objects[69] and therefore capable of doing all things incidental or conducive to the carrying on of any trade or business.

The just repealed Kenyan Companies Act (of 1948) made provision for the doctrine of ultra vires by stating that the memorandum of association of the company shall state the objects of the company.[70] The Act provided for amendment of the objects by special resolution, but even then not in a manner that substantively alters its initial intended main objective of the company.[71] However, similar to the current UK Companies Act 2006, the Kenyan Companies Act 2015 does away with the doctrine altogether by providing that the objects of the company are unrestricted, unless its articles of association provide otherwise.[72] The Companies Act now enables a company, at least in theory, to do anything and pursue any objectives as it deems fit from time to time.

The main aim of the ultra vires doctrine is protection of the shareholders and other parties who deal with the company from the outside: shareholders because they need the assurance that the money they invest in the company is used for the purpose for which it was intended at its giving; and the other third parties because they need to know the extent to which the company can lawfully deal with them.[73] When the objects of the company become too vague because they are too wide, the creditor fails to get protection in the event that the mind of the creditor and 'company' did not meet at the time of contracting. In the absence of the doctrine of ultra vires, a creditor cannot seek protection against a company for losses incurred in a transaction which the company could not have properly completed. Looking at the doctrine from another perspective, it would also be useful for purposes of giving the context in which the directors and management are expected to be knowledgeable. If a corporation's main goal is the building of roads, the expectation that management would be competent in the areas incidental to building of roads,

[69] Section 31(1) of the UK Companies Act 2006 'Unless a company's articles specifically restrict the objects of the company, its objects are unrestricted.'
[70] Section 5(1) (c).
[71] Section 8(1) of the Act provides that a company may, by special resolution, alter the provisions of its memorandum to enable it to carry out its business more economically or more efficiently, to attain its main purpose by new or improved means, to enlarge or change the local area of its operations, to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company, to restrict or abandon any of the objects specified in the memorandum, to sell or dispose of the whole or any part of the undertaking of the company or to amalgamate with any other company or body of persons.
[72] Section 28(1) of the Companies Act 2015.
[73] *Cotman v Brougham* [1918] AC 514 (HL) per Lord Parker of Waddingtom at 520.

and that they would also be conversant with matters related to the processing of milk and milk products is unfounded.

6.4. Responsibility of business for all human rights

Defining the corporate responsibility to respect human rights necessitates answering the question which human rights business should be responsible for. While some argue that businesses can violate any and thus should be responsible for all the recognised human rights,[74] theory seems to associate businesses with some human rights and not others.[75] It may be argued that economic, social and cultural rights such as the right to work and earn a fair wage are associated with business entities as much as, if not more than, the civil and political rights such as the right to life or a fair trial, for example. Defining the obligation of business in some instances can be complex and those who argue that corporations are responsible only for some human rights and not others raise a valid concern. What exactly would an obligation in the area of socio economic rights mean, for example the obligation with regard to the right to food or education? What will amount to breach and how can they be held accountable for violation of this right?[76] Would corporations be required to run schools, or distribute food in the communities? In view of the difficulties that have been faced in the effort to embrace and enforce socio economic rights in the countries where they have been adopted, such a question is not totally unanticipated. Additionally, with further regard to socio economic rights, concepts such as progressive realisation apply, and these rights are subject to the availability of resources, meaning that they would not imply exactly the same thing in different states. If such cases, the connection between human rights and business is not straightforward; yet the universal nature of human rights and freedoms is beyond question and its meaning in the context of corporate human rights obligations must be grappled with.

[74] The Essential Steps for Business to Respect Human Rights Guidance Note developed jointly by the Business Leaders Initiative on Human Rights (BLIHR), the UN Global Compact and the Office of the UN High Commissioner for Human Rights (OHCHR) will be reviewed.

[75] Nolan op cit note 53 at 62. The author observes that providers of economic, social and cultural rights are ever more likely to be non-state actors.

[76] Business Leaders Initiative on Human Rights (BLIHR), the UN Global Compact and the Office of the UN High Commissioner for Human Rights (OHCHR) 'Guidance Note' available at *http://www.integrating-humanrights.org/data/fe/file/ES%20final%20for%20web.pdf*, accessed on 6 August 2014 will be used in this research to provide examples.

The Vienna Declaration and Program of Action of 1993[77] characterised human rights as universal, indivisible, interdependent and interrelated.[78] Limiting the list of human rights that businesses can violate would go against the concept of universality and interdependence of rights; if all rights are related and interdependent and necessary to uphold the dignity of the person, it would not make sense to let businesses get away with violating some of them. The Vienna Declaration went on to say that 'Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments'.[79] Human rights exist despite their recognition or otherwise by governments. They should be upheld whether or not they are defined in instruments, and should not cease to exist merely because they stop being recognised in a country's statutes or corporation's regulations, or because they are complex to define.

One of the arguments advanced against the notion of universality of human rights is that in the face of so many different cultures, which define and limit values and rights, nothing can be universal.[80] Some developing countries argue that some rights are simply not relevant to their societies[81] or that the poorer countries are battling with numerous other fundamental concerns considered of greater importance such as economic development and consolidation of state structure, that the quest for human rights is not paramount.[82] The view of the United States government of the economic, social and cultural rights supports this perception. Opposed to the very notion of this category of rights, it has been said that:

> [A]t best, economic, social and cultural rights are *goals* that can only be achieved progressively, not guarantees. Therefore, while access to food, health services and quality education are at the top of any list of development goals, to speak of them as rights turns

[77] Adopted by UN Resolution 48/121.
[78] Paragraph 1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.
[79] Vienna Declaration para 1.
[80] Point raised and countered by Shashi Tharoor 'Are Human Rights Universal?' (1999/2000) 16(4) *World Policy Journal* 1-16.
[81]Tharoor gives the example here of the right to paid vacations. This may not be an ideal example because this is not even a human right per se, at least not in the category contemplated as fundamental human rights.
[82] Tharoor op cit note 80.

> the citizens of developing countries into objects of development rather than subjects in control of their own destiny.[83]

Whereas there may be some legitimacy in this observation, the fact remains that human rights are not rights because they can be afforded, and neither do they become rights when they can be afforded, but rather they are entitlements by the fact of being human, which fact should be recognised independent of the ability to provide for them. And whereas the USA may hold this view of the rights, it has systems in place, for example social security and food aid programs, that ensure that these basic needs are met, whether they are listed as rights in the constitution or not. The American view of ESCRs goes to support the point that rights are not rights because they are written in the Constitution, and whether or not these basic needs are recognised in their Bill of Rights, they are nevertheless given due importance and measures are taken to ensure they are met. If rights are universal therefore, the dilemma of which rights corporations should be held responsible to protect becomes marginal, the main point being the need for business entities to acknowledge their role in respecting all fundamental human rights that arise in the course of their operations.

John Christopher Anderson discusses the evolving duty of corporations to respect human rights, noting that what was once perceived as a social duty was now becoming an issue of concern for the profitability of companies: consumer action against negative conduct has forced companies to re-consider their decisions.[84] He discusses a number of initiatives that have been applied by international organisations, private corporations (internal private codes) and governments to address human rights abuse.[85] It is noteworthy however that all the examples discussed show efforts to address the abuse of civil and political rights such as child labour, forced labour, discrimination and health and safety of employees at work. This seems to reflect a bias in corporations and governments against economic social and cultural rights giving the impression that corporations do not violate this latter category of rights. John Knox attempts to rationalise the apparent bias, noting that human rights are more likely to be specified the more susceptible they are to violation by private actors, for example labour rights.[86] Other human

[83] Comments submitted by the USA, Report of the Open-Ended Working Group on the Right to Development, UN ESCOR, Commission on Human Rights, 57th Session, UN doc E/CN.4/2001/26 (2001), para 8; quoted in Mashood A Baderin & Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (2007) 113.
[84] J C Anderson 'Respecting Human Rights: Multinational Corporations Strike Out' (2000) 2(3) *University of Pennsylvania Journal of Labour and Employment Law* 463, 472.
[85] Ibid at 463.
[86] Knox, op cit note 33.

rights that may not find application to all corporations and would depend on the nature of each corporation's activities would not ideally be the subject of a law that applies to all corporations.

The Human Rights Council asked the Special Representative to elaborate on [his] view that businesses have a responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders expressed in his report on the issue of human rights and transnational business and other business enterprises.[87] In his report on the issue of human rights and transnational business and other business enterprises,[88] Ruggie elaborates findings from a survey indicating that businesses violate human rights of all natures (ie including the economic, social and cultural rights hitherto not as widely recognised as the civil and political rights) and not only the traditional labour related rights as narrowly understood by many.[89] In his view, businesses can infringe any of the internationally recognised human rights and should therefore be responsible for respecting, promoting and protecting all these rights.[90]

If the task of creating a hierarchy of applicable rights was undertaken, two options exist. First, to establish internationally agreed upon corporate-related human rights standards and then seek to protect human rights according to what the company deems relevant to their business. This option would stand the danger of using limited rights to impose 'imprecise and expansive responsibilities' on the corporation.[91] Ruggie notes that there cannot be a limited list of rights to which corporations must look to identify their responsibilities because they can violate any of the recognisable human rights. Second, a rights-based approach could alternatively be used, where companies take on universally accepted human rights as declared in the international instruments and work back to define corresponding policies and practices. A rights based option, the latter approach, has the advantage of creating specific responsibilities for corporations with regard to all rights. The approach the companies take must proceed from the premise that human rights are universal and ought to be applied with equal force and uniformity by all. This remains a challenge for most states.

[87] In Resolution 8/7 paragraph 4(b).
[88] Ruggie Report 2008 op cit note 1.
[89] Addendum to Ruggie Report 2008, op cit note 1 - A/HRC/8/5/Add.2 *Business and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse.* See also Ruggie 2008 Report, para 52.
[90] The Business Leaders Initiative on Human Rights (BLIHR), UN Global Compact and the Office of the UN High Commissioner for Human Rights (OHCHR) 'The Essential Steps for Business to Respect Human Rights Guidance Note'(Guidance Note) available at *http://www.integrating-humanrights.org/data/fe/file/ES%20final%20for%20web.pdf*, accessed on 6 August 2014.
[91] Ibid at 15.

When all is said and done about which human rights are relevant for business and which are not, the task of 'hierarchising' rights, some being considered fundamental and others not, fails because it leads to mystifying of rights rather than clarifying them.[92] A question that arises in this endeavor is, if rights are not considered fundamental should they be ignored? And if not, to what end is such classification done? It would be much easier and more practical to follow the existing list of rights contained in the international human rights documents. The UN Guiding Principles state that the corporate responsibility to respect includes all the rights recognised in the international Bill of Rights.[93] The particular responsibility of businesses will depend on the right in question, the capacity of the entity to make an impact on the human rights in question and the nature of the activities of the company.[94]

6.5. Creating a corporate culture respectful of human rights

Much trust is put on the ability of the business entities by themselves to be propagators of the human rights cause. In the absence of laws enforcing the corporate obligation to respect human rights, corporations will be expected to uphold human rights on their own volition. In any event, even if such laws existed, corporations would be expected to comply not merely because of the sanctions for non-compliance, but because they have an interest to operate without violating human rights. They will succeed in this task by creating or developing a corporate culture that respects human rights.

Culture may be defined as:

> … information capable of affecting individuals' behaviour that they acquire from other members of their species through teaching, imitation, and other forms of social transmission.[95]

The information about human rights ought to be understood first by business entities, and then at all levels of the entity. This information can be transmitted through means outside the law. A culture of respect for human rights will enable the business to carry out its core functions as intended, without viewing respect for human rights as an additional task they need to create a

[92] Steiner Henry J and Philip Alston *International human rights in context: law politics morals: text and materials* (2000) 120 at 129-130.
[93] Ruggie Report 2008 op cit note 1 at 12.
[94] For example provision of basic human rights delegate by the state to a parastatal. See Alexandra Gatto *Multinational enterprises and human right : obligations under EU law and international law* (2011) at 96.
[95] Richerson P J and R Boyd 'Not by genes alone: how culture transformed human evolution' (2005) 5.

separate department for. Policies are the instruments that translate the ideas proposed or created by the law into action. Private initiatives are seen by some as being more favourable than government intervention in addressing the issue of human rights; this view proposes that government intervention should only come in to give guidance to the private initiatives.[96] John Knox supports this opinion, and points out that although an international mechanism would be more effective, more uniform and predictable in specifying the scope and content of private duties for human rights, it is more important to have a clear and uniform understanding of what the duties anticipated are.[97] These duties can then be specified and human rights due diligence standards and applied by corporations as needed.

To give form to what would otherwise seem as a negative duty requiring companies only to refrain from violating human rights, Ruggie's responsibility to respect includes a positive duty to carry out a human rights due diligence.[98]

6.5.1. Human Rights Due Diligence

The corporate role in advancing human rights will be expressed in awareness of the need for vigilant human rights due diligence in all its operations. Such responsibility, while being linked to what many business entities already carry out as part of their corporate social responsibility, is however much more than that: something as fundamental as human rights cannot be "left to the whim of companies, and to the vagaries of voluntary codes of conduct and CSR initiatives"[99].

The intention behind the UN Guidelines was not to create a new international legal order but rather to establish a common global standard that maybe applied by the different states and by business enterprises to bring about or ensure respect for human rights.[100] Guided by the recommendations proposed in the Guidelines, the Kenyan government can put in place measures to meet certain obligations, and working within such a framework stipulated by government,

[96] Anderson op cit note 84 at 499.
[97] Knox op cit note 33 at 27.
[98] UN Guiding Principles op cit note 6 at 15; Operational Principle No. 15 on corporate responsibility to respect
[99] Corporate Responsibility (CORE) 'Why the UK needs a Commission for Business, Human Rights and the Environment' available at *http://corporate-responsibility.org/wp-content/uploads/2013/11/COREvalues.pdf*,accessed on 6 August 2014.
[100] L Howard & R Smith 'A Legal Guide to the Guiding Principles on Business and Human Rights' (1 July 2011) 1 available at *http://a4id.org/sites/default/files/user/Microsoft%20Word%20-%20Legal%20Guide%20-%20John%20Ruggies%20Guiding%20Principles.pdf,* accessed on 5 August 2014.

companies can be guided to aspire to meet the international standards of human rights compliance. What form will this guidance take?

The due diligence requirement is a relatively new concept, appearing for the first time in Ruggie's 2008 Report,[101] a fact which raises questions about its status.[102] There is no legal obligation to conduct the human rights due diligence, and as yet there is no agreement on the most effective way to carry it out.[103] In defining the corporate responsibility to respect human rights, Ruggie talks of a due diligence requirement for business to enable them identify and mitigate any possible negative impacts, or where they have already occurred, to address such adverse effects.[104] Carrying out due diligence will enable business entities to understand and define their responsibility to respect because it provides a methodology for them to evaluate and address human rights risks and impacts.[105] Any human rights due diligence ought to cover all adverse impacts the business may cause at any given stage of its operations, meaning that the exercise to identify and mitigate negative impacts should be continuous in order to cover any evolving risks or operating circumstances.[106] Undertaking a human rights due diligence would require companies to think beforehand of the possible risks their business activities will pose to individuals and communities and plan how to overcome them.[107]

Surya Deva argues that human rights due diligence is counterproductive, and that there would be serious implications of transferring its meaning from the commercial context, where it looks to the welfare of the company, to the legal and human rights discourse which looks to the welfare of human beings.[108] It would be important therefore to consider this fundamental difference in assessing and factoring in the risk arising from human rights assessment compared

[101] Ibid at 11.

[102] Jonathan Kauffman asks, "is it a legal requirement, a proactive duty or just a good idea?" See 'Ruggie's Guiding Principles Fail to Address Major Questions of Obligations and Accountability' (4/5/2011) available at *http://www.earthrights.org/es/blog/465?page=3,* accessed on 4 September 2014. Article written on Ruggie's Principles' inability to address major questions of obligation and accountability. The subject of due diligence will be addressed further in Chapter 4.

[103] Institute for Human Rights and Business 'The State of Play of Human Rights Due Diligence: Anticipating the Next Five Years' 13 available at *http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf,*accessed on 6 August 2014.

[104] Ibid at 19 (Commentary on para 19).

[105] The State of Play of Human Rights and Business op cit note 96 at 12.

[106] UN Guiding Principles op cit note 6 at 17.

[107] The State of Play of Human Rights and Business op cit note 96 at 12.

[108] See Surya Deva 'Treating Human Rights Lightly: A Critique of the Guiding Principles' Complicity in Undermining the Human Rights Obligations of Companies' in Deva & Bilchitz op cit note 3 at 78-104 (initially presented at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) International Conference, (January 23-24 2012) in Johannesburg. Deva says that targets for human rights due diligence are not fixable as Ruggie has attempted to make them appear, because violation can affect anyone.

to the other risks the business may face; the former involves human beings and cannot therefore be a mere business calculation of probabilities as would be in the case of the latter.[109]

The pillar of the Protect Respect Remedy Framework on corporate responsibility to respect presupposes that market driven human rights can be effective enough to advance the human rights agenda, guided only by moral expectations.[110] Market forces will be relied on to place a check on the delivery of expectations. However, it is debatable whether market forces by themselves are sufficient to force compliance with social obligations by companies. The due diligence expected of corporations cannot happen solely through market forces.[111] For markets to operate optimally there is need for 'adequate institutional underpinnings'[112] where human rights are integrated in the values of the business and executed in its operations. Even in an ideal market system where the forces of demand and supply reign supreme and government regulations or interference is kept to a minimum, only with perfect competition would all concerns be mitigated. A company exists to make profits and it will make the most profit if it has consumers for its services. In a perfect market, consumers will have a choice and will go to the supplier who supplies the best product at the best price. It would thus be in the best interest of the business enterprise to produce efficiently, produce goods of superior quality and sell them at the best price.

However, perfect competition is not the usual case; market inefficiencies, imperfect information, government policies and such other reasons make it impossible to have a perfect market. The quest to get customers and make sales to generate the maximum profits is thus saddled with ethical concerns; disregard for quality; unfair means of production such as cheap labour; disregard for the means of production, application of cheap and unethical means to reduce production costs; disregard for the environment among other concerns. Developing a human centered approach to business management is thus considered one of the important directions that the concept of human rights due diligence has to take in the next few years.[113]

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[109] The State of Play of Human Rights and Business op cit note 103 at 11.
[110] Justine Nolan 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 138-161.
[111] Institute for Human Rights and Business 'Top 10 emerging business and human rights challenges for 2010' available at *http://www.ihrb.org/top10/business_human_rights_issues/2010.html*, accessed on 18 June 2011.
[112] Ruggie Report 2009 op cit note 5 at 7.
[113] The State of Play of Human Rights Due Diligence op cit note 96.

Ruggie gives guidance on what would constitute an ideal model of human rights due diligence. Conducting a human rights due diligence demands that the company have a statement of policy articulating its commitment to respect human rights; that it carry out a periodic assessment of actual and potential human rights impacts of its activities and relationships; that it integrates these commitments and assessments into internal control and oversight systems; and that it tracks and reports on their performance.[114] The Guiding Principles should be used by business entities in Kenya to devise what would be an ideal model to carry out human rights due diligence. Possible measures that can be applied by corporations in creating a culture respectful of human rights are discussed below.

6.5.2. Corporate policy statement articulating human rights obligation

The business entity must undertake the exercise of assessing human rights impacts, and ensure that the findings are communicated and integrated at all levels of the business. The question what form the assessment will take can be answered in different ways. The human rights assessment can either be incorporated into existing apparatus, such as environmental and social impact assessments, or when this is not possible, an independent assessment of human rights may be undertaken.[115] The business entity can either have a human rights policy statement that stands alone, or it could be incorporated in the other areas of the business under which concerns typical of human rights are considered, for example its social and environmental policies.[116] Whatever form of policy articulation the business adopts, it would be useful to have one main point of reference to its obligations for human rights, even if the different aspects may be reviewed in detail in different policies. For example, environment related human rights obligations could be elaborated in the environmental policy, and community related human obligations in the CSR policy; but the company's overall mission statement could make reference to the company's commitment to uphold and respect all human rights.

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[114] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' (9 April 2010) A/HRC/14/27 [Ruggie Report 2010] 17.

[115] The State of Play of Human Rights and Business op cit note 61 at 2.

[116] An advantage of focusing on human rights as a category as opposed to diffusing human rights considerations in other existing channels is that the issues raised get the attention and professional response they require. See Ruggie Report 2009, op cit note 5 at para 78.

The corporation should acknowledge the relevant stakeholders; highlight the mutual interests, goals to be achieved in each relationship and the potential impact the corporation would have on them; monitor the relationship with each and develop supportive policies to deal with them.[117] At present, proposals for corporate governance offer useful and practical guidelines for policy content that would enable companies to assess and monitor their overall impact, including the effect of their activities on the human rights of individuals. For example, the proposed Sample Code of Best Practice for Corporate Governance[118] prepared by Private Sector Initiative for Corporate Governance (of Kenya) has clear expectations on corporate boards, which if applied, would promote a culture of compliance with human rights in the company. Among the principles outlined, the directors will be expected to identify the corporation's internal and external stakeholders and agree on a policy, or policies determining how the corporation should relate to them; identify key risk areas *(human rights risks could be included here)*, highlight the key performance indicators of the business and monitor these factors; and compile and communicate company policies, strategies etc. covering the style of operation, external and internal relationships among other requirements.[119] To this end, the business entity can be required to stipulate what information or reports it prepares on a regular basis and to point out how it will evaluate its own performance.[120]

As the business grows or takes on new customers or suppliers, initiates new projects or undergoes any other changes, it ought to carry out a human rights due diligence in order to ensure that it is well prepared to deal with new situations as they arise. Any serious effort to assess and manage negative impact must be accompanied by measures to adequately monitor its policies in order to evaluate whether they are being implemented in the most effective manner.[121] This process will entail application of qualitative and quantitative indicators, engaging with affected persons to obtain their feedback, and reporting on the outcome in the normal reporting

[117] James E Post et al 'Managing the Extended Enterprise: The New Stakeholder View' (2002) 45(1) *California Management Review* 22
[118] Undated, on file with author.
[119] Ibid
[120] See page 11-2. Sample Code Available at *http://www.ifc.org/ifcext/corporategovernance.nsf/AttachmentsByTitle/Kenyan+CG-Code.pdf/$FILE/Kenyan+CG-Code.pdf* accessed on 24 July 2011.
[121] UN Guiding Principles op cit note 6 at 20.

procedures of the business, indicating how the business enterprise identifies and addresses adverse human rights impacts.[122]

6.6. Obligation of directors as the 'mind and will' of the company

Corporations are fictional entities; they can only act through human agents. Shareholders, usually regarded as the principals of the corporate entity, appoint a board of directors and management who act on their behalf in the daily operations of the company. This relationship was well put in a case where the judge held that:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[123]

Directors inevitably play an important role in understanding and advancing the duties and responsibilities of business entities, both financial and otherwise, because the image and personhood of the corporation is embodied in them. The duties of care and skill, loyalty and good faith established in common law guide the actions of the directors. In the company legislation, the principle of shareholder supremacy is, to a large extent, guided by the duties and obligations imposed on directors to exercise their powers in the best interest of the company; 'company' is usually interpreted to mean the owners of the company who are normally seen as the shareholders. Fulfillment of the responsibility of directors must start with a clear enunciation of what the duty entails. However, any elaboration of the duties will only be useful to the extent that the directors and other officers responsible for implementing it are aware of, understand and commit themselves to executing the duties.

Instead of phrasing the problem in terms of who the corporation has an obligation towards, shareholders or wider group of stakeholders, it is proposed rather that the problem be directed at management because they are the ones who make decisions and have the obligation to ensure that laws are respected. Neither shareholders nor stakeholders make decisions,[124] so it is

[122] Ibid.
[123] *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* CA 1957.
[124] Transcript op cit note 23 at 1297.

management who need to be guided in considering the entire spectrum of possibilities that contribute to their accountability in decision-making. What ought the management of business entities and employees to understand as their duty on the question of human rights? Setting aside the technicalities concerning who in law can be held responsible for human rights violations, directors should ensure that business activities are conducted in a manner that respects individual human rights, and which does not in any way contribute to their infringement.

Human rights, which are inalienable, are grounded on the nature of human beings, which is dignified; no man can lose his nature.[125] Human dignity is the foundation of human rights and must also be an essential consideration in every decision where human beings and their interests are involved:

> Man must not primarily nor even less so exclusively be considered as an object to be defined and employed as a mere quantitative factor in economic calculations but he must be looked upon foremost as an individual with a dignity of his own which is not expendable.[126]

If this is the person that human rights aim to defend, it is incumbent on business entities to respect his dignity and his rights in all circumstances. Whoever has the ability to infringe human rights therefore has a responsibility to refrain from doing that. "Human dignity is said to have acquired a resonance that leads it to be invoked so widely as a legal and moral ground for protest against degrading and abusive treatment."[127] When a person is in the employ of a business, the business cannot divorce its end as a profit making entity from its obligation to respect his dignity. Directors and management of business entities are involved in the delicate task of "organising human labour and the means of production so as to give rise to the goods and services necessary for the prosperity and progress of the community".[128] Prosperity and progress demand a respect for the rights of the person. In seeking this end, there ought not to be any question about compromising the indisputable worth and dignity of the person without which there would be no true progress in society; business entities must respect and be seen to respect this dignity.

Berle and Means say that the duty of directors towards the company has its foundation in equity with the fiduciary obligation arising as in any case where one party is entrusted with the

[125] Jacques Maritain *Natural Law: Reflections on Theory and Practice* (2001) 67.
[126] Ibid at 10.
[127] Schachter op cit note 55 at 849.
[128] L'Oservatore Romano (June 20 1983) English ed 9.

management of the property of another.[129] They questioned the capability of courts to interpret the directors' fiduciary duty to act in the best interest of its shareholders. In their view, the courts were not well equipped to interfere in the management of the companies and could only exercise supervisory jurisdiction in the solution of issues brought before them.[130] They pre-empted the problem of creating an objective standard by which the conduct of directors can be measured. What, for example, is 'best interest'? Does it include social responsibility? If it does, what criterion is applicable to determine proper exercise of the duty? They predicted a new concept of the corporation which defined with greater clarity the relationships between the different stakeholders. They predicted that 'it remain[ed] only for the claim of the community to be put forward with clarity and force…' and when this was done, it was their view that the property rights that existed, then vested in the shareholder, would yield to 'the greater interests of society.'[131]

What does this putting forward with 'clarity and force' mean? Could Berle and Means have been talking about legislating the expectations of the stakeholders in the company? Possibly. From a logical point of view, this move would be appreciated because it would make assessment of the expected obligations and their violation quite straightforward and subject to a less subjective interpretation of the courts. Whereas the accountability of directors to shareholders is founded on the nature of the company, accountability to other stakeholders would be justified if founded on a contractual relationship, or alternatively on legislative provisions.[132]

Can directors of companies that may have been used to perpetrate violation of human rights be held accountable for the violations? The Kenyan Companies Act is not clear on the expectations of directors' decisions in the interest of the company on issues that deal with human rights. The directors' duties in Kenya are currently found in common law; this fact contributes to the uncertainty of expectations on the directors. In Kenya, directors' duties are owed to shareholders as there is no explicit requirement in the current Companies Act that directors consider the interests of other stakeholders. Generally, there is no guidance in law for directors on how to exercise their duties. In the survey carried out in Kenya under Ruggie's Corporate Law Project, it was found that there was no guidance of when, how or why directors should

[129] A Berle and C G Means, *The Modern Corporation and Private Property* Rev ed [1932] (1967).
[130] Ibid at 296.
[131] Ibid at 312.
[132] Andrew Keay, 'Stakeholder Theory in Corporate Law: Has it got what it takes?' (2010) 9(3) *Richmond Journal of Global Law and Business* 249, 295.

consider impacts on non-shareholders.[133] The Project also noted that the penalties imposed by the Companies Act on directors for breach of their duties have not been amended for many years and are hardly enforced.[134] As such, these penalties cannot serve the intended objective of deterring negligence by directors in exercising their obligations, even in the instance that these could be interpreted to include obligations with regard to the human rights obligation of the company.

A solution to the problem of lack of clarity on expectations on directors could be to codify directors' duties. Codification of directors' duties could be one way of living up to the provision requiring states to 'set out clearly the expectation that all business enterprises domiciled in their territory respect human rights throughout their operations'.[135] In the UK Companies Act of 2006, the directors' duties are codified and provided for in a more extensive way than was previously the case. The provision seems to rebut the principal-agent theory where control is seen as a feature of ownership.[136] Section 172 of the UK Companies Act requires the director to promote the success of the company and in doing so consider the interests of employees, be mindful of the relationship with 'suppliers, customers and others' and consider the impact of the company's operations on the community. The UK position follows the enlightened stakeholder approach to the role of the corporation under which directors are required not to base their decisions solely on profit motives but to consider the interests of other stakeholders.[137] This can be interpreted as requiring the directors to identify, monitor and mitigate any possible negative impacts of the company activities on the communities.[138] It was the intention of the government that directors be required to consider the interests of other stakeholders in making decisions affecting the company. It was noted at the time of its drafting that:

> This duty codifies the current law and enshrines in statute what is commonly referred to as the principle of "enlightened shareholder value". The duty requires a director to act in the

[133] Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises: Corporate Law Project on Kenya, (October 2010) 25 available at *http://business-humanrights.org/sites/default/files/media/documents/ruggie/corp-law-kenya-oraro-co-for-ruggie-oct-2010.pdf*, accessed on 5 August 2014.
[134] Ibid at 6.
[135] UN Guiding Principles op cit note 6, see State Duty to Protect, Foundational Principle 2.
[136] Transcript op cit note 23 at 259.
[137] Explanatory note on Section 172 of the Companies Act 2006 available at *http://www.legislation.gov.uk/ukpga/2006/46/notes/division/6/2*, accessed on 31 August 2014.
[138] Section 172 UK Companies Act. Section 172 of the UK Companies Act represents the first instance that shareholder primacy was recognized by statute. See Andrew Johnston 'After the OFR: Can UK Shareholder Value Still be Enlightened?' (2006) 7 *European Business Organization Law Review*, 817, 824.

way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.[139]

A criticism of the provision is that although it introduces major alterations to the current law by extending the duty of directors to include the protection of social and environmental issues, the provision is merely theoretic and does not in fact lead to this eventuality.[140] This provision does not create a direct obligation to consider the interests of other stakeholders in the company. The existing preference for shareholder supremacy is given as much importance as the attempt to strengthen the stakeholder concept indicated by requirement of company law to ensure 'appropriate participation of other stakeholders'[141] because the same provision also states:

4. Transparency

…

c) The law should protect shareholder rights, advance shareholder activism and provide enhanced protection for minority shareholders.[142]

Clause 173 of the UK Act provides that the main aim of the directors should be the promotion of the company's success for the benefit of the members.[143] Stakeholders are not given a voice in the company affairs, and their interests can be considered only to the extent that the directors find this viable, and there is nothing in the Act that specifically allows stakeholders to enforce the duty imposed upon directors to consider their interests.[144] The clause creates general obligations, which it is argued, are not enforceable because the directors still have the

[139] UK Office of Public Sector Information, Explanatory note on s172 of the Companies Act 2006 Prepared: 2 January 2007 Accessed at *http://www.opsi.gov.uk/ACTS/en2006/06en46-f.htm,* accessed on2/29/2016 20 January 2016. See also Lord Goldsmith's views, expressing the government's intention:

> "… it is for the directors, by reference to those things we are talking about – the objective of the company – to judge and form a good faith judgment about what is to be regarded as success for the members as a whole….they will need to look at the company's constitution, shareholder decisions and anything else that they consider relevant in helping them to reach that judgement…the duty is to promote the success for the benefit of the members as a whole – that is, for the members as a collective body – not only to benefit the majority shareholders, or any particular shareholder or section of shareholders, still less the interests of directors who might happen to be shareholders themselves."

Lords Grand Committee, 6 February 2006, column 256 cited in Johnston, 25.

[140] D Arsalidou 'Shareholder Primacy in Cl 173 of the Company Law Bill 2006' (2007) 28(3)*The Company Lawyer* 67.

[141] Paragraph 4 (a) of the Explanatory Memorandum to the Companies Act (1985) (Operating and Financial Review) (Repeal) Regulations 2005 2005 No. 3442, 3 available at *http://www.opsi.gov.uk/si/em2005/uksiem_20053442_en.pdf*, accessed on 8 May 2014.

[142] Ibid, para 4 (c).

[143] Ibidat 68.

[144] Ibid.

discretion to make decisions as to what constitutes the social responsibility of the company. This fact therefore ultimately supports the assertion that the traditional role of the company still reigns supreme:[145] duties to shareholders must be considered before all others, and that these others will be upheld only insofar as they do not destabilise the shareholder's primary position.

Another recent example of codification of directors' duties is the South African company law. The initial approach adopted at the commencement of the company law reform in South Africa (leading up to the amendment of the Companies Act 1973 which was replaced by the Companies Act 2008) which was quite overt in its call for a stakeholder approach in corporate governance was diluted by the time the final document was arrived at.[146] Whereas the formulators of the new law intended for an apparent major overhaul of the current law to reflect 'the Unique South African context' and to 'take into account… the legitimate interests of other stakeholder constituencies'[147] of the company, in the final analysis, this attempt is 'watered down' and not reflected as forcefully as would have been anticipated. The wording of the provision of the current companies' law can hardly be said to represent such novel position, at least not as directly as would have been expected. On the issue of social responsibility of the company, the Companies Act 2008 cannot be said to reflect an 'extensive review of the current [1973] company law'[148] and neither a 'comprehensive company law review'[149] as was anticipated at the time the review took off.

The Companies Act 2008 of South Africa introduces a form of codified regime of directors' fiduciary and reasonable care duties in addition to the common law directors' duties. This was a significant change from the previous law which did not contain clear rules regarding corporate governance and the duties and liabilities of directors.[150] There was an attempt, expressed in the Companies Bill 2007, to make the directors more accountable to shareholders in

[145] In justifying the fading away of the usage of the term 'triple bottom line' by companies to define their objectives, one writer says that profit is the only bottom line, and the other two, social and environmental concerns, rather than being bottom lines are conditions imposed that guide how profit may be generated - See Wayne Norman & Chris MacDonald 'Getting to the Bottom of "Triple Bottom Line" (March 2003) *Business Ethics Quarterly.*

[146]Refer to discussion of the South African Company Law reform position in Section 3.5 above. In the view of the policy makers, the 1973 Act needed a wholesome overhaul to reflect the principles of the new law and to keep within its spirit; see Department of Trade and Industry, General Notice 1183 of 2004, '*South African Company Law for the 21st Century, Guidelines for Corporate Law Reform'* (May 2004) 25 para 2.2.2 available at <*www.polity.org.za/attachment.php?aa_id=1326*>, accessed on 23 July 2014 3.

[147] Ibid at 26.

[148] Ibid at 12.

[149] Ibid at 15.

[150] South African Company Law for the 21st Century op cit note 146 at 18.

a more objective manner directing them to act 'honestly and in good faith and in a manner the director believes to be in the best interests of and for the benefit of the company'.[151] The South African Companies Act 71 of 2008 similarly provides for Standards of directors conduct but not with the exact words of the Bill.[152] The Act goes further to define what 'best interests of the company' means and provides that the director will meet this objective if he has, among other considerations, 'taken reasonably diligent steps to become informed about the subject matter of the judgment...'[153] This provision can be applied to ensure that even in the event that the company has to consider social responsibility issues, the directors will evaluate such options in order to arrive at a decision that ultimately enhances the best interests of the company, which is most likely to be interpreted as enhancing the shareholder value.

From the brief analysis of the UK and South African company law reform and the attempts to codify directors' duties and make them consider wider interests than those of shareholders, shareholder primacy still reigns supreme. Stakeholders' interest will be considered only insofar as it gives overriding credence to the former principle.[154] Suppliers, customers, employees and the wider society are not at the same level as the shareholders; the place of the shareholder as owner of the business, as investor, as risk taker appears to give him a bigger stake in and with that a greater expectation from the company. In the final analysis, the business is formed to make profits for the owners; this remains the case despite the changes that have taken place in the environment in which the company operates.

In a significant move towards a more stakeholder-embracing attitude, the Companies Act 2015 (the Act) in Kenya codifies the common law duties of directors in a manner that makes the duty more embracing than the UK and South Africa provisions.[155] The Act provides for the duty of the directors to act within powers,[156] to promote the success of the company,[157] to exercise

[151] South Africa Companies Bill 2007 s 91(1)(b).
[152] See Section 76 of the Companies Act.
[153] Section 76 (4)(a) of the Companies Act 2008.
[154] See *Re West Coast Capital (LIOS) Ltd* [2008] CSOH 72; 2008 Scot (D) May 16, 2008 (Outer House, Court of Sessions, Lord Glennie) at 21.
[155] Section 140 Companies Act 2015 reads:

> (3) The general duties of directors are based on common law rules and equitable principles apply in relation to directors and have effect in place of those rules and principles with respect to the duties owed to a company by a director.
>
> (4) The general duties of directors are to be interpreted and applied in the same way as common law rules or equitable principles, and those interpreting and applying those rules and principles are required to have regard to the corresponding common law rules and equitable principles.

[156] Section 142.

independent judgment,[158] to exercise reasonable care, skill and diligence[159] to avoid conflicts of interest[160] and not to accept benefits from third parties.[161] In exercising their duties, the directors are directed to have regard to the interests of both shareholders and stakeholders, making it clearer their concern should not be exclusively centered on the shareholder as is currently the case.[162] The Act goes further to make demands of the directors, calling on them to consider the long term effect of the decisions they propose to take, the interests of the employees, customers, suppliers and others, the impact company operations will have on the community and the environment and the need to maintain high standards of business conduct.[163]

Although the Companies Act has been passed, the practicality of the provisions on directors' duties can only be assessed with time.[164] In the other jurisdictions with similar provisions, it has been argued against such provision that the cost of making directors accountable for competing and conflicting interests to a wide and varied spectrum of stakeholders and the likely confusion and misunderstanding that will arise by courts and litigants outweigh any potential benefits that the statutes might bring about.[165] Such an argument in my view is an attempt to simplify what is not simple by nature. If the corporation consists of the complex interweaving of numerous relationships, it is only to be expected that those who run it

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[157] Section 143.
[158] Section 144.
[159] Section 145.
[160] Section 146.
[161] Section 147.
[162] Section 143 reads:

> (1) A director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to,--
>
> (a) the long term consequences of any decision of the directors;
> (b) the interests of the employees of the company;
> (c) the need to foster the company's business relationships with suppliers, customers and others;
> (d) the impact of the operations company on the community and the environment;
> (e) the desirability of the company to maintain a reputation for high standards of business conduct; and
> (f) the need to act fairly as between the directors and the members of the company.

This provision is identical to Section 172(1) of the UK Companies Act, and similar to the Connecticut General Statutes.

[163] See Section 143 on the Duty of directors to promote the success of the company. See also Section 655(4) of the Act on the contents of the Business Review.

[164] A criticism of the requirement for directors to consider the long-term effects of proposed actions is based on the fact that many of the listed companies are majority foreign owned, and an interpretation of long term effects can be the interests of the foreign owners. See discussion in Musikali, Lois M 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19(7) *International Company and Commercial Law Review*, 213-227.

[165] Macey, Jonathan R 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' (1991) *Yale Law School Faculty Scholarship Series*, Paper 1713, 24.

should be able to take into consideration the interests of all the stakeholders, and not only some, for the mere reason of simplifying their task. In any event, this argument is countered by the observation that directors of corporations have had to deal with different classes of shareholders who have different interests and they have usually managed to deal with them all in a beneficial manner.[166] In a similar way the directors can be required to consider and act upon the interests of the different stakeholders of the corporation.

In the shareholder supremacy debate, the argument seems to be whose interests should take precedence, whether the shareholders', to the detriment of the interests of other stakeholders, or the stakeholders', at the expense of the shareholders'. The principal-agent theory places shareholders at the top of the corporation tier because it is he who provides the capital without which the organisation would not exist. The principal-agent theory creates an efficient mechanism for the practical running of the organisation: different roles are played by different people who coordinate their efforts to provide the necessary information which is then passed on to the principal, who makes the decisions.[167] However, the directors should not be forced to express their allegiance on either side: either on the shareholders' side as current corporate law places them or to the side of the other stakeholders as proponents of the stakeholder theory propose. If the concern of the director is to promote the success of the company, as the Companies Act 2015 of Kenya provides, the director need not be on either side because the interests concerned are not always of a nature to be traded off against each other.[168]

In carrying out their role therefore, directors ought to be concerned about the different stakeholders who are in one way or another connected with the business, and take their interests into account in making decisions. However, whereas shareholders are concerned about the return on their investment, the other stakeholders have different expectations: customers want the best goods for the fairest price, the community imposes a moral obligation on the company to acknowledge their (the community's) contribution to its success, and to mitigate the losses it causes them to incur as a result of its activities; employees want conducive working environment and a fair wage for their labour. In many instances, these expectations are not complementary and the profit maximisation theory argues that the profit maximisation ideal should override the other interests because the shareholders are the owners of the business; that it is they who invest

[166] Ibid at 33.
[167] Ibid at 263.
[168] Blair & Stout op cit note 25 at 259.

in the business, and without them the company would not be in existence to serve all the other varied interests. It has also been said against the use of fiduciary duties to safeguard the interests of the community that in the absence of an agreement (between the corporation and the communities), creating an amorphous, open-ended fiduciary duty to the local community in which the firm operates, is impractical.[169] It is said to amount to a decision to transform the business executives into unelected and therefore unaccountable public servants.[170] The opponents of this view argue that creating a fiduciary obligation for directors on behalf of society transforms the manager from a businessperson to an unelected and unaccountable public servant, a role best left to the political process.[171] Proponents of the profit maximisation theory further argue that for ease of monitoring performance, the company ought to have a single goal and again, following the argument of shareholder supremacy, this goal should be profit maximisation.

Respect for human rights requires the company to be concerned that no activity it carries out negatively impacts the community around it, and also that they take positive steps to meet the positive obligations that are within its scope, such as ensuring that its employees right to a decent living is not violated. To the extent that the duty to stakeholders concerns their human rights, it is not a contracted duty and the obligation of the corporation cannot be traded off against its obligation to shareholders. Blair and Stout observe the emergence of a progressive school of corporate scholars who believe that corporate law should require directors to serve a wider group of stakeholders but not as a general duty, rather one along a mediating hierarchy. This model suggests a mid-point strategy that places the directors on neither extreme: not on the exclusive camp of shareholders as the shareholder primacy model desires, neither that of the stakeholders and therefore does not put them under the command or control of either group.

It is my view that requiring directors to consider the interests of stakeholders does not put them under the control of stakeholders, and concern for shareholders does not necessarily prejudice the interests of the others stakeholders. Expansion of the directors' duty to stakeholders will serve to ensure that directors direct responsible operations of the company with a focus on the main reason for its existence, but also with a concern not to harm others in the process of achieving whatever it conceives of as its main goals. The guiding principle for directors in

[169] Ibid.
[170] Ibid.
[171] Macey & Miller op cit note 24 at 421-22.

overseeing the relationship with stakeholders would be to avoid or reduce harm, rather than creating benefits for the community at large, which may not be in the place of the corporation to do in the first place.[172] Amending the law to make directors more accountable to other stakeholders beyond the shareholders will change this position and project a more accurate picture of reality of a corporation which has many players who have different interests, each of which is valid in its own right.

6.7. Conclusion

This chapter has attempted to project the responsibility contemplated by Ruggie into the corporate context. If the Guiding principles are to be concretised through laws, regulations or codes of conduct, the responsibility contemplated will be more specific and thus more easily enforceable. The process of translating the general standards into applicable obligations in the varying local contexts is complex and contested.[173] Generally however, translation of the responsibility to respect will take place in two stages: from the international standards outlined in the Guiding Principles to corresponding responsibilities, and from the responsibilities to everyday business practice.[174] The duty of states to protect its citizens against abuse by corporations is best regulated though 'appropriate and universally enforced national regulation'.[175] The Guiding principles can be institutionalised through corporate law which codifies the corresponding obligations. Governments will live up to their obligation to ensure respect of human rights by amending their company laws to make this possible. Once codified in provisions of corporate law, they will be further translated into operational practice through corporate human rights policies that spell out what will be done throughout the business entity to uphold the responsibility.

The corporate responsibility to respect is not merely a negative duty to refrain from causing harm. It encompasses all means the corporation ought to employ to ensure human rights are not violated. Such means would include the carrying out of a human rights due diligence, the crafting of corporate human rights policies applied at all levels of the business entity, and

[172] James E Post et al 'Managing the Extended Enterprise: The New Stakeholder View' (2002) 45(1) *California Management Review* 22.
[173] Haines et al op cit note 51.
[174] Ibid at (3).
[175] Mary Robinson 'Human Rights: Everybody's Business' (28 April 2008) *Global Compact Quarterly* available at http://www.enewsbuilder.net/globalcompact/e_article, accessed on 25 June 2014.

reporting of the human rights obligation overseen by directors acting as the mind and will of the company.

CHAPTER SEVEN

7. PILLAR III: ACCESS TO REMEDY

7.1. Introduction

As part of its duty to protect, the state has the obligation to ensure that all persons whose human rights are violated have access to effective remedy.[1] This chapter discusses access to remedy, foreseen as the single most challenging aspect in the quest to ensure business entities respect human rights.[2] In the context of corporate accountability for human rights where no international treaty exists on the subject, and where no norm has congealed into customary international law, the proper place to resolve any claims for violation of human rights by corporations will be under domestic law. It is incumbent on states to ensure proper measures are in place to control the activities of corporations in their jurisdictions and to redress any violations they cause.

This chapter highlights some of the challenges the state will face in availing access to remedy for violation of human rights by corporations, including poverty and corruption, and a formal legal system struggling to rise from a history of corruption. In the face of weak or corrupt formal legal systems, there is need to focus on a mixed approach to promote the rights, interests and aspirations of the poor.[3] Being a low income country with more than half the population living below the poverty line[4], the vulnerability of the poor in Kenya is a critical factor that affects their access to justice.[5] However, the legal aid system in Kenya is not well developed, and there is no national legal aid system in place. Although a Legal Aid Bill (2014) has been drafted

[1] Human Rights Council 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13 [Ruggie Report 2009] para 87.

[2] The Joint Committee on Human Rights, appointed by the House of Lords and the House of Commons 'Any of our business? Human rights and the UK Private Sector' First Report of Session 2009–10 (2009) 90. Enforcement of human rights obligations and the availing of remedial measures to those afflicted is seen as likely to be the most difficult part of implementing Ruggie's framework.

[3] Caroline Sage, Nicholas Menzies & Michael Woolcock 'Taking the Rules of the Game Seriously: Mainstreaming Justice in Development' The World Bank's Justice for the Poor Program Justice & Development Working Paper Series (7/2009), 16.

[4] The World Bank, World Development Indicators available at *http://data.worldbank.org/country/kenya,* accessed on 7 April 2015.

[5] A significant population of Kenya is "food poor", meaning they lack the basic food they need for daily living. See Carlo Ninno and Bradford Mills *Safety Nets in Africa: Effective Mechanisms to Reach the Poor and Most Vulnerable* (2015) 108.

pursuant to the Constitutional provision guaranteeing access to justice for all persons,[6] the Bill is currently not considered a priority and may take long to be enacted and to have any impact.

The judicial mechanism of dispute resolution involves resolving human rights disputes through courts with power to award damages for human rights violations. Possibilities to improve judicial enforcement of human rights are discussed, and a proposal made to amend the Penal Code to recognise the capacity of corporations to commit crimes and to hold them responsible for it. Operational or company level mechanisms provide an important non-judicial alternative to the overstretched judicial mechanisms. The absence of strict formalities in company level mechanisms will enable decision makers to use trade-offs and arrive at decisions that are beneficial to all parties. As a national human rights institute, the Kenya National Commission on Human Rights (KNCHR) will play an important role in helping the state to align its laws and policies with its human rights obligations, and in providing guidance on human rights to corporations.

7.2. Judicial grievance mechanisms

The main means by which remedy may be availed for business related human rights abuses is through judicial mechanisms, court decisions on questions of human rights presented before it. A functioning judicial system plays an important role because clarification of emerging corporations' obligations will happen through court decisions, which will set the stage for informed specification of obligations in the future. Domestic courts, with the power to award damages for human rights violations, would be key to promoting compliance with the human rights obligations.[7] States are expected to take steps to ensure the effectiveness of judicial mechanisms.[8] This effectiveness will in turn be measured by the impartiality of the judicial process, its integrity and conformity with due process in dealing with matters before them.[9] The Success of the Bill of Rights under the 2010 Constitution will depend on the extent to which the Kenyan judiciary, previously saddled by allegations of lack of transparency and a tainted integrity, has been transformed and is able to effectively play its role as the guardian of the laws

[6] Articles 48 and 50 (2) (g) and (h) of the Constitution.
[7] John Knox 'The Horizontal Human Rights Law'(2008)102(1) *American Journal of International Law* 1 at 44.
[8] Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' **(**21 March 2011) A/HRC/17/31 [UN Guiding Principles], Operational Principle 26.
[9] Ibid, Commentary on Operational Principle 26.

of the country. High stakes must therefore of necessity be put on the new judiciary if it is to play a part in the transition of the Country into a constitutional democracy that rests more firmly on important values such as the rule of law, human dignity, equality, social justice, human rights, transparency and accountability which are values promoted by the 2010 Constitution.[10]

The ability of the courts to perform the task of being custodians of the law, and of the 2010 Constitution which brings in many issues hitherto not addressed (including the question of human rights and business, and clear provision for socio economic rights) will highly unlikely be managed by the judiciary of the past. Bills of rights are interpreted by judicial officers tainted with legal and cultural bias which necessarily affects their interpretation of the constitution[11] and it is important that they are able to exercise their judgment as freely as possible, basing their judgment on the facts of the cases before them. As elaborated elsewhere in this study,[12] for the longer period of its history, Kenya had a judiciary that was not independent and was in most part shaped by the 'patrimonial' nature of the government of the day which resulted from the authoritarian leadership style inherited from the colonial era.[13] Owing to a weak judiciary, the old Constitution of Kenya underwent successive changes over a period of time, resulting in a person-centred rule rather than one guided by the rule of law and institutions that are committed to uphold it at all costs.[14] The authority of the state ought to be based on laws which the Judiciary is guardian over to ensure they are applied consistently and not according to the whim of authorities who give themselves power to ignore or misconstrue them.

Legitimate institutions, including the Kenyan Judiciary, have to develop through a process of struggles or political contestations.[15] The ability to change is an important feature of any legal system if it is to remain relevant. Modern legal systems are a product of continual shaping and reshaping in response to societal demands.[16] The nature of modern legal systems demands that as society changes, the systems ought to be able to incorporate and reflect new

[10] Republic of Kenya, The Judiciary 'Judiciary Transformation Framework 2012 – 2016' at 17 available at *http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf,*accessed on 7 August 2014.
[11] Mark Tushnet (ed) *Constitutional law* (1992).
[12] Section 4.4.3 above.
[13] Yash Ghai 'The Kenya Bill of Rights' in Philip Alston, ed *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 237.
[14] Ibid.
[15] Sage et al, op cit note 3 at 16.
[16] Ibid.

principles in an orderly manner.[17] Commendable measures have been put in place so far, starting with the fundamental restructuring of the Judiciary by the Constitution, enabling it to be an independent custodian of justice and guardian of a state where human rights are enjoyed by all.[18] Additionally, the competitive selection of officers as opposed to appointments at the will of the Executive will improve competence of judicial officers and their independence. An ombudsperson's office has been set up to process complaints from the staff and the public; a code of ethics and conduct for judicial officers has been created and a standing committee established to enforce discipline.[19] The High Court of Kenya has original jurisdiction to hear claims for violation of human rights and has been divided into several divisions, including the Constitution and Human Rights Division which will be a court of first instance for constitutional cases and is expected to play a leading role in addressing issues on interpretation and enforcement of the expanded Bill of Rights.[20] It is this department of the High Court that will be charged with the task of giving meaning to the law in the emerging area of business and human rights. It will need expertise and a willingness to look to other jurisdictions to see what is being done in this field and apply best practices in developing its competence.[21]

7.2.1. Accessibility of courts for effective protection of human rights

Despite provision of human rights in the Constitution, the effectiveness of human rights protection in reality will depend on a number of factors. There is need for translation of the theoretic provisions of the Constitution into the everyday reality of individuals.[22] Making the human rights provisions practical will depend on whether the Constitution requires implementing

[17] Ibid.

[18] Judiciary Transformation Framework op cit note 141 at 12. However, after yet another bout of energized go at judicial transformation, an apparently competent, ethical and independent selection of office holders, it is telling that the judiciary was plagued by a negative incidence. The Chief Registrar, the holder of one of the most important offices was sacked for misbehaviour, violation of the code of conduct for judicial officers, insubordination and violation of Constitutional provisions on Values and Principles of Public Service (Article 232) and Leadership and Integrity (Chapter 5). Whereas the sacking cannot be taken to say anything about the state of the judiciary as an institution, it nevertheless is an indication that the effort to transform the judiciary must be a vigilant and continuous exercise.

[19] J Willy Mutunga, 'Progress Report on the Transformation of the Judiciary', Speech delivered to mark the first 120 days in office (19 October 2011) available at *http://www.judiciary.go.ke/portal/assets/downloads/speeches/SPEECH%20ON%20THE%20PROGRESS%20REPORT%28120DAYS%29%20ON%2019.10.2011.pdf*, accessed on 5 August 2014.

[20] Ibid.

[21] Preston Chitere et al 'Kenya Constitutional Documents: A Comparative Analysis' (2006) 37 *Institute of Policy Analysis and Research* (IPAR) Working Paper No. 7/2006.

[22] Dawn Oliver & Jörg Fedtke (ed) *Human rights and the private sphere: a comparative study* (2007) 506.

legislation to effect the rights and the accessibility of courts and other grievance mechanisms in terms of ease of approach, costs involved and the complexity of requisite procedures.[23]

A concern affecting the ease and propriety of accessing the courts for judicial remedies for human rights violations would be the nature of the remedies sought: should they be civil or criminal? Civil wrongs, also referred to as torts are wrongs that give rise to an action at common law for liquidated damages, injunction or restitution.[24] They arise from breach of duty created by statute or common law and the basic remedy sought is damages, a right to be compensated for suffering loss.[25] Under civil litigation, the wrong doer is sued without arrest. Civil litigation targets or seeks to regulate the private, individual situation while criminal prosecution creates a wider public interest.

Trial of human rights violations usually takes the form of criminal prosecutions.[26] Human rights violations would normally constitute crimes, and a proposal to consider them as mere civil wrongs would appear to trivialise them.[27] Unlike torts and contracts, crimes are public wrongs. The aim of sentencing in criminal cases is to punish the wrong doer by bringing upon him societal condemnation and stigma, to prevent the wrong doer from committing the crime again, to protect the public from the action of the offender and to secure his or her reformation.[28] Crimes involve more than a private injury and cause social harm, a violation of public rights and duties due to the whole community in its social aggregate capacity.[29] Redress of civil wrongs is directed at the defendant who is sued and is in most instances satisfied by compensation, whereas criminal wrongs are seen as an affront against humanity, calling for the wrath of the entire community and thus not redressible by mere financial compensation.[30] Trial of criminal wrongs is meant to express society's outrage at the offence committed, and payment of fines is not adequate to punish the offender.

[23] Ibid at 506-7.
[24] Tudor Jackson *The Law of Kenya: An Introduction* (1970) 192.
[25] Ibid.
[26] Beth Stephens 'Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27(1) *Yale Journal of International Law* 1.
[27] Ibid at 12.
[28] P L O Lumumba *Criminal Procedure in Kenya* (2005) 166; Criminal Procedure Code. See also Tudor Jackson op cit note 24.
[29] Joshua Dressler *Understanding Criminal Law* 5ed (2009) 1.
[30] Stephens op cit note 26 at 12.

Under criminal law in Kenya, if justice would be best served by punishing the offender, he or she is either imprisoned or given a death sentence.[31] Although the payment of fines is one of the remedies provided for under the Criminal Procedure Code and is meant to be punitive, courts have been reluctant to make use of the compensatory provisions of the Code.[32] Punitive damages are considered a matter for the civil courts and the criminal courts prefer to be concerned about punishing the offender, leaving the task of justifying harms and calculating compensation figures to civil courts.[33]

Under Kenyan law, payment of a fine under criminal law is required to be in relation to the ability of the offender to pay: the court ought to consider the accused's means before imposing the fine, to ensure that it is a sum that he is in a position to pay.[34] The accused's earning capacity is of no consequence to the court's decision: it matters not that he earns much money that paying the fine imposed will not be punitive for him,[35] and neither that he is so poor that the amount fined will be paid by others, thus preventing the accused from suffering the cost of getting the money.[36] No costs, or very minimal figures, are payable in criminal matters, except for private prosecution and contempt of court cases.[37] In this light, any fines imposed are not meant to have a punitive effect.

However, sometimes a wrong classified as a crime under law does not justify public condemnation – and in such cases the line between a crime and a civil wrong is thin and blurred.[38] Under the Constitution of Kenya, no distinction is made between civil and criminal remedies, implying that what is important is that the wrong committed be redressed. Article 23 of the Constitution specifies the remedies that would be applicable for breach of human rights. Under the Constitution, the court may award the aggrieved party both civil law remedies, and criminal law remedies compensation, an injunction, a conservatory order, an order for judicial review among other remedies. The broad concern would be to provide redress to victims of human rights abuses, and the details of the most effective means of attaining that end would be secondary – so long as the specific means applied provides the reprieve sought. The

[31] Section 24 of the Penal Code.
[32] Lumumba op cit note 28 at 163.
[33] Momanyi Bwonwong'a *Procedures in Criminal Law in Kenya* (1994) 264.
[34] *Mohamed v R* 1969 EA 287. See also Momanyi ibid at 260.
[35] *Mita v R* 1969 EA 598.
[36] *Chander Kanta v R* 1962 EA 523.
[37] Momanyi op cit note 33 at 265.
[38] Dressler op cit note 29.

constitutional line between punishment for criminal wrongs and redress of civil wrongs is difficult to draw and can be said to be illusory.[39]

The decision to classify a human rights violation as a crime or tort would depend on whether the moral wrong attributed to it can be said to be an affront to an individual person, or to the whole community.[40] However, it may also be argued that if a civil suit can be used to achieve the ends normally considered achievable through criminal cases, social reform, deterrence and punishment of the offender, then civil litigation can be applied to redress human rights wrongs. The preference for either system, civil or criminal, could be more apparent than real, and dependent more on the legal language of a given jurisdiction and the means available effect the goals intended, more than any particular ideological preference for one system over the other.[41] In the USA, the US Supreme court has decreed that in the absence of a clear line for determining what is civil in nature, breach of which demands compensation or restitution, and what is criminal, breach of which demands punishment, cases will be treated as either civil or criminal depending on the intent of the legislature: if the wrongs are contained in the Penal Code they will be treated as criminal wrongs, and if in other laws or common law they will be decided as civil wrongs.[42]

In some jurisdictions such as the USA, civil human rights litigation has been applied to redress human rights violations, rather than criminal prosecution.[43] In the USA, certain cultural and procedural characteristics of the legal system make it possible to apply civil litigation to offer redress for human rights violations.[44] The United States has a tradition of public interest litigation and civil litigation has been used to as a tool to promote social reform.[45] The aim in public interest litigation is to hold perpetrators accountable, and to raise policy concerns, even when litigation does not result in an enforceable judgment.[46]

To deal with the problem of access to the courts, the Kenyan Constitution makes it easier for aggrieved persons to seek redress by extending *locus standi* to very person.[47] The

[39] Ibid at 13.
[40] Stephens op cit note 26 at 27.
[41] Stephens op cit note 26 at 5 – the author is of the view that a rigid civil-criminal distinction is unfounded, given that either can be applied to successfully redress violations.
[42] Dressler op cit note 29.
[43] Stephens op cit note 26.
[44] Ibid at 4.
[45] Ibid at 13.
[46] Ibid at 14.
[47] Ojwang J B *The Ascendant Judiciary* (2013) 37.

Constitution provides that any person who feels aggrieved, or a person acting in his interest or in the interest of the public may bring a claim for violation of human rights before the courts.[48] Under the old Constitution, public interest litigation could only be instituted by parties who could prove they had a direct personal interest in the matter.[49] Allowing other persons to file proceedings on behalf of the aggrieved person will ensure that victims of human rights violations are not excluded from accessing remedies owing to ignorance or poverty.

To further ensure that the Courts are accessible, the Kenyan Constitution provides that no court fees will be charged for claims of human rights violations,[50] and that formalities related to the proceedings and concern for procedural technicalities will not be obstacles in enforcing the Bill of Rights.[51] While commendable in the effort to increase accessibility to courts and to ensure redress especially for the most vulnerable, this provision nevertheless raises issues of implementation. First, the danger arises of unrestricted access to the courts by litigants who have nothing to lose by instituting frivolous matters, which can lead to abuse of the court system.[52] To reduce the probability of unnecessary litigation, there should be a minimum requirement of professional responsibility under the rules of civil procedure.[53]

The second concern raised is the alternative means of financing the proceedings in the absence of litigation fees and requirement that no costs be borne by the losing party. Poverty is a real obstacle in accessing remedies for violation of human rights. Disputes against business entities will, in many cases, mean that the complainants have less access to expert information or financial resources to pursue redress compared to those accused of violating human rights.[54] Availability of legal aid from the state or other institutions would have been a viable way of increasing access of the poor to the courts, both in terms of lower costs and availability of expert

[48] Article 22. See also Human rights and the UK Private Sector op cit note 2 at 87 recommending representative or collective actions as a means of improving access to justice for victims who would not have the resources for individual action against corporate entities .

[49] *Wangari Maathai v Kenya Times Media Trust* Nairobi High Court Civil Case 5403 of 1989. It is noted however that the Court relaxed its stance in later decisions. See for example *Ruturi and Another v Minister of Finance and Another* 2002 KLR 61 where the court held that procedural restrictions could not bar the court's jurisdiction.

[50] Article 22 (3) (c).

[51] Article 22 (3)(b)&(d).

[52] See Hogg P *Constitutional Law of Canada*, 1365. Other possible abuses include a floodgate of unnecessary litigation, hypothetical rather than real disputes and institution of cases by parties who have no real interest in the outcome.

[53] Stephens op cit note 26 at 14. The standard of the professional requirement under the Civil Procedure rules would require the litigant to certify that to the best of his/her knowledge, information and belief formed under a reasonable inquiry in the given circumstances the claim made is warranted, and is non-frivolous and the factual contentions made will have evidentiary support. See Rule 11(b) of the USA Federal Rules of Civil Procedure.

[54] Guiding Principles op cit note 8 para 31.

support. However, the efforts made by the government towards providing access to justice for the poor and underserved communities are not sufficient. The National Legal Awareness Program (NALEAP) exists in Kenya as a project of the Ministry of Justice, National Cohesion and Constitutional Affairs to co-ordinate and facilitate the realisation of Democratic Governance through protection and enjoyment of fundamental rights and freedoms.[55] However, the program appears to still be operating on a pilot basis; the failure to develop into a full program raises concerns of how effective it has been in meeting its objectives.[56]

7.2.2. Litigation-friendly procedures that will make civil litigation of human rights violation possible

Punitive damages payable in civil suits, can be used to create a deterrent effect on the perpetrator. Payment of punitive damages implies punishment for the defendant, making the civil claim more identified with a criminal prosecution.[57] Redress of civil wrongs can thus share the element of punishment and deterrence with criminal wrongs.

Other litigation-friendly features of the US civil litigation system that have made it possible to use civil causes to redress human rights violations include the fact that in the US, there is no penalty for losing a suit, thereby encouraging those who have cases that satisfy the minimal requirements of procedure and professional responsibility to bring a suit before the court, without fear of having to pay the defendant's costs should they lose the case.[58] In Kenya, unless the judge has exceptional reasons for ordering otherwise, the costs follow suit, and the loser pays the costs of the party who wins the case. This can be a discouraging factor, and especially so for the poor victims of human rights abuse who have to go against big companies. A more litigation friendly environment will encourage victims to bring matters for resolution before the courts, even when the probability of success is unknown, as may be the case in many instances when considering the novelty of issues around corporate accountability for human rights.

[55] National Legal Awareness Program (NALEAP) website available at *http://www.justice.go.ke/index.php/about-us/mandate-vision-mission,* accessed on 26 January 2014.
[56] KNHCR 'Report to inform Review of Implementation of the ICCPR' at 6 para 15.
[57] Stephens op cit note 26 at 15.
[58] Ibid at 14.

This study makes the point that the outcome of a concerted effort to implement the Constitution in its entirety necessitates the amendment of the law of companies to reflect the obligation of corporations to uphold the Bill of Rights. It is proposed to make recommendations for the amendment of the Companies Act to make it comply with Article 20(1) of the Constitution. It is argued that at the very least, Article 20(1) which provides for a horizontal application of the Bill of Rights envisions an entity that cannot claim shareholder primacy to the exclusion of other stakeholders, and therefore it is proposed to amend the law of corporations to reflect a more balanced view of all the stakeholders and demand that their rights be respected. This research proposes that, being creatures of law and thus guided by the law in terms of what it can or cannot do, amending the Company Law of Kenya to define an entity that has an obligation to respect human rights is the best way to ensure accountability of business for their human rights obligations.[59] The Companies Act will thus make it a wrong for the company to commit certain acts that amount to violation of human rights, and such breach will be redressed accordingly under the provisions of the civil procedure Code, and appropriate remedies be provided to the plaintiffs who institute cases.

7.2.3. Corporate criminal liability for corporate violators of human rights: a possibility?

Being the law that defines and shapes what companies do, and how they ought to operate, mention of human rights duties of companies in company laws is encouraged.[60] Corporate laws have in the past not included direct provisions on human rights. The framing of company law, defining how liability for the acts of a corporation may be attributed to the persons who manage the company, can present legal barriers to redressing business related human rights abuses.[61] With reference to violation of human rights, can states punish corporate entities directly, apart from the individuals acting on their behalf?[62] And what liability should be applied for the wrongs, personal liability or corporate liability? Ruggie notes in his 2009 Report that there was

[59] Gavin is alive to the implications and challenges of applying the Constitution to private entities. He says that there could be a flood of litigation beyond the court's capacity. Also, the deliberations involved would turn courts from adjudicators making them mediators, requiring them to balance claims on social resources, a task they are not prepared for because they are designed to produce winners and losers, not compromises. (See J C Anderson 'Respecting Human Rights: Multinational Corporations Strike Out' (2000) 2(3) *University of Pennsylvania Journal of Labour and Employment Law* 463, 548).
[60] Ruggie Report 2009 op cit note 1 para 24.
[61] Ibid, Commentary on Operational Principle 26.
[62] Ibid para 89.

still uncertainty regarding whether corporate entities should be punished directly, separately from the individuals who act on their behalf and also whether civil causes of action should be applied to corporate related abuse.[63]

The application of corporate criminal liability would be a viable affront against the shield of the corporate veil of incorporation that individuals may hide behind to escape responsibility for wrongs they cause. In contemplating the option of corporate crimes, one must deal with the consideration that despite having a corporate personality and a legal body, corporations cannot commit crimes because criminal wrongs need a physical body and mens rea to legally constitute a crime.[64] While acknowledging the concept of separate legal personality, courts in Kenya have not been hesitant in finding corporations liable for committing criminal offences, and holding them responsible for it.[65] Corporations as legal persons have been held liable for crimes under laws, in courses of action brought under the Penal Law. The Penal Code of Kenya, under which all criminal charges are brought to court, provides:

> Where an offence is committed by any company or body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.[66]

Under the Penal Code, the offence of the person of the company is therefore attributable to persons in charge of the company, who may advance a defense if they can show that they were unaware of it or took reasonable steps to prevent its occurrence. This possibility presents an easy way out for persons called upon to take the blame on behalf of the corporation, giving them much leeway to wiggle out of their duty.

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[63] See Ruggie Report 2009 op cit note 1. Demands may be made of directors as in the UK Companies Act(Section 172) or the requirement of social and ethics committees as in the South African Companies Act (2008) [Section 72(4)].

[64] Kyle Noonan 'The Case for a Federal Corporate Charter Revocation Penalty' (2012) 80(62) *The George Washington Law Review* 602 fn 65.

[65] See discussion of corporate criminal liability in Byron Mutali Corporate Criminal Liability In Kenya (Unpublished LLB Thesis, Moi University 2011) available at *http://www.academia.edu/1389470/CORPORATE_CRIMINAL_LIABILITY_IN_KENYA*, accessed on 28 July 2014.

[66] Penal Code Chapter 63 Laws of Kenya, Section 23.

The position of the Kenyan courts in matters that relate to criminal liability of corporations appears to be no different from the criminal liability of natural persons. In the case of *Manager, Nanak Crankshaft Ltd v Republic*[67] one of the issues raised on appeal was whether a company, which is a corporate entity, could be charged with a criminal offence. The appellant disputed that the he, as manager of the offending company was the right person to plead to the charge on behalf of his company. The judge noted that the initial position where the difficulty of taking a plea from an incorporated body made charging it for a criminal offence seemingly impossible was no longer the case.[68] In this particular instance, it was held that the Public Health Act[69] made provision for the manager or secretary to be summoned to plead to charges on behalf of the company, and to be held liable if the company contravened the provisions of the Act. The issue before the court was not whether or not the company could be an accused party in a criminal case. That seemed settled. In another case *Director, Wonderloaf Bakery Ltd v Republic*,[70] a company was convicted by a subordinate court for failing to comply with provisions under the Public Health Act.[71] In *Paper House of Kenya Ltd v Republic*[72], the trial and conviction of a company for failing to comply with provisions of a law[73] was upheld on appeal. The sentence imposed was a fine or imprisonment in default.

The treatment of natural and corporate persons in a similar manner is however a simplification of issues.[74] Majority of the cases where companies were criminally charged and convicted involved the violation of the provisions of the Health Act. If the same reasoning is applied, it would in theory be possible to bring corporations to court and charge them for breach of provisions of the law that also amount to violation of human rights. There is a gap that needs to be filled through the development of the law, so that the effort made in prosecuting juristic persons has the intended deterrent results. Some of the issues that need addressing and which make existing criminal sentences less effective for business entities include the challenges involved in administering the punishment of natural persons to companies. Whereas fines may

[67] Criminal Revision Case 763 of 2007 eKLR.
[68] As held in the case of *Stephen Obiro v Republic* [1962] E.A. 61 which was presented as a precedent.
[69] Chapter 242 Laws of Kenya, Section 165.
[70] Criminal Appeal 577 of 2005 [2007] eKLR.
[71] Chapter 242 Laws of Kenya, Section 115 as read with Section 118 and 119.
[72] Misc Crim Applic 245 of 2006 [2006] eKLR.
[73] The Public Health Act, Section 115 as read with Section 118 and 119.
[74] See George O Otieno Ochich 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' *Kenya Law Review* Vol. II [2008-2010]. He notes that there is need to develop principles upon which decisions on corporate criminality are founded.

affect an individual and impose on him or her social stigma, corporations may simply treat the fines imposed as part of the cost of doing businesses.[75] The loss or effect of paying the fine will be felt by the shareholders, and perhaps not the directors or managers who make the decisions that result in criminal offences. Additionally, the fines imposed generally serve to punish the offender, in this case the company, but they do not compensate the victims of the crime.[76]

In considering the alternative of criminal liability of corporations for human rights violations, it would be useful to consider the development of sentences that serve the purpose of punishing business entities for violation of human rights, deterring them from repeating the offending actions[77] and offering redress to the victims of abuse. Examples of such alternative punishment include restricting the place where the company can operate, banning it from procurement opportunities, requiring it to publicise the sentence or punishment given as a means of naming and shaming, confiscation of property and winding up.[78]

A proposal made at the 19th African Union Summit appears to offer a meaningful solution to this question. If the proposal goes through as put forward, the African Court of Justice and Human and Peoples Rights will be the first regional court to have international corporate criminal jurisdiction.[79] Though the proposal will no doubt come up against many challenges, the possibilities it offers are promising. A recommendation was made to merge the African Court of Justice and the African Court on Human and People's Rights and give it jurisdiction to try criminal cases.[80] In a meeting held in May 2012,[81] the 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' was drafted. The Protocol

[75] Jennifer Zerk 'Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies' A report prepared for the Office of the UN High Commissioner for Human Rights 39, available at *http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf,* accessed on 29 July 2013.

[76] Ibid.

[77] Ibid. Under the US Sentencing Guidelines Manual, para. 8D1.4(c), an offending company can be placed on probation, and the court can require it to put in place compliance and ethics programs and report on their implementation.

[78] Ibid.

[79] Brittany West,'African Union Considers Proposals to Add International Criminal Jurisdiction to the Pan-African Court' (2013) available at *http://hrbrief.org/2013/04/african-union-considers-proposals-to-add-international-criminal-jurisdiction-to-the-pan-african-court/,* accessed on 28 July 2014. See also Chidi Anselm Odinkalu 'Concerning the Criminal Jurisdiction of the African Court – A Response to Stephen Lamony' (2012) available at *http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/,* accessed on 28 July 2014.

[80] *Avocats Sans Frontières* 'Africa and the International Criminal Court: Mending Fences' (2012).

[81] Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters 7 to 11 and 14 to 15 May 2012 Addis Ababa, Ethiopia Exp/Min/IV/Rev.7.

makes provision for an entirely new section on 'Provisions Specific to the International Criminal Jurisdiction of the Court'.[82] Article 46C of the Chapter provides for Corporate Criminal Liability.[83] The Protocol states that the African Court of Justice and Human and Peoples Rights, a regional court set up to ensure protection of human and peoples' rights in Africa, will have jurisdiction over legal persons.[84]

The revised version of the Draft protocol has amended the provisions on corporate criminal liability. In the initial draft, the *mens rea*, or corporate intention to commit a crime under the Protocol would be established by proving that company policy, expressly stated or implied,[85] supported the action or actions that caused harm. The revised Protocol merely requires proof that the offending act was based on the policy of the corporation.[86] A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.[87] Under the initial Draft Protocol, corporate culture, defined as attitude, policy, rule, course of conduct or practice,[88] could be applied to determine that the corporation was aware of the offending action.[89] This provision is omitted in the revised Draft Protocol. Under the initial Draft, the corporate veil could not be imposed to shield persons responsible for the actions resulting in violation of human rights,[90] meaning that individuals will be held responsible should they instigate, contribute to or condone action that results in violation of human rights. The current (Revised) Draft does not refer to the corporate veil, but states that kit will be sufficient to prove that the corporate knowledge of the commission of an offense was possessed within the corporation.[91] The effect of both provisions is to prevent the directors or management of the corporation from hiding behind the veil of incorporation when criminal offenses are committed within the organisation. Although not dealt with in exhaustive detail, the directives given can act as a guide for the Court (the African Court of Justice and Human and Peoples Rights) in deciding questions of corporate abuses that amount to violation of human rights.

[82] Chapter IVA.
[83] This provision, Article 46, is maintained in the revised version of the Draft Protocol African Union 'Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (15 May 2014) STC/Legal/Min/7(I) Rev. 1.
[84] Article 46 C (1) of both Draft Protocols.
[85] Article 46C(3) of the initial Draft Protocol.
[86] Article 46C (3) of the Revised Draft Protocol.
[87] Article 46C (3) of both versions of the Draft Protocol.
[88] Article 46C (7) of the initial Draft Protocol.
[89] Article 46C (4) of the initial Draft Protocol.
[90] Article 46C (6) of the initial Draft Protocol.
[91] Article 46C (4-5) of the Revised Draft Protocol.

The clarity with which the additions proposed in the initial Draft Protocol addressed pertinent issues was commendable. Though numbing the effects by toning down the language of lifting the corporate veil and deducing intention to do wrong from the culture of the corporation, the provisions enabling the imposition of corporate criminal liability will serve to ensure that corporations that commit corporate crimes are held responsible. If impunity of governments or other factors make it impossible to obtain redress for violations or to prosecute offenders, victims should be able to have recourse to a higher level authority. The regional courts provide a possible alternative. In any event, the relevant provisions as articulated in the Protocol offer an example that national jurisdictions may emulate in the bid to address the question of liability for corporate crimes. Specific amendments to the Companies Act and to the Penal Code to make it possible to hold corporations accountable for human rights violations and to ensure redress for victims are provided in Chapter 8 below.

7.3. Company level operational mechanisms

Human rights are shaped by peoples' struggles in their search for dignified lives, and the means that promise to secure this life for them.[92] Land and natural resources, which are the source of raw materials for the operations of many corporations, are also the most valuable assets to communities, representing their identity and values, reflecting their understanding of the world.[93] Land and the natural resources found on it are thus bound to be a source of conflict between the corporation and community, and a source of human rights violations. The Law is seen as rules and systems relevant for governing communities and resolving disputes[94] and will be effective in the measure that it achieves the end of resolving disputes and providing access to remedy for victims of human rights violations.

Non-judicial mechanisms for dispute resolution could be administrative or legislative and they may be mediation based or adjudicative.[95] Mediation and dialogue-based methods are ideal for operational level mechanisms at the level of the business entity which seeks to resolve an issue while at the same time being a party to the complaint.[96] An operational level grievance

[92] Malindi Inquiry Report, Chapter 6.
[93] Taking the Rules of the Game Seriously op cit note 3 at 19.
[94] Ibid at 17.
[95] Ibid para 27.
[96] Ibid para 31.

mechanism engages the business entity directly in assessing the complaints raised and is accessible directly to individuals and communities adversely impacted by the activities of a business entity. It is administered by the business entity, alone or in collaboration with relevant stakeholders or a mutually acceptable external expert or body.[97] It should ideally be the first point of call, accessible by the complainant without having to exhaust other means of recourse.[98]

The responsibility to respect requires business entities to identify negative human rights impacts, caused by their operation, or towards which they have contributed, and to work on their remediation.[99] From a practical point of view, and considering the over-stretched court system and the operational challenges likely to be faced by the National Human Rights Institute (NHRI), operational level mechanisms run by companies may be the most practical means to afford victims of corporate human rights violations the respite they need. In proposing operational mechanisms as ideal remedial system, reference is made to their potential practicality compared to the other mechanisms of redress.[100] They are formed by the decision of the company to constantly address the complaints by its employees, communities it serves and other stakeholders, thus progressively putting a limit on complaints and making them manageable by addressing recurring grievances. This will save on time that would have been spent resolving cases through other means. They could be adjudicative, or dialogue based or may be adapted through any culturally appropriate means.[101]

An operational level mechanism is important and useful to the business entity as it offers a channel by which its operations may be analysed to pick out recurring trends to identify and correct negative practices.[102] The direct nature of the solution also presents an immediate means

[97] Ibid; see State-based non-judicial grievance mechanisms, Commentary on para 29. An example: The Cambodian Arbitration Council is a dispute resolution body comprising, employers (may include corporations) and the government. Parties to a dispute each choose an arbitrator (from the Chartered Institute of Arbitrators), and the two arbitrators select a third; this creates trust in fairness of the process. A panel of arbitrators has wide powers to grant civil remedies – but decisions are non-binding. To formally reinforce a decision, a court order must be sought – but this might not be a practical option, given the challenges faced by the courts, and in dealing with them. The Arbitration Council is seen as a viable mechanism for conducting negotiations between a weak or compromised state, well-resourced companies, fledgling labour unions representing the interests of vulnerable members/workers eg women and has been successful in finding workable solutions minimally acceptable to all parties. Publication of "reasoned" decisions, considered transparent, are seen to legitimize the process.
[98] Ibid, para29.
[99] Ibid para 22.
[100] Ibid at 18.
[101] Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' **(**21 March 2011) A/HRC/17/31 [UN Guiding Principles]
[102] Ibid para 29.

of addressing negative impacts thereby containing the resulting harm.[103] Being non judicial mechanisms, company level mechanisms have the advantage of garnering the requisite expertise, and thus providing a specialised point of reference to resolve the questions of business and human rights, ensuring that disputes are addressed by people with adequate skills. Business entities are best suited to operating operational level grievance mechanisms which are directly accessible to affected persons and communities without the need to have gone through other means of redress.[104]

Other advantages of the internal company-level mechanisms include the familiarity of the contesting parties; the existing relations between the aggrieved persons (most likely to be an employee, supplier, customer or community members) and the mediator/corporation would mean that they know more about the circumstances giving rise to the conflict than an outsider such as the court would, and therefore there is an assumption that they would be keener on arriving at an amicable solution that reduces the tensions created by the dispute.[105] Additionally:

> Internal decision-making processes and decisions can be less formal, more flexible, and better able to deal with subtleties. Whereas court decisions tend to be zero-sum, internal decision makers can use tradeoffs that avoid or side-step zero-sum games[106]

Operational level mechanisms allow for negotiations among the disputing parties, and compromises which, while not offering the most ideal solution, will offer solutions to both parties. For operational level mechanisms, directors as custodians of corporate conduct will play an important role in ensuring that the business entity does what it says it will do in its policies. Only when a grievance cannot be sorted through the internal grievance mechanism should recourse be had to the external options.

To address the possibility that a company level mechanism managed by the company's management may not be able to resolve issues without bias for the shareholders against the company's other stakeholders, it is proposed that a stakeholder relationships committee be constituted by the board of directors and charged with the task of operating the company level grievance mechanism. To make the process more trustworthy, the conflict resolution team should have representatives from the employees and the community. A properly constituted

[103] Ibid, see section on 'State -based non-judicial grievance mechanisms', Commentary on para 29.
[104] Ibid para 29.
[105] Blair Margaret M and Stout Lynn A 'A Team Production Theory of Corporate Law' (1999) 85(2) *Virginia Law Review* 248, 285.
[106] Guiding Principles op cit note 101.

committee of the board can be tasked to deal with the matters relating to stakeholders and any disputes arising, and only when this fails will the matter be taken to the KNCHR or to court. Because of the knowledge they have regarding the operations of the company and the relationships arising in relation to the activities the company undertakes, it is proposed that directors be the main arbiters in conflicts between the company and relevant stakeholders.

To put in place a Stakeholders' Relationship Committee, the insertion of a Section 134(B) in the Companies Act 2015 with the following wording is proposed:

Provision of Law:

Appointment of a Stakeholders Relationship Committee

134(B) A company that is a quoted company or a public interest company shall establish and appoint a stakeholders relationship committee and outline its mandate:

1. A company's board of directors shall constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board. Ideally, members should include representatives of all the different stakeholders who interact with the company, both voluntary stakeholders (employees, suppliers) and involuntary stakeholders (such as communities in the areas the corporation operates).
2. The Stakeholders' Relationship Committee will be responsible for looking into and redressing grievances brought forward by stakeholders of the company relating to any matters arising out of the activities of the company and any such matters that may be considered necessary in relation to stakeholders of the Company.
3. The Stakeholders Relationship Committee shall be responsible for appointing a compliance officer and fixing his responsibilities.
4. The chairperson of each of the committees constituted under this section or, in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

The mandate of the Stakeholders' Relationship Committee, in order to bring about the effects desired under the above provision will include an obligation to:

a) Prepare the business review outlining the human rights policies of the company and action taken to conduct an impact assessment, to mitigate and remedy any grievances resulting from its activities.

b) Identify the principal stakeholder risks and uncertainties facing the company, including human rights risks

c) Establish a monitoring and evaluation system to recognise risks that are harmful to the company, and to address them early.

d) Establish and provide information about stakeholders with whom the company has contractual or other arrangements which are essential to the business of the company and any company matters that are likely to significantly impact them;

e) Develop stakeholder policies and particularly the human rights policy of the company and develop board procedures regarding communication of the policies and policy statements

f) Provide periodic information about stakeholder policies and the extent to which the policies have been successfully implemented.

7.4. The Kenya National Commission on Human Rights (KNCHR)

Out of all the possible judicial and non-judicial grievance mechanisms available to victims of human rights abuse, those that are state based are expected to form the fundamental basis of access to remedy.[107] National Human Rights Institutes (NHRIs) fall under the state based grievance category of mechanisms. Non judicial mechanisms are administered by the state, or branch or agency of the state, or an independent body on a statutory or constitutional basis.[108] Collaborative efforts between the state and non-state entities can also be sought to enhance the state based initiatives.[109] In his 2009 Report, Ruggie looks to the NHRIs as a potential avenue at the national level for remedying human rights abuses and calls on them to assess how they may contribute to giving effect to the Protect, Respect, Remedy Framework.[110]

Non-state legal systems are important in ordering community interactions and providing recourse to remedy.[111] The UN Guiding Principles propose that states should provide guidance to

[107] Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (Guiding Principles) para 25 (Foundational Principle on Access to Remedy).
[108] Ibid para 25.
[109] Guiding Principles op cit note 24, Commentary on para 25.
[110] Ruggie Report 2009 op cit para 103.In addition to courts and National Human Rights Institutions, other mechanisms for seeking redress include labour tribunals, National Contact Points under the OECD Guidelines and ombudsperson offices and government run complaint offices. Where these exist, states are expected to create awareness of these mechanisms and how they operate, and to provide the financial and expert support needed to do this. (Guiding Principles op cit note 24, Commentary on para 25).
[111] Taking the Rules of the Game Seriously op cit note 3 at 18.

business enterprises on how to respect human rights throughout their operations.[112] This could be done effectively through an institution such as the Kenya National Commission on Human Rights, an organ of the state. The UN Guiding Principles argue for the reinforcement of the role of National Human Rights Institutes (NHRIs) in ensuring a positive human rights impact of business activities. The Guiding Principles note:

> National human rights institutions that comply with the Paris Principles have an important role to play in helping states identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-state actors.[113]

The Constitution of Kenya makes provision for the Kenya National Human Rights and Equality Commission[114] which will act as the principal state organ in the task of ensuring compliance with obligations under human rights treaties and conventions.[115] The Commission is tasked with promoting respect for and developing a culture of human rights in the public and private institutions of the country;[116] its jurisdiction goes beyond state organs to include business entities.

Functions of the Kenya National Commission for Human Rights (KNCHR)

The KNCHR (the Commission) is mandated under the Constitution to act as the principal organ of the state (and therefore national human rights institution (NHRI)) in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights.[117] The work on business and human rights within the KNCHR is carried out under the Economic, Social and Cultural Rights program, whose objective includes an obligation to ensure a greater commitment by business entities to respect human rights.[118] Work done under this program relating to business and human rights falls into four broad categories: inquiries into complaints, capacity building, developing guidelines for investors and networking.[119] The KNCHR acts as a supervisory body over the Government in the area of human rights, aiming to provide key

[112] Guiding Principles, Operational Principle No. 3(c) on the State duty to protect human rights.
[113] Ibid at 8.
[114] Section 59.
[115] Section 59 (1)(g). An Act of Parliament is necessary to give effect to this provision.
[116] Section 59 1(a) & (c).
[117] Section 59(2) (g).
[118] KNCHR Report for 2007/8, 47; KNCHR Report for 2008/9, ECOSOC Program, 46.
[119] KNCHR Report for 2008/9.

leadership in moving the country towards the status of a human rights state.[120] It is expected to develop a culture of human rights in the country by promoting the protection and observance of human rights in public and private institutions.[121] It is also required to investigate and report on the observance of human rights in all spheres of life, receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.[122] The Commission is further tasked with the obligation of investigating or researching issues of human rights in public or private institutions, either of its own initiative, or on the basis of complaints it receives, endeavor to resolve the issues through conciliation, mediation or negotiation[123] It is also expected to make recommendations to improve the functioning of state organs.[124]

NHRIs take on a convening role, bringing together all the concerns for human rights and business and the different players in the field; coordinating the efforts of different institutions and other government departments dealing with human rights and facilitating understanding of human rights among them.[125] The KNCHR, being the national body tasked with safeguarding human rights should take upon itself the mission of consolidating the framework and ensuring that all relevant parties play their part in executing it. It would be the best placed to play a coordinating role, bringing about greater integration of human rights principles and standards between government departments which deal with business and trade and economic related issues.[126]

The KNCHR undertakes capacity building activities. Formulation of teaching material and education on human rights are tasks of the NHRIs, as proposed under the Paris Principles.[127] National Human Rights Institutions are required to publicise human rights issues through information and education.[128] The KNCHR Act mandates the Commission to develop and implement programs that raise public awareness of rights and obligations of citizens under the

[120] Mandate of KNCHR available on Commission website available at *http://www.knchr.org/Aboutus/Establishment.aspx*, accessed on 6 September 2014.
[121] KNCHR Act, No. 14 of 2011, Section 8.
[122] Ibid Section 8(c).
[123] Ibid Section 29.
[124] Ibid Section 8(e).
[125] Office of the United Nations High Commissioner for Refugees 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) at 33.
[126] Ibid.
[127] Article 3(f) and (g).
[128] Paris Principles **[**Principles Relating to the Status of National Institutions: Competence and Responsibilities] No. 10 Annex, page 186) A/RES/48/134, 3(g).

Constitution.[129] In line with the Paris Principles, the KNHCR seeks to assist in the formulation of programs for the teaching of, and research into, human rights. The KNCHR further seeks to develop Information, Education and Communication (IEC) materials to support various issues of human rights and business.[130] It thus engages in capacity building through conducting human rights education, facilitating training, campaigns and advocacy on human rights. The KNCHR further seeks to publicise human rights issues generally and make efforts to combat all forms of discrimination by increasing public awareness.[131] A task or function in line with this objective would include dissemination of good practice to the public and private sectors.[132]

Training could be carried out for communities to sensitise them on their rights in relation to businesses that operate where they are, or which seek to set up operations within their communities. Corporations and other business entities could benefit from an elaboration of what their responsibility under the Protect, Respect, Remedy Framework and the UN Guiding Principles entails. Government officials in the departments and agencies that deal with trade and business matters could also be trained on what the obligation to protect means and how they may go about executing it.

The KNCHR plays an advisory role to governments.133 In this role it is expected to give opinions, recommendations or make proposals on legislative provisions, after examining the relevant legislations in force, including bills, and make recommendations necessary to align them with human rights requirements.[134] Following the 10th Meeting of NHRIs,[135] the participants at the meeting sought to develop methodologies that could be applied to assess public policy and state action against its obligation for human rights and business.[136] The International Coordinating Committee (ICC) Working Group on Business and Human Rights agreed to broaden the work on NHRIs in the area of human rights and business, and to include business

[129] Section 8(g).
[130] Promoting business responsibility for human rights op cit note 142.
[131] See Kenya National Commission on Human Rights 'Promoting and Protecting Human Rights in Kenya: Strategic Plan 2013-2018'.
[132] As the Scottish Human Rights Commission does. See Human rights and the UK Private Sector op cit note 2 at 83
[133] Paris Principles op cit note 128. Under the Paris Principles, NHRIs ought to play an advisory role to governments.
[134] Ibid.
[135] Held in Edinburgh, Scotland in October 2010.
[136] Scottish Human Rights Commission, Centre for Economic and Social Rights, Kenya National Commission for Human Rights, 'Monitoring states' obligation to fulfill economic, social and cultural rights: methodologies for national institutions' Side event held during the 10th International Conference of National Human Rights Institutions, Edinburgh, Scotland, 7 – 10 October, 2010.

and human rights in their strategies and work plans.[137] As one of their key priorities, the NHRIs would reinforce the state's duty to protect as the foundation of their work on business and human rights.[138] In 2010/11, the Advisory Committee for the Government of Kenya on the UN Protect, Respect, Respect Framework on Business and Human Rights was formed.[139] However, there is no publicly available information stating the existence of the Committee or highlighting its work and progress. Such a Committee would be instrumental in assisting the Government to translate the UN Guiding Principles into practicable considerations in the relevant government ministries and departments. The task falls back to the KNCHR to execute in its advisory role to the government.

The KNCHR is also required to play an advisory role to business entities. The KNHCR seeks to undertake initiatives to help clarify and support business in taking up their human rights responsibilities and to monitor corporate conduct through compliance assessments in order to make relevant interventions and provide strategic advice to government and specific business sectors.[140] It seeks to award business entities that employ sound human rights practices and carry out activities that complement realisation of human rights.[141]

In its advisory role, the Commission endeavors to develop and share relevant tools and approaches to assist Government, business and Civil Society Organisations to cooperatively strengthen the realisation of human rights for and in Kenya.[142] The Commission undertook the task of developing guidelines for investors on issues of human rights and identified a tool developed by the Danish Institute, which it could adopt for its purposes.[143] In 2009/10, an analysis of the human rights situation in Kenya was carried out using the tool, and the main areas of concern for investors were identified as non-discrimination, freedom of association, workplace health and safety, conditions of employment, corruption and bribery.[144] The development of a locally adapted tool such as the Danish Tools is recommended for a systematic

[137] KNCHR 2010/11 Report, 40. See also Workshop Report on Side Event, ibid.
[138] Final Statement of the 10th International Conference of National Human Rights Institutions, "Building a strategic partnership between NGOs and NHRIs on business and human rights" Edinburgh, Scotland (October 8-10 2010), 2
[139] KNCHR 2010/11 Report xvi.
[140] KNCHR 'Promoting business responsibility for human rights' available at <*http://www.knchr.org/LinkClick.aspx?fileticket=QZ4yU_b-MzU%3D&tabid=155&portalid=0&mid=582*>,accessed on 27 February 2014.
[141] Ibid.
[142] Ibid.
[143] This was done following a similar successful exercise of the Danish Institute in South Africa.
[144] KNCHR2009/10 Report at 43.

and effective dissemination of advice to corporations on their corporate obligation for human rights.

Going by the above analysis, the KNCHR has a comprehensive mandate and seems very much alive to business and human rights concerns and the role it can play. However, the activities it engages in appear too many, and there may be need to refine its mandate if it is to be able to effectively address all concerns in the business and human rights sphere. These multiple roles defined for a NHRI are demanding, and may be too much to take on for some NHRIs. The primary responsibilities of NHRIs are human rights promotion and protection. Additionally, they are expected to advise governments, make recommendations or proposals, promote harmonisation of national laws, regulations and policies with international human rights standards, cooperate with other institutions dealing with human rights and assist in the formulation of programs or material for teaching human rights[145] - as indeed the KNCHR seeks to do. Whereas these would constitute a comprehensive mandate that would result in respect and promotion of human rights by all concerned, it may be too ambitious for KNCHR.

Based on the experience had since it ventured to take on business and human rights as one of its areas of concern, the KNCHR ought to take stock and assess whether it is practical or most effective for it to take on all the relevant tasks. The Constitution of Kenya makes a restructuring of the KNCHR possible, enabling the creation of a second Commission which can take on some of the duties of the KNCHR thus making its workload manageable.[146] It may be advisable for the Commission to review its mandate with the aim of assessing what is practically achievable, and what might best be passed on to another institution, perhaps one similar the proposed UK Commission on Business, Human Rights and the Environment.[147]

[145] Ibid at 34.
[146] Under Section 59 (4).
[147] In 2009 there was a proposal to have a UK Commission for Business, Human Rights and the Environment designed to be a dispute resolution body with coordinating, capacity building and informational roles (but which does not seem to have come into operation). (See Corporate Responsibility (CORE) 'Why the UK needs a Commission for Business, Human Rights and the Environment' available at http://corporate-responsibility.org/wp-content/uploads/2013/11/COREvalues.pdf accessed on 6 August 2014). It was designated to receive, investigate and settle complaints against UK companies for human rights abuses, clarify standards of conduct with regard to human rights, and in its capacity building role promote learning on business and human rights among stakeholders. The proposal was rejected by the UK Government, and it was suggested that the existing NHRI could become more active in the private sector and do the work proposed for this new Commission. (Human rights and the UK Private Sector op cit note 2 at 89.)

7.4.1. Bringing a complaint before the KNCHR: lessons from the Malindi Inquiry

As already noted, the Commission is tasked to monitor, investigate and report on the observance of human rights abuses in all spheres of life.[148] It undertakes to receive and process petitions relating to allegations of human rights violations by corporate bodies.[149] This provision gives it the authority to go into the private sphere and ensure human rights are upheld. The Complaints and Investigation Program of the KNCHR investigates the complaint received and attempts to solve the matter by mediation or negotiation, and advises the Commission on options for redress. The Redress Department coordinates the redress mechanisms, whether litigation, public inquiry, or mediation, negotiation or conciliation methods of alternative dispute resolution are applied. If there are adequate remedies available through other means, the Commission can refuse to take up the investigations.

Persons may complain to the Commission alleging denial, threat to their human rights, or actual infringement.[150] Complaints can be received by letter, email or orally. Similar to the Constitution which makes a wide provision of who may institute court proceedings for violation of human rights, the KNCHR Act provides for persons other than the aggrieved persons as admissible complainants.[151] However, the Act limits who can act on behalf of an aggrieved person by stating that representation of the aggrieved person by a member of his or her family or other suitable person is permissible if the aggrieved person is dead or otherwise not able to act for himself or herself.[152] A member of the National Assembly can initiate proceedings with the consent of the aggrieved person or other person who is entitled to make the complaint on behalf of the aggrieved person.[153] The Commission will receive and investigate complaints on violation of human rights and take steps to ensure appropriate redress.[154]

[148] Section 59 (1)(d).
[149] Promoting business responsibility for human rights op cit note 140.
[150] Section 59 (3).
[151] See section 7.2.1 above on "Accessibility of courts for effective protection of human rights" for the Constitutional provisions. The person aggrieved, a person acting on his behalf, or a person acting as a member of, or in the interest of a group of persons, a person acting in the interest of the public or an association acting on behalf of its members may institute proceeding for violation of human rights in Court
[152] Section 32(2) (a).
[153] Section 32, KNCHR Act.
[154] Section 59(1)(f).

In 2005, the KNCHR carried out its first major inquiry into corporate violation of human rights in Kenya.[155] A committee comprising the local community, provincial administration and salt companies was established to amicably resolve any issues arising affecting the human rights of the individuals in the community.[156] The Inquiry exposed numerous challenges and shortcomings on the part of the corporations: poor health and safety and sanitation conditions; lack of adequate work clothing or equipment; unsuitable transport of workers; poor housing conditions; workers who worked on casual basis permanently; companies that operated without the required certificates, for example from the Occupational Health and Safety Directorate among other short comings.[157]

From an operational perspective, one of the challenges experienced during the Malindi Inquiry and which is likely to affect the capacity of the Commission to execute its mandate is the resource-consuming nature of the procedures in relation to the capacity of the Commission. It was observed that during the entire inquiry, the Commission scaled down on the other work as practically all the Commissioners were needed to participate in the inquiry.[158] Lack of procedures for bringing maters before the Commission resulted in lack of clarity on whether witnesses could be represented; whether there would be cross examination or whether the Commission could issue compensation to the victims. Additionally, the summons for witnesses to appear before the Commission were issued late, and some of the witnesses ignored them.[159] Shortcomings of this kind can lead to a lack of trust by those the inquiry procedure is meant to serve. From the experience, the Commission realised the need for clear procedures well known to the parties before the inquiry. Some of these concerns arising from the Inquiry were addressed in the KNCHR Act of 2011 drafted pursuant to the 2010 Constitution of Kenya. The Act lays down the general powers of the Commission, and the powers of investigation, jurisdiction and manner of presenting the findings.[160]

[155] Kenya National Commission on Human Rights, Economic Interests versus Social Justice: Public Inquiry into Salt Manufacturing in Magarini, Malindi District, A special report submitted to the President and the National Assembly under section 21 of the KNCHR Act 2002 (The Malindi Inquiry Report), 36.
[156] KNCHR2009/10 Report 43.
[157] The Malindi Inquiry Report op cit note 155 at 102.
[158] Ibid.
[159] Ibid.
[160] Part III of the Act.

Being the first of its kind, the Inquiry was viewed as a learning experience of what the Commission could expect in future exercises of the kind.[161] One of the main lessons learnt in the inquiry process was that conflict cannot totally be eliminated, and can even be seen as a good thing, a means to bring to the fore the different voices necessary in the process or search for development, for the re-ordering of society.[162] It is through deliberations and negotiations on the different views that new procedures are formed and get to acquire legitimacy.[163] In the Commission's view, deliberations with the companies improved the understanding of business entities of their human rights obligations. The Commission involved the Government, community and companies in the inquiry, and afterwards disseminated the findings to each group. The Commission further helped stakeholders to develop and adopt a joint action plan to guide salt companies in observance of human rights of the community and discussed with each group the proposed plan of action.[164]

Following consultations with the concerned companies, communities and government departments, the Commission made numerous recommendations which in its view the concerned parties had an obligation to comply with.[165] The Commission recommended that the concerned corporations implement the requisite law and policy standards, and provide the appropriate clothing and implements for the workers. Proposals were also made directed at the government ministries and departments, requiring for example the allocation of adequate budgets for the proposed measures.[166] The Commission directed the umbrella body of salt manufacturing companies to develop codes of conduct that salt manufacturing companies would be expected to abide by in order to meet international standards.[167]

The Commission's recommendations are overall suggestions which, if they were not be complied with, there would be no penalty to the government ministries and departments or corporations concerned. The proposed increase in government budgets to enable the employment of more labour inspectors should go hand in hand with facilitation of a greater understanding of the corporations of their obligations, so that the intervention of the Commission is not merely

[161] Malindi Inquiry Report op cit note 155.
[162] Ibid at 15.
[163] Ibid.
[164] KNCHR2007/8 Report.
[165] The Malindi Inquiry Report op cit note 155 at 16.
[166] Directives were issued requiring an increased budget for the Ministry of Labour as the enforcer of labour requirements; to have it employ more labour officers.
[167] The Malindi Inquiry Report, op cit note 155 at 110.

one of policing. Development of codes of conduct would have to be accompanied by oversight measures to ensure that the companies complied.

A more direct way of facilitating corporate change in behaviour is to require compliance through legislative provisions and offering guidance through reporting requirements highlighting what companies can do to meet the legal requirements. The Human Rights Council in a Resolution dated 23 June 2014 noted the value that action plans and such other frameworks can contribute to the implementation of the UN Guiding Principles encouraged states to develop such plans and frameworks.[168]

7.4.2. The Danish Tools: a model for offering human rights guidance to business entities

The training offered by the KNCHR should include instruction of lawyers on the principles of responsible contracting[169] to ensure that they are well equipped to negotiate foreign contracts or to advise their clients, where the client is the Government. Training could also be carried out for communities to sensitise them on their rights in relation to businesses that operate where they are, or which seek to set up operations within their communities. Corporations and other business entities could benefit from an elaboration of what their responsibility under the Protect, Respect, Remedy Framework and the UN Guiding Principles entails. Government officials in the departments and agencies that deal with trade and business matters could also be trained on what the obligation to protect means and how they may go about executing it. The KNCHR should seek to make it clear to all stakeholders what is expected of them in the issue of business and human rights, and, being a relatively novel area in every jurisdiction, it could do this by putting together best practices and sharing with the relevant stakeholders during the training.

During the 10th International Conference of National Human Rights Institutions, the NHRIs committed to "…consider implementing non-judicial remedial processes that are consistent with international human rights principles for effective remedies to address business and human rights issues".[170] The Business Department of the Danish Institute for Human Rights (DIHR) created tools to help companies translate international human rights standards into

[168] Human Rights Council in its Draft Resolution A/HRC/26/L.1 dated 23 June 2014.
[169] Office of the UNHCR'National Human Rights Institutions op cit note 40 at 30.
[170] Final Statement of the 10th International Conference of NHRIs op cit note 138 at 3.

company practices and give practical recommendations to companies.[171] The Department has developed both an assessment tool and risk framework to translate the international human rights obligations into measurable company performance. It has created four tools so far: the Human Rights Compliance Assessment (HRCA) the HRCA Quick Check, the Global Compact Self-Assessment Tool and the China Business and Social Sustainability Check.[172]

The Danish Institute for Human Rights has also developed a framework looking at company operations, site locations, stages of engagement and legal liability with the aim of helping the companies to ensure that their codes of conduct are effective in helping them to respect human rights.[173] The framework covers 3 areas: company risk, country risk and policy analysis. Company Risk Mapping will help the companies to understand which of their actions will put them at risk of interfering with the human rights of individuals either directly or through its supply chain, or through a lax government or other business partners, so that they can take appropriate measures to avoid these. This framework also enables managers to identify human rights risks so that they can avoid them.[174] Country Risk Mapping refers to assessment of the human rights risks in the local operating environment to help companies identify and tackle key challenges in a country setting where it plans operate.[175] Policy Analysis helps companies to match external commitments to the entity's internal procedures regarding human rights.[176] The DIHR helps companies to conduct a 'gap analysis' which contrasts company policies to international human rights law, sector-specific standards and industry best practices so that the company's policies can be aligned as necessary. Creation of tools similar to those developed by the Danish Institute for Human Rights would help the KNCHR carry out its task of providing guidance to business entities in a tangible manner.

[171] See *http://www.humanrights.dk/focus+areas/human+rights+and+business/tools+and+methods*, accessed on 19 January 2014.
[172] See *http://www.humanrights.dk/focus+areas/human+rights+and+business/tools+and+methods/assessment+tools+for+businesses*, accessed on 19 January 2014.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.

7.5. Conclusion

A Legal Aid Bill has been drafted creating a National Legal Aid Fund, pursuant to the Constitution which requires the state to provide access to justice,[177] guaranteeing the right to free trial and right of any complainant to be represented in proceedings or to have an advocate assigned to him.[178] The KNCHR Act currently provides no representation or legal aid, (although it charges no fees to receive and process complaints) but it is hoped that with the enactment of the Legal Aid Bill victims will have recourse to the national fund for the access to means for the resolution of their disputes.

Companies should be required to have grievance mechanisms, and it is proposed that the KNCHR offer guidance and capacity building in the setting up of the mechanisms. Only when recourse has been had to this mechanism and no reprieve given should the complaint be brought before the KNCHR. The KNCHR will investigate the matter, and propose litigation, or conciliation, mediation of the dispute. Because the country is still at a nascent stage of development of the business and human rights jurisprudence, it is proposed that more recourse be had to inquiries and stakeholder negotiations to resolve disputes. The process of inquiry is effective as it creates a forum for engagement of the stakeholders, raising concerns, education on duties and responsibilities, leading to an overall increase of knowledge of corporate human rights responsibility, and better relationships among the stakeholders.[179] Although the method has many challenges, it has equal promise, as noted by an independent evaluation of the Malindi Inquiry:

> An independent evaluation of the inquiry observes that while it may not have achieved immediate life-changing positive results for the workers and community members, it galvanized the community, put government officers in the area in the spot light and most importantly, opened the salt companies to demands for public accountability on their human rights record. The evaluation noted that the companies were responding to community concerns, that there were attempts at coordination by CBOs to rally around the

[177] Section 48 of the Constitution provides that 'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.'

[178] Under Article 50 on the right to fair trial, the Constitution provides:

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

…

(*g*) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(*h*) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

[179] Malindi Inquiry Report op cit note 155.

> salt mines issue. It also observed that the inquiry re-energized citizen participation in governance issues and in particular in protecting their fundamental rights and freedoms.[180]

In the resolution welcoming the work of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, the Human Rights Council requested the Working Group to conduct consultations with states and other relevant stakeholders from 2015 to deliberate and facilitate sharing of legal and practical remedies for victims of corporate human rights abuses.[181] Such sharing of experiences will serve to further refine and boost the capabilities of state and non-state mechanisms applicable to provide remedy for victims of corporate human rights abuse, providing new possibilities of approaches to availing remedies for victims of corporate human rights violation.

[180] Kenya: Governance, Justice, Law and Order Sector (GJLOS) Programme; Kenya National Commission on Human Rights Case Study. Submitted to the Third Joint Review Meeting, March 2006.
[181] Human Rights Council Draft Resolution A/HRC/26/L.1 (23 June 2014) para 8.

CHAPTER EIGHT

8. IMPLICATIONS OF THE UN GUIDING PRINCIPLES AND 2010 CONSTITUTION ON THE KENYAN LAWS ON CORPORATIONS

8.1. Introduction

A sharing of practices applied in different jurisdictions and found to be effective will help to facilitate the useful implementation of the UN Guiding Principles in crafting workable solutions to the business and human rights problem. The 1998 Guiding Principles on Internal Displacement are deemed to have been effective in bringing about change in governments attitudes towards internal displacements.[1] Like the UN Guiding Principles on Business and Human Rights, the Guiding Principles on Internal Displacement are not legally binding. Nonetheless, states that had ratified human rights and humanitarian instruments that formed the foundation of the Guiding Principles are bound by the principles. States could also opt to incorporate the Guiding Principles into domestic law, thus making them binding in the domestic context.[2] In a review of the effectiveness of the Guiding Principles on Internal Displacement ten years after they were drafted, it was fond that the Principles had become a key point of reference in developing frameworks for protection of internally displaced persons in domestic laws and policies.[3] The UN Guiding Principles on Business and Human Rights can similarly be incorporated into national laws and policies and applied as a guide to make clearer the legal obligation of corporations for human rights. It may even be hoped that if the Guiding Principles

[1] The Guiding Principles on Internally Displaced Persons was prepared by the Representative of the Secretary-General on internally displaced persons, which were presented to the Commission on Human Rights in 1998.

[2] Ibid. There is then need to take the debate further and inquire whether soft law has the potential to bring about the expected change in the area of business and human rights." see Global Database Guiding Principles on Internal Displacement available at *http://www.law.georgetown.edu/idp/english/id_faq.html,* accessed on 7 April 2015. The provision reads:

> 'To the extent that States have ratified the human rights and humanitarian instruments upon which the Guiding Principles are based, they are bound by the corresponding principles. States also can opt, as some have done, to make them binding by incorporating them into their domestic law.'

[3] Marion Couldrey & Maurice Herson (eds) 'Ten Years of the Guiding Principles on Internal Displacement' *Forced Migration Review* (December 2008) 6. The Guiding Principles had also been required to be incorporated into domestic law by signatories of the Great Lakes Protocol on the Protection and Assistance to IDPs as a legal obligation. (p6)

on Business and Human Rights are effectively implemented, the need for direct obligations (as in the form of a treaty) may be diminished.[4]

This chapter proposes the amendment of the Companies Act, the main law that governs corporations, if the implementation of the Constitution is to be more completely achieved. Although a Companies Act was passed,[5] a proposal is made to further amend the Act. The chapter reviews provisions of the Act that can be strengthened, together with other relevant laws, and offers rationale for the proposed amendments and additions. Specifically, it proposes amendment of the provisions to require directors to consider the interests of stakeholders in decision-making. A proposal is made for an obligation of directors to consider the human rights impact of company operations as opposed to a general duty to consider only social interests. Constituency Statutes are proposed as a model for the proposed amendments. Constituency Statutes are state laws in the USA which were seen as revolutionary when they emerged in the 1980s because of their intent to codify social and community obligations of directors.

In line with the 2010 Constitution and its greater elaboration of human rights, it is proposed that the Government make a commitment to embrace the changes proposed below to the country's Companies Law CAP 486. The proposed changes are suggested as a most immediate and direct way of making human rights obligations applicable to corporations, in line with the provisions of the Constitution which contemplates a horizontal application of the Bill of Rights to non-governmental entities. A concrete addition on business and human rights to the most recent national action plan on human rights drafted to implement the Constitution will help to show the government's commitment to ensure human rights are respected by all, including business entities.

The strategies of Commission for the Implementation of the (2010) Constitution (CIC) in Kenya do not include directives that would make the Constitution applicable to corporations as contemplated in Article 20 of the Constitution. The recommendations made in this chapter are proposed to be included in the action plan for implementing the Constitution, and especially Article 20 which binds corporations to human rights.

[4] Knox John H 'The Ruggie Rules: Applying Human Rights Law to Corporations' (August 16, 2011) *Wake Forest Univ. Legal Studies Paper 1916664* 20, *a*vailable at *http://ssrn.com/abstract=1916664*, accessed on 9 June 2015
[5] The Companies Act 2015

8.2. Implementing the 2010 Constitution: need to amend the Companies Act

The Commission for the Implementation of the Constitution (CIC) is required to work with the Attorney-General and the Kenya Law Reform Commission to prepare for tabling in Parliament the legislation necessary to implement the Constitution.[6] The CIC worked with the Kenya Law Reform Commission, the agency tasked to spearhead the law reform and review process, to identify the legislation that needed amendment to ensure that the law 'conforms to the letter and spirit of the Constitution'.[7] Article 20 of the 2010 Constitution binds corporations to the Bill of Rights, in effect making the Bill horizontally applicable to corporations.

The CIC has as one of its tasks the identification of legislation and policies that may require amendment in order to conform to the Constitution.[8] With the aim of meeting its objective, the CIC drafted an *Implementation Guide for Integration of the Bill of Rights in the Public Service* (the Guide) whose objective was to 'guide implementers in all sectors of the public service on the integration of constitutional and human rights principles… in their work.'[9] The implication of this Guide is that the impact of non-state actors such as companies is not considered important. Restricting the focus of implementation of the Constitution by seeking to implement the Bill of Rights only in the public sector, ignores a major source of inequality, the economic power of oppression that corporations can have,[10] which makes them pose as much a threat to the exercise of fundamental rights as governments.[11] The CIC based its decision to develop the implementation guide for the public sector on the reason that its three years of experience in implementing the Constitution and international best practice showed that the key

[6] Article 261 (4) of the Constitution Transitional and Consequential Provisions; see also Section 4 of the Commission for the Implementation of the Constitution Act (No. 9 of 2010) [Rev. 2012].
[7] The Kenya Law Review Commission Act Section 6(1) states that "The Commission shall — (a) keep under review all the law and recommend its reform to ensure—(i) that the law conforms to the letter and spirit of the Constitution.
[8] Commission for the Implementation of the Constitution (October to December 2014) *Quarterly Report 44*.
[9] Reported to have been processed in the period October – December 2012- see Commission for the Implementation of the Constitution, Quarterly Report (October-December 2012), 21. See also "Integration of The Human Rights Principles in all Sectors: CIC Develops a Human Rights Implementation Guide for the Public Service" available at *http://www.cickenya.org/index.php/newsroom/item/286-integration-of-the-human-rights-principles-in-all-sectors-cic-develops-a-human-rights-implementation-guide-for-the-public-service#.VLksI_sV_RY,* accessed on 16 January 2015.
[10] Gavin Anderson 'The Limits of Constitutional Law: The Canadian Charter of Rights and Freedoms and the Public-Private Divide' in Conor Gearty and Adam Tomkins (eds) *Understanding Human Rights* (1996) 546.
[11] G E Devenish 'Human Rights in a Divided Society' in Conor Gearty and Adam Tomkins (eds) *Understanding Human Rights* (1996) 62.

to achieving the expected change was changing the public service mindsets, beliefs, culture and public service delivery institutional structures.[12]

It was precisely the recognition of the negative impact that juristic persons can have in the enjoyment of rights that led to the constitutional provision binding them to the Bill of Rights alongside state organs in what was previously seen as a state-only sphere. In recognition of this fact the CIC recognises the need to 'ensure effective implementation of human rights [by] all stakeholders, both state and non-state actors, [who] should appreciate their responsibility in the implementation process'.[13] It is therefore imperative that effort be made to ensure that juristic persons appreciate the obligation they have under the Constitution because failure to do this will result in only a partial implementation of the Constitution. The proposed amendments to the relevant laws are further elaborated below.

8.3. Constituency statutes as a model for amending the Companies Act

Human rights are not optional; they are due where owed. Similarly, regulatory goals that would make the attainment of human rights are non-negotiable. However, the means of best achieving the end of human rights protection will vary depending on the size, sector, organisational culture or compliance capacity of the business entity. What is effective in one culture may not be effective in another and therefore a direct transplanting of laws across jurisdictions may not be ideal.[14] However, laws can be used as models, taking provisions that are likely to be applicable, adapting them to local circumstances and modifying them as the need arises. It is with this understanding that Constituency Statutes are proposed as a model for the modification of the Companies Act of Kenya.

Almost half a century after commencement of the debate on corporate purpose and the perceived role of the director in the corporation, corporate statutes stipulating directors' duties

[12] The Commission for the Implementation of the Constitution Quarterly Report for July to September 2013, 11.
[13] 'Integration of The Human Rights Principles in all Sectors: CIC Develops a Human Rights Implementation Guide for the Public Service' available at *http://www.cickenya.org/index.php/newsroom/item/286-integration-of-the-human-rights-principles-in-all-sectors-cic-develops-a-human-rights-implementation-guide-for-the-public-service#.VLksI_sV_RY* ,accessed on 16 January 2015.
[14] Haines Fiona, Macdonald Kate & Balaton-Chrimes Samantha Contextualizing the business responsibility to respect: How much is lost in translation?, *in The UN Guiding Principles on Business and Human Rights: Foundations and implementation* (2011) 107-128.

that go beyond the traditional shareholder-centric concern did actually emerge. From the 1980s in the USA, different states came up with what came to be known as director statutes, or constituency statutes which codify the duties of directors, requiring them to consider the interests of stakeholders in decision-making.[15] Constituency statutes originated as a response to corporate boards lobbying for more legislative protection against corporate takeovers.[16] The statutes were revolutionary in codifying what until then had been regarded as voluntary obligations. The broad duty of corporations which extended to the wider societal groups was regarded as best enforced out of the corporation's own volition, without the force of law. The constituency statutes emerged to take the CSR deliberations a step further, making a legal obligation out of the requirement that directors consider the interests of stakeholders. Gavis refers to the emergence of constituency statutes as the codification of a 'subversive doctrine', because the statutes sought to entrench the stakeholder theory, destabilising the traditional shareholder supremacy model of corporate law.[17]

None of the existing constituency statutes direct or require corporations to consider stakeholder issues, but rather invite them to do so, using the term 'may' as opposed to 'shall'.[18] In the only state that attempted to use the mandatory phrase 'shall' referring to the obligation of directors, the law was changed in 2010 to refer to 'may' as all the other statutes.[19] An interpretation of these laws therefore leads to a conclusion that still places the shareholder above the other stakeholders. A typical constituency statute provision on the duties of directors reads:

> … a director of a corporation … <u>*may*</u> consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) *community and societal*

[15] Andrew Keay, 'Stakeholder Theory in Corporate Law: Has it got what it takes?' (2010) 9(3) *Richmond Journal of Global Law and Business* 246.The first statute was enacted in 1983 in Pennsylvania.

[16] Nathan E Standley 'Lessons Learned from the Capitulation of the Constituency Statute' (2012) 4 *Elon Law Review*, 209. Corporate interest was interpreted as shareholder interest justifying takeovers which benefitted shareholders to the detriment of the other stakeholders.

[17] Alexander C Gavis 'A Framework for Satisfying Corporate Directors' Responsibilities under State Non-shareholder Constituency Statutes: The Use of Explicit Contracts' (1990) 138 *University of Pennsylvania Law Review* 1451.

[18] Standley op cit note 16 at 215.

[19] The Connecticut General Statutes (Title 33 Chapter 601, Section 33-756) which provides for General standards for directors: CT Gen Stat § 33-756 (2013).

> *considerations including those of any community in which any office or other facility of the corporation is located.* A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.[20] (Emphasis added)

In effect, the constituency statutes have been effective in theory more than in practice. Although they generated debate among the practitioner and academic circles and were seen as the harbingers of a radical change in corporate law, constituency statutes were generally overlooked by courts; judges did not seem to know how to interpret them independent of the requirement of shareholder primacy.[21] In the absence of clear guidelines in answer to ambiguities of the statutes, courts seemed to resort to common law and in doing so perpetrated the status quo.[22] The statutes were described as potentially revolutionary, but in reality they were considered 'superfluous, adding nothing new to existing law and having no direct impact of the statutes in US commercial life.'[23] These laws are seen at best to be ideological in giving legal recognition to stakeholder interest with the result, at least in theory, that shareholder primacy remains supreme.

Keay defines the disadvantages of the constituency statutes in a radical way.[24] Gavis expresses equally wild fears of adopting constituency statutes, arguing for example that they would encumber the corporations with "unwieldy" contracts, making them unattractive to potential bidders thereby harming shareholder interests.[25] Other disadvantages of the statutes are briefly considered here. First, constituency statutes can lead directors to hide behind them, making any decisions to the detriment of shareholders and claiming that the decision was made at the behest of stakeholders.[26] Second, constituency statutes are said to transfer wealth from shareholders, leading them to be disinclined to take up shares. Thirdly, the authority to consider other interests amounts, in the view of some, to a descent to socialism as it leads to confiscation of shareholder property and its distribution to others. Constituency statutes are also seen as a form of wealth sharing or re-distribution, encouraging those who benefit from the corporation

[20] Ibid.
[21] Keay op cit note 15 at 246 and Standley op cit note 16 at 209.
[22] Standley op cit note 16 at 209.
[23] Ibid.
[24] Keay, op cit note 15 at 246.
[25] Gavis op cit note 17 at1451.
[26] Standley op cit note 16 at 228-9.

(usually shareholders) to compensate those who lose (the other stakeholders).[27] Fourth the challenge of considering conflicting views is another disadvantage: what weight ought to be given to the different interests by the directors? Under the constituency statutes, directors are expected to consider the best interests of all stakeholders in making decisions: but the best interest of the stakeholder is not defined, and directors may make decisions that compensate stakeholders for losses they incur resulting from decisions aimed at shareholder maximisation.[28]

If the interests of all stakeholders were to be considered, there would be too many considerations as to make it difficult to arrive at any meaningful decisions in good time.[29] Gavis argues that requiring directors to consider the interests of everyone will give directors a 'multi-faceted super-corporate defense' for any wrong decision they make.[30] There would be too many masters in the relationship, and others not even foreseen, making it impossible for the directors to attend to each one.[31] In aiming to reach everyone, constituency statutes fail to offer a benchmark for shareholders or stakeholders to hold directors accountable.[32] Fifth, the inherent softness of the wording of constituency statutes creates a significant problem, and this gap has given courts the leeway to construe them to reflect the common law which favours shareholder supremacy.[33] Finally, constituency statutes are more theoretic than practical because they fail to give the shareholder a right of enforcement.[34] The lack of power by stakeholders to bargain with directors to consider their interests and the lack of enforcement of directors' duties towards the stakeholders present a fundamental problem that defeats the purpose of giving the rights in the first place.[35]

Standley notes that the failures of the constituency statutes ought to provide opportunities for legislatures to learn from their mistakes, enabling them to make the provisions clearer and more effective in facilitating change in corporate law.[36] Suggestions for improvement made by

[27] Gavis op cit note 17 at1451.
[28] See discussion on arguments against the stakeholder theory in Keay, op cit note 15 at 269 – 298.
[29] Standley op cit note 16 at 218.
[30] Gavis op cit note 17 at 1451.
[31] Keay op cit note 15 at 246 (12).
[32] Keay op cit note 15 at 277.
[33] Gavis op cit note 17 at 1451. Standley also notes the permissive wording of constituency statutes as a problem and shows that case law on constituency statutes hesitated to deviate from common law of shareholder primacy.
[34] Standley op cit note 16 at 212.
[35] Gavis op cit note 17 at 1451; and Standley op cit note 16 at 209.
[36] Standley ibid.

Standley include: requiring that directors consider the conflicting interests of stakeholders mandatory rather than permissive; that they be applied in any conceivable situation where a number of stakeholders with different interests are concerned; that there be included in the statute stakeholder enforcement rights; and that managers provide evidence to show that they have fulfilled their obligations to stakeholders[37] (this can be done through reporting). Standley also proposes that meetings be held between the corporations and stakeholders to facilitate the airing of stakeholder grievances; these interactions can lead to reduced litigation.[38] In further support of the constituency statutes, Gavis also concedes that despite the numerous possible shortcomings the statutes seem to have, legislative and judicial standards can be put in place to avoid director abuse of discretion.[39]

A proposal is made to introduce in the Companies Act of Kenya a provision regarding the duty and scope of directors' duty to stakeholders, suggesting that it includes specific reference to responsibility to consider human rights impact of the company's activities, taking into consideration the perceived weaknesses and suggested solutions considered above.

8.4. Proposed changes to the Companies Act (2015) of Kenya

Corporations and other business entities ought to be able to look to the state for concrete guidance on what they can and ought to do in order to fulfill their human rights obligations. Business entities ought to be assured of the backing of government in terms of effective assistance in assessing and managing the human rights risks involved.[40] The Universal Declaration on Human Rights (UDHR), considered the genesis of the international bill of human rights, proclaims a common standard of achievement for the promotion and respect of rights and freedoms by all peoples including every organ of society.[41] The UDHR as such directs every individual and every organ of society to promote respect for the rights and freedoms contained

[37] Standley op cit note 16 at 227 et esq.
[38] Ibid at 230.
[39] Gavis op cit note 17 at1451.
[40] The Joint Committee on Human Rights, appointed by the House of Lords and the House of Commons 'Any of our business? Human rights and the UK Private Sector' First Report of Session 2009–10 (2009) 63.
[41] The Preamble of the Universal Declaration of Human Rights states: 'Now, Therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms…'

therein. Nevertheless, businesses have not considered the expectations placed on them in this regard clear.[42] As J. F. Sherman notes:

> …expectations of appropriate corporate conduct are unclear; currently companies are uncertain as to what practical actions they should take to discharge their human rights obligations beyond the need to comply with statutes imposing liability directly upon them to avoid complicity with human rights violations committed by others.[43]

The Companies Act 2015 says something that may be interpreted to give guidance to corporations by requiring them to heed their human rights obligations. However, as it is, the provisions are too vague and need reinforcement to make them more stakeholder-oriented and thus capable of bringing about the desired impact. The Companies Act introduces the enlightened shareholder value, similar to the approach brought about by the UK Company law review that resulted in the 2006 Companies Act.[44] The enlightened shareholder value approach implies the probability that the directors can consider the interests of a wider spectrum of stakeholders in their decision-making. Section 655 of the Companies Act 2015 requires directors to prepare a business review and in it describe how they take into account social and community issues in making decisions. Whereas these provisions open the way for the inclusion of efforts to show what the company does to exercise its corporate obligation to respect human rights, the indications and requirements are permissive, and not clear even to the corporations that may be well disposed to apply them.

Proposals are made below regarding reporting obligations of corporations. The requirements will provide companies with a guide of what they can do to ensure respect for human rights. Directors may not be clear on the role they ought to play in view of the wider obligation imposed on the company in the Constitution and on them by the Companies Act 2015. As a corporate executive observed, "Firms don't violate human rights because they are evil, but typically because they are not aware of the impact of their business."[45] The proposals made offer

[42] Human Rights Council 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises'A/HRC/11/13(22 April 2009) [Ruggie Report 2009] 57.
[43] John F Sherman, Corporate Duty to Respect Human Rights: Due Diligence Requirements (2007), 1 available at *http://198.170.85.29/Sherman-Corporate-Duty-to-Respect-30-Nov-2007.pdf*, accessed on 5 August 2014.
[44] The stakeholder theory was adopted in the UK Companies Act 2006; see Section 172.
[45] Susanne Stormer, vice president of corporate sustainability at Danish pharmaceutical giant Novo Nordisk cited in UN guidance on the business approach to human rights available at *http://www.theguardian.com/sustainable-business/business-cohesive-approach-human-rights*, accessed on 11 November 2014.

a refined description of directors' duties giving them a more focused idea what the company ought to do in respecting human rights. It is hoped that the probability of the amendments and additions suggested succeeding will be higher because they address an objective problem and clarify expectations, as opposed to merely seeking to punish companies for failing to uphold human rights.[46]

8.4.1. Modifications to company reporting obligations

Corporate reporting and codification of directors' duties can be used as means of facilitating and ensuring corporate accountability for human rights and holding directors accountable for this task. Reporting obligations are necessary for tracking performance. Adequate reporting requirements must be used to ensure that corporations go beyond financial considerations and address in a systematic manner all aspects that affect stakeholders. It is through reporting that business entities can make known what measures they have in place to ensure respect for human rights, and how they are faring in executing those measures. In a British case, the obligation of reporting was interpreted as a duty conferred on the corporation by the privilege of limited liability.[47] In return for the incentive granted to entrepreneurs to take risky ventures in the comfort that their liability if they incurred losses would be limited, corporations were expected to keep accounts that show the world what was happening.[48] Reporting is seen as a way for directors to show that they have complied with the reciprocal obligations on which their duty to make decisions on behalf of the company is based. The court expressed its opinion thus:

> …thus a total failure to keep statutory books and to make statutory returns is significant for the public at large and a matter which amounts to misconduct if not complied with and is a matter of which the court should take account in considering whether a man can properly be allowed to continue to operate as a director of companies, or whether the public at large is to be protected against him on the grounds that he is unfit, not

[46] Ko-Yung Tung et al, World Bank Legal Review: Law and Justice for Development "Assessing a bill in terms of the public interest: the legislator's role in the law-making process" Ann Seidman and Robert Seidman (2003) 207-25 at 240.
[47] *Re Rolus Properties Ltd and Another*, (1988) 4 BCC 446, cited in Dine Janet *Companies international trade and human rights* (2004) 215.
[48] Supra.

> because he is fraudulent but because he is incompetent and unable to comply with the statutory obligations attached to limited liability…[49]

The same reasoning can be applied where the directors fail to adequately prepare the statutory books, thereby showing negligence which should be used to call for their disqualification. If the reporting obligations are amended to require a comprehensive report that includes an analysis and justification of the company's decisions and actions affecting stakeholders, then a failure to prepare the report, or failure to adequately prepare it will be a reason for the disqualification of the director. This view of the director's duty should motivate him to ensure that the required reports are well prepared, reflecting the state of operations of the company and by extension facilitate the creation of a corporate culture respectful of human rights.

In the Guiding Principles, Ruggie proposes that the state encourage, and where appropriate require business enterprises to communicate how they address their human rights impacts.[50] Companies are required to communicate the country context and whether there are any particular challenges that affect their responsibility to respect human rights; the human rights impact of their own activities; and any chance of complicity in human rights violations by other entities through their business relationships.[51]

8.4.2. A reflexive law approach to law making

In situations where the ability of the law to adequately regulate a set of relationships is diminished owing to the complexity of the relationships, the reflexive law approach has been proposed as an alternative to the traditional substantive legislation.[52] As opposed to commanding

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[49] Ibid.

[50] Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' **(**21 March 2011) A/HRC/17/31 [UN Guiding Principles] Operational principle 3 (d).

[51] The corporate responsibility to respect exists independently of States' duties. See Human Rights Council 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (7 April 2008) A/HRC/8/5 [Ruggie Report 2008] para 57.

[52] See generally David Hess 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1999) 25 *Iowa Journal of Corporate Law* 41. The article refers to reflexive law in response to the limits of substantive law to address corporate social responsibility. I adopt the approach proposed, but applying to the regulation of human rights obligations and not in any way to social responsibility of corporations.

a given outcome, the reflexive law approach guides thinking, leading the concerned parties to arrive at the desired results. The law of corporations which regulates the conduct of companies can be applied to require corporations to consider their activities and the impact they will have to ensure that the activities do not result in violation of human rights. The reflexive law approach goes beyond the mere prohibition of certain conduct; the law offers guidance that prompts change in behaviour rather than the law merely being used as a reproach for the company's inappropriate behaviour.[53]

The human rights and business scenario presents such a set of complex relationships. Corporations are created and regulated by domestic statutes; human rights have long been considered the preserve of states. Although corporations have grown in size and power and the capacity to negatively impact on human rights, International Law has not been successful in devising means to hold them accountable at the international level. The states are thus faced with the obligation of holding corporations accountable for human rights – although they also have no readymade means of doing this. Reflexive law in such a situation holds that the most important and urgent task is to achieve the desired outcome – respect for human rights in the present case - as opposed to drafting of laws to cover every conceivable relationship which may result in complex laws perhaps impossible to implement.[54] In this situation, social accounting, auditing and reporting are seen as reflexive means to control corporate behaviour.[55] This approach encourages self-examination, a self-reflective and self-critical process that leads to adjustment of behaviour based on the findings made.[56] The requirement for social accounting and reporting acknowledges the reality of a corporation that operates within a context that is not purely financial thereby necessitating varied reporting.

Laws can used to channel behaviours into desired patterns as opposed to merely changing rules or commanding companies to act in a given way.[57] Through the provisions guiding corporations on what to report on, and how to report, the law can transform institutions, the company in the present case, making it develop a culture of respect for human rights. Without

[53] Eric W Orts 'A Reflexive Model of Environmental Regulation' Business Ethics Quarterly (Oct 1995) 5(4) *The Environment* 779, 780.
[54] Hess op cit note 52 at 42.
[55] Ibid.
[56] Orts op cit note 53 at 780.
[57] Ko-Yung Tung et alop cit note 45 at 215. See also Orts op cit note 53 at 779-794.

the provisions of law that guide directors on what to consider in decision-making, and without a format for reporting on the impact of its activities, companies would have good intentions but no knowledge how to translate the ideals to perceptible reality. The insertion of the following proposed provisions to the Companies Act 2015 will help to bring about consistency in company reporting in a manner that ensures that human rights are considered and respected in company operations.

8.4.3. A guide for reporting

In discussing the need for corporate reporting on matters other than the traditional financial concerns that are objective and quantifiable, the difficulty involved in accounting for intangible assets is not overlooked:

> In particular, any requirement that '"soft" assets' be disclosed must face the problem that 'adequate standards and benchmarks for reporting do not yet exist, capable of carrying the weight which is needed to establish effective pressures to ensure that there is an adequate response to this range of interests.[58]

Despite the difficulty in assessing and putting value to the efforts by the company to deal with the non-quantifiable factors affecting the company, it is nonetheless imperative to do this if a comprehensive picture of the company, its activities and impact is to be given. Best practice reporting standards should be applied, showing among other non-financial impacts the human rights impact of the company's operations.[59] Towards this end, a recommendation is made for companies to refer to the Global Reporting Initiative (GRI) which offers a guide for qualitative reporting and a means to standardise voluntary disclosure as an important initial step in the effort to change corporate behaviour and create a culture that respects human rights. Subscribing to the GRI is an accessible means to bring to the knowledge of business entities the different obligations they have and to provide a means of living them out. The GRI is a comprehensive guide for sustainability reporting, offering guidelines and an implementation manual to guide entities in the reporting process. The GRI outlines areas of human rights concern that should be

[58] Andrew Johnston 'After the OFR: Can UK Shareholder Value Still be Enlightened?' (2006) 7(4) *European Business Organization Law Review* 817, 834.
[59] UNCTAD 'The Investment Policy Framework for Sustainable Development (IPFSD), National Investment Policy Guidelines' para 3.7.3.

reported on.[60] Using the GRI will both enable companies to meet their obligations under the Companies Act, and in addition give them a guide to apply regarding what to include in the report to enable them meet other relevant requirements, such as sustainability.

Through the GRI process, the business entity will be required to report on material aspects of the business, which may be defined as activities, issues or concerns that could result in significant economic, environmental and social impact. In addition to the GRI Framework, the Implementation Manual accompanying it helps the business entity to identity the relevant topics, the extent, scope or boundaries to consider in reviewing the relevant topics, whether the impact may be deemed material, the reporting priority and the extent of reporting or coverage required.[61] Requirements of the United Nations Guiding Principles are identified in the Initiative as considerations that may make a topic relevant for reporting.[62]

The GRI offers a well-defined multi-step process for the company to follow in order to arrive at the material aspects. The initial step involves a systematic identification of significant aspects, considering all activities of the business. These are generally the topics considered potentially important to reflect the impact of the organisation's activities.[63] Boundaries are determined, which may also be referred to as the sphere of influence, delineating exactly where the impacts occur, whether within or outside the organisation.[64] The next step involves a qualitative analysis and quantitative assessment, followed by a discussion to determine the way forward. Once the relevant topics to determine materiality and the need for reporting have been identified, each topic will be assessed on its influence on stakeholder assessments and decisions and the significance of organisations' economic, environmental and social impacts.[65] The engagement with stakeholders, both internal, such as employees and suppliers; and external, such as communities affected by the operations of the business entity, is expected to be a systematic,

[60] Table 5: categories and aspects in the guidelines, GRI page 5 lists the human rights aspects as Investment, Non-discrimination, Freedom of Association and Collective Bargaining, Child Labor, Forced or Compulsory Labor, Security Practices, Indigenous Rights, Assessment, Supplier Human Rights Assessment, Human Rights Grievance Mechanisms.
[61] Global Reporting Initiative 'Sustainability Reporting Guidelines: Implementation Manual' 35 (Step 1).
[62] Ibid at 34.
[63] Ibid at 33.
[64] Ibid.
[65] Ibid at 35.

two-way and objective dialogue, either continuously or specifically for purposes of reporting had there been no need to engage them earlier.[66]

The Third Step is directed at validating the report prepared, giving a reasonable and balanced analysis of the potential impacts, both positive and negative, with the aim of finalising the report content.[67] This stage of the process addresses the concern or need for completeness to ensure that all possible material aspects have been considered and their boundaries determined for the current reporting period. The resulting compilation of material aspects ought then to be approved by the senior decision makers of the organisation, including the directors.

The final step is concerned with reviewing the report after its publication. The material aspects identified and stakeholder feedback given in the previous period are reviewed with the aim of better preparing for the current reporting cycle. The aim of this step is to ensure that the report gives a reasonable and balanced view of the organisation's impact.[68] This would be important to ensure improvement and learning from the past in order to get better results. The end result of a conscientious application of the GRI guide for reporting will be the creation of a corporate culture that respects human rights.

8.4.4. Proposal for insertion of a Business Review Supplement to the Companies Act 2015

In the USA, the courts have interpreted directors' fiduciary duties to include an obligation to ensure that a reporting system exists to provide management and directors timely and accurate information needed to form an opinion of whether and how the corporation complied with legal requirements.[69] Section 655 of the Companies Act 2015, which is similar to Section 417 of the

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[66] Ibid.
[67] Ibid at 38.
[68] Ibid.
[69] In *re Caremark International Inc Derivative Litigation***,** 698 A. 2d 959, 971 (Del. Ch. 1996) (the Delaware case) the court raised the expected standard of fiduciary duty of directors by holding that

> '… it would … be a mistake to conclude … that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance. Obviously the level of detail that is appropriate for such an information system is a question of business judgment.'

In the USA, courts have also been dynamic in using the Committee of the Sponsoring Organizations of the Tradeway Association (COSO) Guideline to determine if directors had exercised their fiduciary duty as expected.

UK Companies Act, requires directors of quoted companies to prepare a Business Review which, among other requirements, gives information on 'Social and community issues, including information on any policies of the company' in relation to those matters and the effectiveness of those policies.[70]

[70] See specifically section 655 (4) (b) The Section in its entirety provides:
(1) Unless the company is subject to the small companies' regime, the directors shall include in their report a business review that complies with subsection (3), so far as relevant to the company.

(2) The purpose of the business review is to inform members of the company and assist them to assess how the directors have performed their duty under section 145 (duty to promote the success of the company).

(3) The business review complies with this subsection if-
(a) It contains--
(i) A fair review under subsection (l) of the company's business; and
(ii) A description of the principal risks and uncertainties facing the company; and
(b) Is a balanced and comprehensive analysis of-
(i) The development and performance of the business of the company during the company's financial year; and
(ii) The position of the company's at the end of that year, consistent with size and complexity of the business.

(4) In the case of a, quoted company, the directors shall specify in the business review (to the extent necessary for an understanding of the development, performance or position of the company)-
(a) The main trends and factors likely to affect the future development, performance and position of the business of the company;
(b) Information about-
(i) Environmental matters (including the business of the company on the environment);
(ii) The employees of the company; and -.
(iii) Social and community issues, including information on any policies of the company" in relation to those matters and the effectiveness of those policies; and
(c) Information about persons with whom the company has contractual or other arrangements that are essential to the business of the company.

When business review not required:
(5) If the business review does not contain information of each kind mentioned in subsection
(4(b) (i), (ii) and (iii) and (c), the directors shall specify in the review which of those kinds of information it does not contain.

(6) The directors shall include in the business review (to the extent necessary for an understanding of the development, performance or position of the company's business)-
(a) An analysis using financial key performance indicators;
(b) If appropriate, an analysis using other key performance indicators (including information relating to environmental matters and employee matters); and
(c) References to, and additional explanations of, amounts included in the company's annual financial statement.

(7) In relation to a group directors' report, this section has effect as if a reference to a company were a reference to an undertaking to which the report relates.

(8) The directors shall also include in the business review references to, and additional explanations of, amounts included in the company's annual financial statement.

While acknowledging the contribution this provision makes to the elaboration of directors duties, additions that can further refine the Business Review provisions and make them clearer in guiding human rights are hereby proposed.[71] The additions can be contained in a Schedule to the Act providing the necessary guidance to directors in fulfilling the obligation outlined in the Act to show the company's compliance with human rights obligations. The Business Review reflects the directors' understanding and analysis of the business, and it should be written in such a way as to complement the corporation's annual statements.[72] The Business Review will be prepared by the directors and audited and published as part of the company's financial statements. The Review can thus be viewed as a legal compliance mechanism to which directors may be held accountable for in the task of ensuring corporate compliance with human rights provisions.

This Business Review Supplement is proposed to be inserted in the Companies Act 2015 and read together with Section 655 of the Companies Act 2015.

A. **Provision of Law:**

1. Objective of the Business Review

(1) A business review must be a balanced and comprehensive analysis, consistent with the size and complexity of the business, of—

a) The development and performance of the business of the company during the financial year,
b) The position of the company at the end of the year,
c) The main trends and factors underlying the development, performance and position of the business of the company during the financial year, and
d) The main trends and factors which are likely to affect the company's future development, performance and position, prepared so as to assist the members of the company to assess the strategies adopted by the company and the potential for those strategies to succeed.

Explanation:

Business performance will be interpreted to include non-financial activities and impacts of the company in line with the requirements of Section 655 of the Companies Act 2015. The position

(9) If directors of a company fail to comply with a requirement of this section, each director of the company who is in default commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings.

[71] The suggestions are in large part modelled on the repealed UK Operating and Financial Review of 2005, drafted to supplement the amended Companies Act of the UK.

[72] Accounting Standards Board (ASB) 2006 'Reporting Statement: Operating and Financial Review' 9.

of the company at the year-end will reflect both the financial position as presented in the balance sheet, and the non-financial considerations arrived at following the guide hereby provided.

Reporting on the main trends and factors presupposes the continuous tracking and analysis of relevant data – financial, social, environmental, human rights etc, reflecting the company's impact throughout the year. The company needs to adopt relevant policies to facilitate the systematic and objective collection of this information and its evaluation by the directors on a regular basis. The policies adopted should encourage responsible business practices, and foster an understanding by business of what it means to develop a corporate culture that respects human rights.[73] A regular analysis of the company's policies on human rights will enable the directors to account for the trends likely to affect the company's future development and therefore to factor them in in decision-making. Reporting in a standardised form from one period to the next will facilitate the comparability required in assessing common trends and factors. Specifically, the targets should be identified and progress measured against targets for each reporting period, lessons learned drawn and applied in the operations of the following reporting period.

B. Provision of Law:

2. Other general requirements

(1) With regard to human rights and other social concerns, the review must include:

a) a statement of the business, objectives and strategies of the company;
b) a description of the resources available to the company;
c) a description of the principal risks and uncertainties facing the company;
d) information about persons with whom the company has contractual or other arrangements which are essential to the business of the company;

Explanation:

For an understanding of the business, it is imperative that the Articles of Association refer to a concrete list of objects outlining what the company is set up to do as duly amended from time to time. Based on the stipulated objects, the directors will describe the structure of the business, its products or services, its operations, relevant market, the major market(s) in which it operates and

[73] Ruggie Report 2009 op cit note 42 para 21.

its competitive position within those markets, the legal and regulatory features that affect it, the social environment that impacts it and where its impact is felt[74] and any other information the directors deem necessary for an understanding of the business. The objectives of the business should include where appropriate non-financial objectives, well defined to give users of the review a good understanding of the entire business.

The Business Review should explain in detail the operational, stakeholder, strategic, financial, environmental and social or reputational risks, and the opportunities and impacts based on the objectives of the business and its current and intended activities. The directors should assess and highlight the likelihood for each risk materialising, and the impact it could have and also outline its strategy for dealing with the identified risks. These will include human rights risks, impacts and opportunities based on the definition of human rights in relevant laws, including the Constitution and other internationally accepted standards. Operational risk assessment would include awareness of possible judgment owing to real or potential cases against the company, settlement costs that could accrue, reputational harm that could arise from the activities of the company or any particular circumstances, possible criminal charges against the management or directors of the company etc Human rights can lead to great reputational harm and must be factored in risk management by putting in place systems that relay relevant information – this could be in the internal reporting which is also verified by the external auditor. The risks should be prioritised, and the criteria for prioritising disclosed. In subsequent reporting periods, the progress made in mitigating the identified risks should be elaborated. Persons with whom the company has had essential dealings could be communities in which they conduct business and which have given up their land.

C. Provision of Law:

3. The Review should provide information about human rights issues, and social and community issues.
An insertion is proposed to include human rights and thus replace Section 655(4)(b)(iii) with:
"Human rights, social and community issues, including information on any policies of the company in relation to those matters and the effectiveness of those policies"

Explanation:

[74] ASB Reporting Statement op cit note 72 at 15.

Social and community issues may be taken to include the issues that fall within the social responsibility of the business, and those distinguished from the typical financial issues that the company usually reports on. Social and community issues will comprise non-financial issues that have an impact on the business, or impacts of a nature that the directors consider material because they affect the business. In reporting on community and social issues, a distinction must be made between social and responsibility concerns that arise out of the philanthropic endeavours of the company, and those matters that strictly speaking are human rights issues.

The information given will include strategic priorities and specific areas of concern for the short and medium term with regard human rights and the effort made to respect the Constitutional provisions and other internationally recognised standards on human rights, and how such standards relate to the long-term organisational strategy and success. The human rights impacted will depend on the industry in which the business operates. It is incumbent on the directors to identify the relevant industry and apply the guidelines given by the Cabinet Secretary to identify appropriate indicators to track impact.

A proper understanding of CSR will be important as a means of underscoring a view of the corporation that goes beyond concern for the shareholders only. Though used in other contexts, the term social responsibility does not have a universal meaning.[75] An understanding of social responsibility in a more universal or widely acceptable usage will be important in consolidating the existing experience of the corporations and using that experience to move on to a higher plane to appreciate the role it has in promoting human rights. To this end, a standardised definition of social responsibility that could be applied is:

> Responsibility of an organisation for the impacts of its decisions and activities (products, services and processes) on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, including health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organisation and practised in its relationships (within its sphere of influence).[76]

[75] See Working Report on Social Responsibility (30 April 2004) Prepared by the ISO Advisory Group on Social Responsibility.

[76] ISO 26000 definition of Social responsibility. ISO (International Organization for Standardization) is an independent, non-governmental membership organization and the world's largest developer of voluntary International Standards. It is made up of 165 member countries who are the national standards bodies around the

D. Provision of Law:

4. Policy statement and policies articulating human rights

(1) The review must, in particular, include —

a) Information about the human rights policy of the company; and

b) Information about the extent to which the policy has been successfully implemented.

Explanation:

The business entity must first undertake the exercise of assessing human rights impacts, and strive to ensure that the findings are communicated and integrated at all levels of the business. It can either have a human rights policy statement that stands alone, or it could be incorporated in the other areas of the business under which concerns typical of human rights are considered. The question as to what form the assessment will take can be answered in different ways: the human rights assessment can either be incorporated into existing apparatus, such as environmental and social impact assessments, or when this is not possible, an independent assessment of human rights may be undertaken.[77] An independent approach to human rights would be in keeping with the unique nature of human rights claims that makes them superior to any other claims that may arise.

As the business grows or takes on new customers or suppliers, initiates new projects or undergoes any of the changes typical to business entities, it ought to carry out a human rights due diligence in order to ensure that it is well prepared to deal with new situations as they arise. Any serious effort to assess and manage negative impact must be accompanied by measures to adequately monitor its policies in order to evaluate whether they are being implemented in the most effective manner.[78] This process will entail application of qualitative and quantitative indicators, engaging with affected persons to obtain their feedback, and reporting on the outcome in the normal reporting procedures of the business, indicating how the business enterprise identifies and addresses adverse human rights impacts.[79]

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world, with a Central Secretariat. ISO standards aim to give world-class specifications for products, services and systems thus facilitating international trade and relations in the standardized areas.

[77] The State of Play of Human Rights Due Diligence: Anticipating the Next Five Years, 2 available at *http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf*, accessed on 6 August 2014.

[78] UN Guiding Principles op cit note 49 at 20.

[79] Ibid.

E. Provision of Law:

5. Indicators that objectively measure the policies articulated.

(1) The review must include analysis using financial and, where appropriate, other key performance indicators, including information relating to human rights, environmental and employee matters.

Explanation:

Key performance indicators (KPIs) refer to factors by reference to which the development, performance or position of the business of the company can be measured effectively. A separate proposal is made for the use of the GRI to provide KPIs relevant for measuring the social and community issues that may touch on human rights concerns.

F. Provision of Law:

6. Reference to and explanation of company's accounts and compliance with accounting and reporting standards.

To the extent necessary to comply with the general requirements of paragraphs 1 and 2, the review must, where appropriate, include references to, and additional explanations of, amounts included in the company's annual accounts.

Explanation:

Ideally, the value of the corporation will be affected by issues that are not readily quantifiable, for example impending costs of litigation either due to suits in action, or potential suits that are foreseen or could be expected owing to the nature of the company's activities. An explanation of such costs – whether financial or non-financial – should be provided in the review. The directors should also comment on significant activities that may alter the value of the business after the balance sheet date.[80] The nature and extent of information included in the Business Review should be determined by the nature of the business and how it is operated, also bearing in mind what the directors judge to be material. Where relevant, directors should reveal the source of the information used, and its reliability to enable those who use the information to make a reasoned judgment.[81]

[80] ASB Reporting Statement op cit note 72, 10.
[81] Ibid at 11.

G. Provision of Law:

7. Compliance with required standards

The review must—

a) State whether it has been prepared in accordance with relevant reporting standards, and

b) Contain particulars of, and reasons for, any departure from such standards.

Explanation:

Acknowledging the widespread efforts across numerous corporations to live out some form of social responsibility, particular effort is made to draw a distinction between social responsibility and human rights. Human rights responsibility, while being linked to what many business entities already carry out as part of their corporate social responsibility is, however, much more than that: something as fundamental as human rights cannot be "left to the whim of companies, and to the vagaries of voluntary codes of conduct and CSR initiatives"[82]. The effort of business to create a culture of human rights respect throughout its activities will be supplemented by the government's oversight role, in an understanding of the complementary obligation of both the state and business entities for human rights. In addition to Section 655, a provision is proposed that gives the relevant Minister the power to determine the reporting standards that may be applied in preparing the Business Review.

H. Provision of Law:

8. Reporting standards for Business Review

i) Proposed addition to definition of "prescribed financial accounting standards" as provided in Section 3 of the Companies Act:

"prescribed financial accounting standards" means statements of standard accounting practice issued by a professional body or bodies in accounting and finance recognized by law in Kenya".

These standards would include relevant reporting standards, in relation to a company's Business Review, as issued under the "companies' general regulations" in accordance with Section 3 of the Act."

ii) Proposed addition in the "companies' general regulations" made and in force under the Act, referred to in Article 3 of the Companies Act:

[82] Corporate Responsibility (CORE) 'Why the UK needs a Commission for Business, Human Rights and the Environment' available at *http://corporate-responsibility.org/wp-content/uploads/2013/11/COREvalues.pdf*,accessed on 6 August 2014.

"The 'prescribed financial accounting standards" which are statements of standard accounting practice issued by *a professional body or bodies in accounting and finance recognized by law in Kenya* include best practice standards (as proposed by the Cabinet Secretary or issued by the relevant accounting body) that companies can apply in preparing the Business Review required under the Act."

Explanation:
This provision will put forward a standard against which corporations will be judged. The provision can be used by the Cabinet Secretary to propose best practice standards that will enable business entities to present their efforts to uphold human rights in a manner that can be verified by outside parties.[83] A suggestion is further made for the Cabinet Secretary in the regulations to require that corporations adopt the Global Reporting Initiative as a standard for preparing the Business Review.

I. Provision of Law:

9. Auditors' report on Directors' Report and Business Review

If the company is a quoted company, the auditors must state in their report—

a) whether in their opinion the information given in the business review for the financial year for which the annual accounts are prepared is consistent with those accounts; and

b) whether any matters have come to their attention, in the performance of their functions as auditors of the company, which in their opinion are inconsistent with the information given in the business review."

A proposal is made to replace Section 728 of the Companies' Act 2015 (on auditors' report on directors' report) with the following:

728 Auditor's Report on Directors' Report and Business review

The auditor shall state in the auditor's report on the company's annual financial statement:

a) Whether in the auditor's opinion the information given in the directors' report and the Business Review for the financial year for which the financial statement is prepared is consistent with that statement; and

b) Whether any matters have come to their attention, in the performance of their functions as auditors of the company, which in their opinion are inconsistent with the information given in the Business Review."

Explanation:

While the directors will have the discretion to prepare the Business Review in the manner they consider best and most aptly representative of the business, the process applied to arrive at the

[83] See Nicola Jagers, 'Will Transnational Private Regulation Close the Governance Gap?' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) at 327. Jagers suggests mandatory reporting of human rights as one of proposals for the Working Group set up to support the implementation of the Guiding Principles to consider.

document should be subject to audit, to avoid the danger of the directors misusing or abusing the discretion they have in the process.[84] Such an audit will enable the auditor to establish whether adequate and relevant processes have been applied in reaching the judgments that the directors do, for example, in deciding what is material enough to be reported on, but it will not entail a questioning of the directors' judgment, which the auditor should not do, nor a substitution of their judgment for his.[85]

J. Provision of Law:

10. Cabinet Secretary's notice in respect of reports and reviews

It is proposed that sections 697 of the Companies Act 2015 - "Application to the Court to rectify defective annual financial statement or directors' report of the company", 698 - "Power of Cabinet Secretary to authorise other persons to make application to the Court under section 710 (sic)" and 700 - "Power of Cabinet Secretary or authorised person to require documents, information and explanations" be amended to include "business review" in all the places where "financial statement or directors' report" is mentioned.

Explanation:

The Cabinet Secretary himself, or through persons who have a stake in the status of the business, may require the provision of more information regarding the business review, and if the company fails to comply, the matter can be taken to court to compel the directors to provide the information and produce a revised business review that reflects the position of the business. On receiving complaints of human rights violation against a company, the body receiving the complaint, such as the KNCHR, can assess the business review, request for more information through a revision of the business review, and if breaches of the company's obligations are found, the necessary remedial action will be taken.

The purpose of the provision is to give the Cabinet Secretary or other authorised person power to require revision of the financial statement, directors' report or business review to provide further explanation as may be necessary to provide satisfactory explanation of the position of the business. This provision provides a further check to ensure that the directors

[84] Modern company law for a competitive economy: Completing the Structure URN 00/1335, A consultation document from the Company Law Review Steering Group - November 2000, para 3.39.
[85] Ibid.

present an accurate position of the company, and if they fail, they can be ordered to redo the business review.

Section 697 of the Companies Act 2015 empowers the Cabinet Secretary to authorise persons who can investigate complaints against the company or who ought to ensure compliance by directors with the provisions of the Act to take the directors to court requiring them to revise the business review and if necessary have it re-audited. This provision can be used to ensure that the corporation provides accurate information regarding compliance with human rights requirements.

8.4.5. Right of stakeholders to bring a claim against directors for breach of duties towards them

For the extended duties of the directors as proposed above to have an impact, stakeholders ought to be able to bring a claim against the directors for breach of their duties towards them. It is proposed to add a provision to the law to enable other stakeholders to also have the right to sue directors for breach in line with the provision creating the obligation for directors to consider their interests. Under Part XI of the Companies Act 2015 of Kenya which provides for derivative actions, only members of the company can sue directors for an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust. In the effort to observe the duty of directors to promote the success of the company,[86] the director is required to have regard to the impact of the company's activities on the community and the environment.[87] It would make little sense if this requirement is not enforceable. It is therefore proposed, as a complementary provision to the wider duty of directors, to give non-shareholder stakeholders a right of enforcement, allowing them to bring action against the director for breach of the duty they have towards them.[88]

All stakeholders whose interests are mandated to be considered by directors should have a right to bring an action against the directors should they feel that the directors have breached this obligation. The stakeholders will have the duty to prove that there has been an injury against them and that the injury arose form a valid contractual relationship or other relationship of

[86] Section 143 of the Companies Act 2015.
[87] Section 143 (d).
[88] Standley op cit note 16 at 209.

legitimate expectation with the corporation, which they can prove.[89] The directors will then be tasked to prove that the decision they took leading to the detrimental cause of action was taken purely in the interest of the company.[90] The complaining stakeholder can then show that the intended purpose could have been fulfilled through less injurious means.[91] To effect this scenario, it is proposed to add the following provision to the Companies Act under a proposed Section 996 (B):

Provision of Law:
Injunctions
The Court may, on the application of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing. Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

a) a contravention of this Act; or
b) attempting to contravene this Act; or
c) aiding, abetting, counselling or procuring a person to contravene this Act; or
d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
f) conspiring with others to contravene this Act.

8.4.6. Changes to requirements regarding the objects of the company

a) The Companies Act 2015 provides in Section 28 (1) "unless the articles of a company specifically restrict the objects of the company, its objects are unrestricted."

It is proposed that the provision be amended to read:

"The memorandum of every company shall state the objects for which the company is proposed to be incorporated and any matters considered necessary in furtherance thereof."

[89] Mitchell Lawrence E 'A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes' (1992) 70(3) *Texas Law Review* 579, 635-6.
[90] Ibid at 636.
[91] Ibid.

b) Section 20 (1) of the Act, on Company's Constitution: Articles of association reads:

The regulations may prescribe model articles for companies

It is proposed that the following addition be made to Section 20:

i. 20 (1) The articles of incorporation must set forth provisions not inconsistent with law:[92]
ii. Outlining the purpose or purposes for which the corporation is organised.
iii. Defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders.
iv. Eliminating or limiting the liability of a director to the corporation or its shareholders for monetary damages for any action taken, or any failure to take any action, as a director, except liability for acts or omissions which involve intentional misconduct or a knowing violation of law.
v. Stipulating that, in discharging the duties of their respective positions and in determining what is believed to be in the best interests of the corporation, the board of directors, committees of the board of directors, and individual directors, in addition to considering the effects of any action on the corporation or its shareholders, will consider the interests of the employees, customers, suppliers, and creditors of the corporation and its subsidiaries, the communities within the sphere of influence of the corporation, and all other factors such directors consider pertinent; provided, however, that any such provision shall be deemed solely to grant discretionary authority to the directors and shall not be deemed to provide to any constituency any right to be considered.

Explanation:

In assessing whether the best interests of the company have been considered, the director is expected to have taken reasonably diligent steps to become informed about the subject matter of the judgment. It is further suggested that in view of the multiplicity of expectations, the director should apply a hierarchy of director duties: that he seeks to obey the constitution and decisions of the company which bind the director; to promote what he calculates in good faith to be likely to promote success for members' benefit; and, as part of that process, to take account of the factors (after identifying and assessing them in accordance with his duty of care and skill) which he believes in good faith to be relevant for that purpose.[93] This will ensure that in the event that the company has to consider human rights issues, the directors will evaluate such options diligently and thus factor them in their decision-making.

[92] Examples taken from Georgia Code Title 14 Chapter 2 Article 2 (O.C.G.A. § 14-2-202 (2014)) on Incorporation. See also Keay, op cit note 15 at 246, (9, fn 56).
[93] See Modern company law for a competitive economy op cit note 83 para 3.19.

8.5. Modification to other laws

a) The Penal Code CAP 63 Laws of Kenya

In order to make the Penal Code of Kenya more suitably applicable to hold corporations accountable for violation of human rights, the following proposals are made for its amendment.[94]

I. Addition to Section 4 of the Penal Code on "Interpretation"

board of directors, of a corporation, society, etc., means the body exercising the executive authority of the corporation, society, etc., whether or not the body is called the board of directors.

corporate culture, for a corporation, society, etc., means an attitude, policy, rule, course of conduct or practice existing within the corporation, society, etc. generally or in the part of the corporation, society, etc. where the relevant conduct happens.

senior management, of a corporation, society, etc., means an employee, agent or officer of the corporation, society, etc. whose conduct may fairly be assumed to represent the policy of the corporation, society, etc because of the level of responsibility of his or her duties.

II. Additional punishments to be added to Section 24 on "Different kinds of punishments"

…

j) restricting the place where a corporation, body corporate, society, association or body of persons can operate

k) banning corporation, body corporate, society, association or body of persons from procurement opportunities,

l) requiring corporation, body corporate, society, association or body of persons to publicise the sentence or punishment given as a means of naming and shaming, confiscation of property

m) winding up of corporation, body corporate, society, association or body of persons

III. Replace Section 23 of the Penal Code with the following:

23. Offences by corporations, bodies corporate, societies, associations or bodies of persons

1) General principles

[94] The Australian Criminal Code has been used as a guide.

This Code applies to corporations, societies, etc in the same way as it applies to individuals, but subject to the changes made by this part and any other changes necessary because criminal responsibility is being imposed on a corporation, society, etc .rather than an individual.

2) Physical elements

A physical element of an offence consisting of conduct is taken to be committed by a corporation, society, etc. if it is committed by an employee, agent or officer of the corporation, society, etc. acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority.

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly.

3) Fault elements other than negligence

(1) In deciding whether the fault element of intention, knowledge or recklessness exists for an offence in relation to a corporation, society, etc., the fault element is taken to exist if the corporation, society, etc. expressly, tacitly or impliedly authorises or permits the commission of the offence.

(2) The ways in which authorisation or permission may be established include—

(a) proving that the corporation, society, etc.'s board of directors intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a senior management of the corporation, society, etc. intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the corporation, society, etc. that directed, encouraged, tolerated or led to noncompliance with the contravened law; or

(d) proving that the corporation, society, etc. failed to create and maintain a corporate culture requiring compliance with the contravened law.

(3) Subsection (2) (b) does not apply if the managerial agent proves that through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he or she exercised appropriate diligence and took all reasonable steps to prevent the conduct, or the authorisation or permission that led to its commission.

(1) Factors relevant to subsection (2) (c) and (d) include—

a) whether authority to commit an offence of the same or a similar character had been given by a senior management of the corporation, society, etc.; and

b) whether the employee, agent or officer of the corporation, society, etc. who committed the offence reasonably believed, or had a reasonable expectation, that a senior management of the corporation, society, etc. would have authorised or permitted the commission of the offence.

(2) If recklessness is not a fault element for a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a senior management, of the corporation, society, etc. recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

4) Negligence

(1) This section applies if negligence is a fault element in relation to a physical element of an offence and no individual employee, agent or officer of a corporation, society, etc. has the fault element.

(2) The fault element of negligence may exist for the corporation, society, etc. in relation to the physical element if the corporation's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).

5) Mistake of fact—strict liability

A corporation, society, etc. may only rely on section 36 (Mistake of fact—strict liability) in relation to the conduct that would make up an offence by the corporation, society, etc. if—

a) the employee, agent or officer of the corporation, society, etc. who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have been an offence; and

b) the corporation, society, etc. proves that it exercised appropriate diligence to prevent the conduct.

6) Intervening conduct or event

A corporation, society, etc. may not rely on section 39 (Intervening conduct or event) in relation to a physical element of an offence brought about by someone else if the other person is an employee, agent or officer of the corporation, society, etc.

7) Evidence of negligence or failure to exercise appropriate diligence

Negligence, or failure to exercise appropriate diligence, in relation to conduct of a corporation, society, etc. may be evidenced by the fact that the conduct was substantially attributable to—

a) Inadequate corporate management, control or supervision of the conduct of one or more of the employees, agents or officers of the corporation, society, etc.; or
b) Failure to provide adequate systems for giving relevant information to relevant people in the corporation, society, etc.

b) The Nairobi Securities Exchange Act

The Corporate Governance Guidelines issued by the Capital Markets Authority of Kenya offers guidelines and best practices for public listed companies to enhance self-regulation of these entities. The listed companies are expected to disclose annually the extent to which they comply with the stipulated requirements and give reasons for non-compliance. Commitment to respecting human rights is not an explicit requirement at incorporation or when companies are listed in the stock exchange. However useful these guidelines are, they are voluntary and corporations apply them at will. It is proposed that a specific requirement be made in the NSE Act, to require that the Business Review outlining the Company's treatment of human rights be provided as part of the listing requirements.

Provision of the law:

Amend Section C. 07 of the Nairobi Securities Exchange Act to read as follows:

C.07 A statement that for a period of not more than fourteen days before the date of listing and until fourteen days after the date of listing, at a named place as the Authority may agree, the following documents (or copies thereof), where applicable, could be inspected-

...

j) the audited accounts of the issuer or, in the case of a group, the consolidated audited accounts of the issuer and its subsidiary undertakings for each of the five financial years preceding the publication of the Information Memorandum, including, in the case of a company incorporated in Kenya, all notes, reports or information required by the Companies Act "together with the Business Review outlining the Company's human rights….[95]

Explanation:

Ruggie's Corporate Law Project studied more than 40 jurisdictions and only in few of these did the existing reporting requirements consider human rights related risks as factors determining

[95] Nairobi Securities Exchange Listing Manual (June 2013) Part D (R.10 (1) (D)) "Disclosure Requirements for Listing by Introduction" Part ID.C.00Information on the issuer.

materiality, and thus worth reporting on.[96] What is material will be determined by directors, and will be a response to the question: 'Given my good faith, honest judgment about the best way of presenting the operations of the business for its defined purpose, does this item matter?'[97] Ruggie suggests that human rights risks be defined as potentially material and that they be disclosed in the financial reports. It would therefore be important to require compliance with human rights as a pre-condition for listing on the Stock Exchange.

c) The Special Economic Zones Bill

One of the laws that can be used to enforce human rights is the Special Economic Zones Bill, which is set to replace the Economic Processing Zones Act, the law that governs special zones set aside for manufacturing goods for export, and which offer a free trade area and liberalized regulatory environment. Export Processing Zones (EPZs) have been in Kenya since 1990.[98] Numerous regulatory exemptions were given to investors who invest in the EPZs,[99] and many workers' human rights were consistently violated within these zones. In addition to tax incentives, procedural incentives are offered to investors within the EPZ area such as the offer of facilitation services by the EPZ Authority together with exemption from having to take out a number of licenses. Whereas the benefits to the investors are clearly spelt out in the EPZ Act, the demands placed on them are not. With this glaring anomaly, the Government cannot actively refute assertions that it is more concerned about attracting investments than it is about protecting the interests of its citizens. For many years, it was known that EPZs which are sources of

[96] Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' (9 April 2010) A/HRC/14/27 [Ruggie Report 2010] 9.

[97] Modern company law for a competitive economy op cit note 83 para 3.34.

[98] Lene Kristin Vastveit, Export Processing Zones in Sub-Saharan Africa – Kenya and Lesotho, (Thesis) Department of Economics, University of Bergen (01.09.2013) 33.

[99] Tax incentives are offered to investors that locate their operations in Export Processing Zones under the Export Processing Zones Act (and subsequent amendments thereto): an initial 10-year corporate income tax holiday and a 25% corporation tax rate for a further 10 years thereafter; 10-year withholding tax holiday on dividends and other remittances to non-resident parties; perpetual exemption from VAT and customs import duty on inputs – raw materials, machinery, office equipment, certain petroleum fuel; perpetual exemption from payment of stamp duty on legal instruments; 100% investment deduction on new investment in EPZ buildings and machinery, applicable over 20 years; exemption from any quotas or other restrictions or prohibitions on imports or exports with the exception of trade in firearms and military equipment (Export Processing Zone Act *Cap 517 (Rev. 1993)* sec 29) (See United States Department of State, Bureau of Democracy, Human Rights and Labor, Country Report on Human Rights Practices for Kenya (2011) 42-43).

employment for many are excluded from the Factory Act's provisions and, unlike other businesses, EPZs could not have their work sites inspected. [100]

Kenya plans to continue the growth of EPZs as shown in its Vision 2030 Strategy, aiming to create three special economic zones in Mombasa, Kisumu and Lamu as a means of creating jobs in the manufacturing sector.[101] Bearing in mind the dark history of EPZs, it is important for the Government to have clear guidelines for investors who it will seek to attract to the EPZs, to ensure that they know what is expected of them and that they respect human rights. In line with this, enactment of the proposed Special Economic Zones Bill is anticipated.[102] However, this new law does not offer any guidance on the issue of human rights, with no mention of it being made anywhere in the Bill.[103]

The Special Economic Zones Bill establishes the SEZ Authority (SEZA) (the Authority).[104] Among other tasks, the SEZA is mandated to recommend regulations for the operation and regulation of SEZs, determine investment criteria and issue the requisite approval and licenses for the establishment of the SEZs. This presents an opportunity for the Authority to ensure that entities that come to invest have a high regard for human rights, by specifying human rights among the criteria necessary for granting licenses required. Numerous incentives are given to attract investors, such as tax exemptions, reprieve from advertising fees or business permit fees and exemption from regulation under the Standards (Quality Inspection of Imports) Act among others.[105]

Whereas these concessions for investors are viable, there must be equal demands on the investors to ensure that they reciprocate the privileges given to them by investing in high

[100] United States Department of State's Report on Kenya ibid at 42.
[101] Government of the Republic of Kenya 'Kenya Vision 2030' (2007) – Second Medium Term Plan 2013 – 2017 at 54. Approximately 2,000 km^2 of land have been identified for Mombasa and 700 km^2 for Lamu.
[102] SEZ 2013-17 Page 13. As at December 2012 the Bill had been approved by the Cabinet and was awaiting passing by Parliament but has not been approved as at the date of completing the thesis.
[103] A total absence of the term human rights in the EPZ Act and the SEZ Bill that will replace it implies a lack of determination to undo the wrongs of the past. It is interesting to note that the Special Economic Zones (SEZ) Bill contains many of the provisions that were contained in the EPZ Act. The Bill refers to the SEZA's obligation to ensure compliance with customs procedures, financial regulations, to recommend prohibited activities and to suspend or cancel licenses for violation of the SEZ Act, the Customs and Excise Act or the Value Added Tax Act (See Part III). The SEZ Bill further mandates the SEZA to assess the engineering and financial plans, financial viability and the environmental and social impact of proposed projects before issuing licenses. If it went into such detail to give direction to the SEZA on the things it ought to consider, the Bill ought to have similarly touched on the need for upholding human rights.
[104] Section 11.
[105] Section 38.

standards of production with due regard to the persons who work for them and the communities in which they operate. A vague use of terminology in the SEZ Bill – referring to environmental and social impact only[106] – may lend itself to interpretation that fails to accord human rights the priority they deserve. Whereas environmental and social duties as used in the Bill may be interpreted to include human rights duties, it is not guaranteed that this will be the case. One way to ensure respect for the human rights situation is to be clear about the importance of human rights, and to demand their respect, censuring their violation in at least as much clarity as violation of tax and finance requirements. It is therefore recommended that the SEZ Bill be amended to place a clear obligation on investors to respect human rights.

8.6. Conclusion

The purpose of the proposed changes and additions to the law is to acknowledge that there are other constituents who contribute to the success of the corporation in addition to the shareholders, and whose interests should also be considered in the operations of the company. The proposed amendments will highlight the fundamental importance of human rights – different from and superior to mere corporate social responsibility – and guide management in the application of human rights considerations in their operations and decision-making. The aim of elaborating on the expectations of directors in carrying out their obligations is to offer guidance on how they can consider stakeholders' interests. The Business Review supplement, by highlighting the expectations in reporting on the activities of the company, compels companies to disclose qualitative and substantive information not usually found in the financial statements of the company.[107]

Using law to regulate the constitution of the company, the framing of its objects and the exercise of directors' duties is preferable to using 'softer' means such as corporate codes of conduct. Any proposed amendments to such a law would be subjected to discussions and debate

[106] Section 28 of the SEZ Bill provides that 'In evaluating applications for special economic zone developer, operator and enterprise licenses, the Authority shall assess the specific engineering and financial plans, financial viability, and environmental and social impact of the applicant's proposed special economic zone project, as appropriate.'

[107] Andrew Johnston After the OFR: Can UK Shareholder Value Still be Enlightened? (2006) 7 *European Business Organization Law Review* 817, 818.

in parliament, and the resulting compromises would thus be more acceptable and in the best interests of all concerned.[108]

[108] Modern company law for a competitive economy op cit note 83 para 3.31.

CHAPTER NINE

9. CONCLUSION

9.1. Introduction

The main question this research sought to answer is what must be done by states and corporations to guard against corporate violation of human rights, and to remedy violation when it occurs. On the foundation that Ruggie set in proposing the UN Protect Respect Remedy Framework and the UN Guiding Principles on Business and Human Rights, the corporate obligation for human rights could develop in different ways. It was the intention of Ruggie in developing the UN Guiding Principles on Business and Human Rights that each state consider in its particular circumstances how best to give meaning to the corporate obligation for human rights. This study has attempted to give greater specificity to the corporate obligation for human rights, recommending changes to laws and alignment of policies to facilitate the creation of corporate cultures respectful of human rights.

In proposing means to operationalise the Protect Respect Remedy Framework, Ruggie refers to the inadequacy of the market forces to promote social objectives or allocate scarce resources.[1] Left to the mercy of market forces, the needs and concerns of the shareholder seeking to maximise profits will be given priority to the detriment of the other stakeholders. Big companies may wield their power to take advantage of the employees for example, by paying them poorly, or offering poor working and living conditions, counting on the fact that they have no means to attain alternative employment. Without state intervention, corporations may pursue their ends with total disregard for the impact of their operations on their employees and the communities within which they operate.

The need for a free market, the different sizes of business entities, the need for protection of all human rights and not only some, among such other factors serve to make the efforts to consolidate all the requirements for the effective guidance on the corporate obligation for human rights into one comprehensive framework very complex. Yet, because states bear the primary responsibility of ensuring that individual human rights are protected and respected at all costs, it behoves governments to play a role for which there is no substitute: to integrate social and

[1] Council for Human Rights 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13 [Ruggie Report 2009] para 7. See also Azhar Kozami *Business Policy and Strategic Management,2e* (2002) 370.

human rights concerns into all their plans and to do so in a systematic and effective way so as to bring about corporate cultures respectful of human rights.[2] This chapter presents proposals on the way forward regarding the question of corporate responsibility for human rights, taking the research objectives and the research questions into account. In concluding this study, this chapter reviews the core arguments of the research and proceeds to make recommendations under the state duty, the corporate responsibility and access to remedy pillars of the United Nations Protect, Respect, Remedy Framework and Guiding Principles on Business and Human Rights.

9.2. Core arguments of the study

In stating the problem of the study, Chapter One set out to establish how corporate accountability for human rights in Kenya can be promoted in the absence of internationally binding human rights obligations for business. The study proceeded from a backdrop of two central points of departure which bring to the fore the role of corporations in promoting human rights, and contextualise the question of corporate accountability for human rights: the debate at the international level on the corporate obligation for human rights as expressed in the UN Protect Respect Remedy Framework, and the promulgation of the 2010 Constitution of Kenya. Going against expectations that time for an international treaty was ripe, Ruggie had preference for a domestic approach to the question of business and human rights. The UN Guiding Principles are the product of evolving international debate on business and human rights. They are the latest of a string of attempts at the international level to keep corporations in check. Though the Framework and UN Guiding Principles are voluntary like many of the previous attempts, they do a better job of converting the obligation of corporations into implementable standards than the previous efforts. The UN Guiding Principles offer concrete ways that states and corporations can apply to translate the corporate obligation into implementable standards.

For Ruggie's critics, the decision to offer guidelines to implement the Protect, Respect, Remedy framework he devised rather than create a treaty, or propose its negotiation, was the biggest failure of his work. Having chosen to approve Ruggie's approach, Chapter Two set out to offer a defense of this approach, showing that his decision that the solution to the question of business and human rights would best be found at the national rather than international level is

[2] Ruggie Report, ibid para 10.

not fatal to the business and human rights agenda.[3] The research made the case that signing onto the treaty by itself would not be a guarantee that the treaty obligations will be observed. The research refers to empirical findings to show that states that signed and ratified international human rights instruments did not always reflect human rights compliant practices. The development of strong institutions to serve as local enforcement mechanisms will serve better than a treaty to bring about change in the behaviour of corporations to make them human rights-respecting. Additionally, International Law relies on domestic enforcement; recourse to International Law requires exhaustion of local remedies, a fact which presupposes that local remedies exist and are well developed. Furthermore, the international jurisprudence builds on domestic experiences; effective International Law draws on lessons from the domestic level to help build a stronger and more effective system. For these reasons, the study describes the need for the moment as developing a domestic jurisprudence on business and human rights, including the strengthening of local implementing institutions as a more immediate task compared to the negotiation and signing of a treaty.

If human rights infringements do not threaten international peace and security, any claims for violation should be addressed at the domestic level.[4] Such would be the case in the circumstances of a developing country like Kenya, where many companies are locally incorporated and operate within the state. The UN Guiding Principles will serve to develop the domestic jurisprudence, offer means to create awareness of, and understand state and corporate human rights obligations better, as well as create consensus around the subject. All these efforts made at the domestic level will serve to create the solid foundation needed for a more successful negotiation and implementation of a Treaty on Business and Human Rights in the future.

Kenya adopted a new constitution in 2010, modern in its provisions which make it applicable beyond the traditional public-private divide. Unlike the previous constitution which applied only to public entities, the 2010 Constitution also applies horizontally to juristic persons. Chapter Three sought to analyse the Constitution in light of its application to juristic persons, situating it amongst existing models of horizontality in a bid to project its application to corporations in Kenya. The absence of settled jurisprudence on the place of International Law

[3] See Chapter 2, 2.2 above.
[4] Rein A Mullerson 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990), 39 quoting L Henkin 'Human Rights and Domestic Jurisdiction' in T Buegenthal (ed) *Human Rights, International Law and the Helsinki Accords* (1979) 22.

under the 2010 Constitution will raise a number of challenges.[5] Although Kenya becomes a monist state under the 2010 Constitution, the Treaty Making and Ratification Act enacted pursuant to Article 2(6) of the Constitution requires domestication of treaties through a process that essentially reverts to the dualist system.[6] Further clarification is needed, or a law to harmonise the implication of the Act. Additionally, the process of domestication of treaties will involve practical challenges, such as the need for public participation which will entail civic education and the attendant resources needed to ensure useful participation.

A further challenge is posed by the attitude of the courts in interpreting the novel provisions of the Constitution. Court decisions made after the promulgation of the 2010 Constitution tend to underplay the role of International Law; jurisprudence on the matter is not well developed – for example, one court interpreted the Constitution to give International Law a lower ranking in the Constitution than Acts of Parliament; another ranked it at the same level, and yet another expressed no preference, arguing that the court was not the proper forum to decide the matter. Resolution of these uncertainties is of utmost importance if International Law were to play a substantial role in the promotion and protection of human rights.

The study finds that a different kind of corporation is contemplated by the 2010 Constitution, placing on business – as it does – a direct obligation to respect and uphold the human rights enumerated thereunder. The jurisprudence in other jurisdictions with similar provisions was explored, and prevailing gaps highlighted. Even in the jurisdiction with the most identical provisions, courts have been conservative in holding corporations bound by the Bill of Rights.[7] In face of such uncertainties, the UN Guiding Principles would serve a useful purpose in the effort to implement Article 20(2) of the Constitution. The Constitutional provisions binding corporations may be implemented by amending corporate law as proposed under the UN Guiding Principles to require companies to respect human rights, thus re-defining the corporation and making it consider other stakeholders in decision-making, not only the shareholders.

Owing to the fact that many corporations and other business entities in Kenya ascribe to CSR policies as the main means of expressing an appreciation of a duty to society, Chapter Four sought to establish whether CSR can be a measure for human rights obligations. Most policies express an appreciation of CSR as philanthropic activity, giving back to the community, in the

[5] See Chapter 3, 3.2.
[6] See Chapter 3, 3.2.1.
[7] See Chapter 3, 3.4.4.

measure that the corporation is able to. The vague nature of CSR has made it difficult to legislate; the bid to impose legal social responsibilities on corporations in many jurisdictions that attempted has been futile, raising doubts whether the force of the law ought to be applied to create the fraternity that CSR envisions.[8] Corporate social responsibility in Kenya is not legislated, and may continue to be unlegislated in the long run; there are no mandatory requirements in the area of social responsibility, and no systematic means of reporting on efforts made by an entity in this regard. Whereas an appreciation of CSR is important because it moves the company into a culture that owes responsibilities and sees beyond the profit-making motive, it is not sufficient. With no objective measure of CSR requirements, having different meanings and no sanctions for non-compliance, CSR cannot adequately underpin the human rights obligation of the corporation.[9] Unlike social responsibility, human rights are mandatory, objective and not dependent only on the perception of the corporation. The nature of human rights makes their observance or execution unique and irreplaceable. Unlike social responsibility as popularly understood, human rights demand the force of the law to implement. Human rights obligations are contained in the International Bill of Rights and in the Constitution, which binds corporations, thus taking pride of place and demanding their respect by everyone, including corporations. Merging business and human rights will entail bringing business into a vague landscape of human rights conception; transforming their perception of corporate social responsibility (understood as doing good to the community, when possible and in the measure that is considered reasonably possible) to an appreciation of mandatory obligations, owed as a matter of right and not dependent on the good will or philanthropic inclination of the business entity. To have the importance they deserve, therefore, corporate policies must adopt the specific terms "human rights"; human rights policies ought to be endorsed by senior management of the company, applied throughout the company operations and verified in regular reporting of the non-financial aspects of the company.[10]

Chapter Five elaborated on the state's primary duty to protect human rights. This was proposed as a two-fold obligation including a positive duty to provide for human rights, and a negative duty to refrain from violating human rights, and at the same time ensure that human rights are not violated by anyone else, including corporations. The duty of the state to protect

[8] See Chapter 4, 4.4 and 4.6.
[9] See Chapter 4, 4.7.
[10] See Chapter 6, 6.5.2.

will involve giving guidance to corporations through laws; offering guidance through having clear reporting standards which track the effort made by corporations to monitor the impact of their activities, and address any negative concerns; and providing means of access to remedy for the victims where the business entities fail to respect their human rights. In executing its duty the state will ensure that corporate laws are aligned to the provisions of the constitution; it will offer regulations on corporate reporting to guide corporations on reporting beyond the traditional financial status of the corporation; and it will ensure vertical coherence where its policies are aligned with its International Law obligations. In light of the concerted efforts to implement the 2010 Constitution and particularly the provision making it applicable to juristic persons, the state duty to protect could be aptly summed up in an action plan for business and human rights, outlining the roles and responsibilities of the different actors involved.[11] The state duty includes adjudication of corporate violation of human rights to ensure redress for violation, a task for which the courts can be better prepared, owing to the novelty of the corporate obligation and lack of a settled jurisprudence on the application of the Constitution to corporations.

The corporate responsibility to respect was discussed in Chapter Six. The primacy of the duty of the state to protect against human rights violation does not in any way preclude the responsibility of businesses for their actions. The initial view that only states can infringe human rights is a myth of the past; it is now well acknowledged that corporations have the power to infringe human rights and individuals therefore need protection and recourse to remedy in the event that their rights are violated by corporations. However, moving from the perception of the state as the only bearer of human rights obligations to recognising corporate entities as wrong-doers demands an elaboration of duties both with respect to the right holder and the one who owes the right. Bringing together perceptions of corporations and corporate law on the one hand and human rights on the other, long considered foreign to each other, will not be easy.

Ruggie's corporate responsibility to respect is a vague and indeterminate obligation, described as a social expectation thus casting doubt as to its ability to ensure human rights are upheld. However, by considering certain aspects, Ruggie entrenches the obligation, making it more concrete. He proposes positive aspects to supplement the negative character of the responsibility to respect; the requirement for human rights due diligence, and the need for corporate human rights policies overseen by directors who act as the mind and will of the

[11] See Action Plan in Appendix 1.

corporation. Additionally, by relating the corporate responsibility to specific and concrete human rights instruments and directing states to require that corporations respect all internationally accepted human rights as contained in the international Bill of Rights and ILO Conventions, the responsibility to respect is given a firmer foundation. The responsibility will be effected by incorporating the different proposals in national laws that shape the operation of corporations.

The essence of providing human rights is that they must be protected. This was discussed in Chapter Seven. The existence of human rights creates an obligation upon someone who has the power to provide for them and who should face consequences for failing to provide for them, or for violating them. Enforcement of human rights will ensure that the appropriate tools, mechanisms and institutions exist or are formulated so that human rights find application in reality. In the absence of direct obligation for corporations to respect human rights, this right is contained within the obligation of the state to protect human rights, which would require that the state guarantees the protection of human rights by all, including business entities, and when this is not done, that appropriate sanctions are meted out to recompense the victims. Judicial and non-judicial means play a complementary role in ensuring that human rights are upheld by all. However, the mechanisms are under developed and not adequate to deal with the complaints of corporate violations of human rights, owing to the emerging jurisprudence on the subject which is still in its very early stages. Effort is therefore needed at the level of corporations, the KNCHR and the Judiciary, to develop efficient means and procedures to deal with the subject.

The relationship between human rights and business so far has been by default more than any deliberate effort on the part of the Government or the business entities themselves to ensure such linkage. Chapter Eight proceeds from the argument that legal certainty guarantees enforcement and thus offers the most effective guidance by states for corporate human rights obligations. Amendment of corporate law is further mandated by the novel provisions of the Kenyan Constitution which contemplates a human-rights respecting corporation. To this end, the law that creates the corporation and directs its operations has to be amended to require it to comply with human rights obligations.[12]

[12] See Chapter 8, 8.4.

9.3. Recommendations

An important role for NGOs in advancing the Business and Human Rights agenda

The goal of corporate respect for human rights will be achieved if the State takes the lead in playing its central part, avoiding any direct violation, and ensuring that corporations and other business entities also do not violate human rights. Whereas the law outlining the obligation of juristic persons is well laid out in the Constitution, thereby setting a good foundation for the advancement of the cause of corporate respect for human rights, it may not, by itself be sufficient. In 2013, the African Civil Society Dialogue convened a Regional meeting to gather inputs and recommendations from experts and key stakeholders to inform the development of a comprehensive Toolkit to support national implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). It was noted that compared to other regions, African States had failed to devise action plans to implement the UNGPs, and this failure or lack of interest, both within governments and among business entities, was attributed to an ignorance of the initiatives following Ruggie's extensive research and proposals at the conclusion of his mandate.[13]

Non-Governmental Organisations (NGOs) can play a communication function,[14] creating an awareness of rights and obligations among all the concerned sectors: states, corporations and potential victims of human rights violations, making known what corporate accountability entails in the part of the different stakeholders. NGOs can lobby the Government, charting out the importance of respect for human rights and the dignity of all, convincing the State to make the concern for business and human rights part of its efforts to implement the 2010 Constitution. Through their work, exercising their 'power of persuasion'[15], NGOs can move the Government

[13] This was the general view expressed by African representatives at the African Civil Society Dialogue held in Accra in November 2013. See African Civil Society Dialogue on the National Action Plans Project in Accra, Ghana (25 November 2013) Summary of Participants' Observations at 1, available at *http://accountabilityroundtable.org/wp-content/uploads/2013/12/African-Civil-Society-NAPs-Dialogue-Summary.pdf*, accessed on 10 August 2014.

[14] At the advent of the internationalization of human rights after WWII, the initial draft of the UN Charter was designed to have only a passing reference to human rights. (See William Korey 'Human Rights NGOS: The Power of Persuasion' (1999) 13(1) *Ethics and International Affairs* 151, 153). However by the action of NGOs, human rights became a central component of the Charter, paving way for the deliberations on and adoption of the Universal Declaration of Human Rights in 1948.

[15] Korey, ibid.

to include the business and human rights agenda in the proposed National Action Plan for the implementation of the 2010 Constitution.

In the event that the Government neglects play its role in furthering the cause for business and human rights, NGOs can put pressure on it, recalling the international treaties and conventions it has signed which place on it the duty of overseeing corporations and ensuring that they do not violate human rights, and calling upon it to live up to the obligations it freely took on in signing those human rights instruments. NGOs can serve to remind the Government of the country's past, where corporations violated the human rights of many, calling upon it to fully implement the 2010 Constitution in order to ensure that human rights are not violated as they have been in the past.

NGOs can also influence government policies, contributing to critical discussions by Government on emerging issues that touch on business and human rights. NGOs can play an important role for example in pushing the agenda for justiciability of economic, social and cultural rights a reality, and highlighting the role that corporations and other business entities can play in advancing them, and not contributing to their violation. Through their activism, NGOs can play an important and irreplaceable role in the effort to bring about corporate respect for human rights by pushing for action in ways that may include advancing the following recommendations in order to advance corporate accountability for human rights under the three Pillars of the UN Framework on Business and Human Rights.

9.3.1. State Duty to Protect

The state has a duty to protect the human rights of everyone from abuse. The duty includes an obligation to ensure that third parties, including corporations, within its territory respect the human rights of others. Some recommendations made in this study relating to the duty of states include the following.

First, inspired by the adoption of the progressive 2010 Constitution, Kenya should move on to align its policies with its obligations, creating a seamless synthesis across all relevant departments and agencies that deal with business. This will ensure that they are aware of and implement measures that will promote respect for human rights. Because it guarantees enforcement, legislation is an ideal means to regulate the conduct of companies and ensure they do not violate human rights. However, the state, in its efforts to promote corporate cultures

respectful of human rights, ought to see legislation as just one element of a mixed economy of approaches. Regulation, while not being a solution for every conceivable wrong in society, can play a useful role in ensuring that the economic ends of business are not pursued at a negative cost to the fundamental rights of other stakeholders. The Government will express its commitment to Business and Human Rights through the design and implementation of a human rights action plan specific to business entities. The National Policy and Action Plan and any subsequent initiative drawn up by the Ministry of Justice to implement the Constitution should include a section on business and human rights as a specific category together with accompanying goals, timelines and agencies responsible for implementation.[16] The Kenya Law Reform Commission should include the Companies Act, Nairobi Securities Exchange Act and Penal Code among the laws proposed to be amended to implement the Constitution. The laws will contain particular provisions regarding an enhanced duty of directors to consider the human rights impact of stakeholders in decision-making, a provision on reporting that includes an obligation to report on the human rights impact of the company and modification of requirements of corporate crime and punishment for corporate crimes.

Second, as Kenya embarks on an ambitious development agenda in its Vision 2030 strategy, human rights must be at the very core of its concerns. The national drive in recent years to develop infrastructure of varying kinds and colossal sizes: ports and highways, railways, airports and an oil and gas pipeline among other infrastructure, the investments in agribusiness in collaboration with foreign states and companies among other development goals, should be accompanied by governmental vigilance to ensure protection of human rights. All whose livelihoods are currently sustained on the land and resources required for the new developments should be adequately consulted and appropriately compensated where necessary. The government should require a guarantee that the projects and investments undertaken will not negatively impact human rights.

Consequently, the Government, through the KNHCR should conduct a human rights audit of laws and regulations to ensure that they comply with international human rights standards, and thus contribute to executing the human rights agenda of the Government in line with the Constitution. For purposes of coherence with the national policy for development,

[16] The Tanzanian National Human Rights Action Plan 2013-2017 has a section on Business and Human Rights and can be an example of what can be included in the National Human Rights Policy and Action Plan of Kenya.

Vision 2030, which has already undergone a human rights audit, it is proposed that other national plans and strategies related to trade, business and the private sector[17] be similarly developed with a specific concern to ensure respect for human rights in the respective areas. This audit of relevant laws, policies and strategies related to trade and economic development could be undertaken in the baseline study to outline the human rights' status of the country *vis-a-vis* the UN Guiding Principles on Business and Human Rights. The baseline study will involve the audit of relevant laws, policies and strategies related to business, trade and economic development to establish if they acknowledge the need for respect for human rights. The baseline study will establish the extent to which the relevant government departments and corporations generally, are conversant with the requirements of international human rights standards. This knowledge will inform the interventions put in place to ensure that the State, through its various ministries and departments, and corporations are aware of their obligations; for example, the training and technical advice given by the KNCHR. The Ministry of Justice should put in place measures to ensure that all departments that deal with trade and business report on implementation of human rights, and it should use this information to feed into regional and international reports which it is required to prepare outlining the status of human rights in the country.

Third, intervention by the government should be checked or measured by applying the principles of subsidiarity, the ideal of a free market, human dignity and the common good. The exercise of making laws and regulations and specifically those that affect businesses and elaboration of the role that different government agencies play in the bid to make human rights a reality for all should be reviewed through the lens of these principles which will ensure that there is legal intervention where and whenever needed, and also that any intervention is only in the required measure. To this end, laws enacted should seek to enforce respect for human rights, and not just social responsibility widely understood as corporate philanthropy. The state should facilitate the creation of corporate cultures respectful of human rights by giving appropriate guidance to business entities through laws and regulations and reporting guidelines. Existing laws can be used to promote respect for human rights. However, human rights claims should be seen as claims in their own right, predicated on the dignity of the person, due to all alike and therefore not negotiable. The particular use of the term 'human rights' in relevant laws, corporate policies and plans and government strategies – as opposed to generic terms such as social

[17] Such as the Ministry of Industrialization's Private Sector Strategy.

considerations or corporate social responsibility – is therefore important as it raises the nature of the claims made and demand their more pressing fulfilment.

Fourth, it is proposed that the Companies Act be amended to expand directors' duties to include a concern for the impact of the companies' activities on the human rights of stakeholders – employees, communities and others who may be affected by the decisions and actions of the corporation. For this measure, it is proposed that the concept behind the constituency or shareholder statutes in the USA be adopted to codify directors' duties to stakeholders. However, effort should be made to address the shortfalls of the present Constituency Statutes, which are currently silent on issues which are necessary to give weight to the proposed statutory duties. The provision on directors' duties should provide clarity about the expectation of directors to consider the human rights impact on stakeholders as opposed to mere social effects of the companies' activities. Additionally, the Companies Act should require directors not only to consider but to act on shareholder interests. The provision on directors' duties should be further accompanied by provisions indicating what will happen if the directors fail to function as provided for in the law. The provision should specifically offer guidelines to answer the questions: how does one go about deciding who are the relevant stakeholders among the local communities? What weight ought to be given to shareholder interests compared to the other stakeholders' interests? What action will be taken in the event that stakeholder and shareholder interests conflict, and cannot be reconciled? What standard ought the court to use in determining whether the director duly exercised his duty to safeguard stakeholder interests?

Proposed solutions to the above queries are incorporated in the amendments suggested for the Companies Act under the provisions on Business Review.[18] At present, Kenya does not have any laws that require companies to report on their human rights risks and impacts. The Government has not put out a policy or set out other expectations regarding reporting on how companies address potential and actual adverse human rights impacts. A comprehensive Business Review which includes a report on the human rights impact of the company should be prepared to accompany the directors' annual report. The Business Review provisions in the Companies Act (2015) of Kenya should be further amended to require the directors to report on the human rights impact of the company, thus reflecting the effort made to carry out a human

[18] Chapter 8, 8.4.3.

rights due diligence to prepare for and mitigate against any possible negative human rights impacts and efforts to remedy any grievances resulting from the entity's operations.

Fifth, on reporting and corporate governance requirements, it is recommended that companies be required to apply the Global Reporting Initiative as a guide to reporting. It is proposed that the Cabinet Secretary for the Ministry of Justice, by the powers granted to him under the Companies Act,[19] prepares regulations regarding company reporting. In the regulations, the Cabinet Secretary can require companies to use the Global Reporting Initiative which offers comprehensive guidelines on reporting on social and human rights issues as a guide in preparing the Business Review. The Global Reporting Initiative will offer a useful and comprehensive guide to corporations and other business entities, enabling them to create and sustain corporate cultures respectful of human rights. The resulting Business Review should be audited and presented alongside the financial statements of the company.

Finally, it is also recommended that the listing requirements should make human rights reporting a condition for listing. Commitment to respecting human rights is not an explicit requirement at incorporation or when companies are listed in the Nairobi Securities Exchange. It is proposed that a specific requirement be made in the Nairobi Securities Exchange Act to require the Business Review to be provided during application for listing, outlining the Company's treatment of human rights. It is further recommended that licensing of potential investors for operation in the country is made conditional on respect for CSR and human rights. Corporate social responsibility as understood and applied by corporations in Kenya is not sufficient to underpin corporate obligation for human rights. Owing to the current use of the term among corporations in Kenya where CSR is seen merely as a philanthropic exercise of making corporate donations to worthy causes, it should not be confused with the acceptance of human rights responsibilities.

The specific obligations of directors to consider the impact of human rights on stakeholders, and the reporting obligation of corporations under the Companies Act as proposed, will help to clarify the differences in expectations between CSR and human rights. Current CSR initiatives do not make a concerted effort to refer to human rights. However, owing to the fact that corporations have mostly understood their obligations beyond profit making through the lens

[19] Proposed addition in the companies' general regulations made and in force under the Companies Act, as referred to in Section 3 of the Companies Act 2015.

of CSR, it is recommended that CSR be required as a minimum standard of conduct for any business as part of the licensing requirements for local or foreign business entities wishing to operate in the country. There are no specific national CSR policies, programs or regulations. The Kenya Bureau of Standards has been developing guidelines, and has also proposed the adoption of ISO 26000 as a guide for corporate reporting on social responsibility. It is recommended that together with these, reference be made to best practice international CSR initiatives which companies can adapt to their needs in reporting on their social responsibility.

9.3.2. Corporate responsibility to respect

The corporate responsibility to respect will ensure a balance between free market unfettered by government regulation and the creation of a corporate human rights culture within business entities. The following proposals are made for companies to create a human rights-compliant culture within the organisation:

First, every corporation should be required to conduct a human rights due diligence to ascertain how their operations impact the communities they relate with and which particular human rights are likely to be affected.[20] The findings of the due diligence should be integrated into corporate structures and management systems through human rights policies. The business entity ought to have a public statement expressing its commitment to identify, prevent or mitigate human rights risks, and remedy any adverse impact it has caused, or contributed to.

Using the UN Guiding Principles on the corporate responsibility to respect, the KNCHR as advisor to business entities can offer guidance or give advice to business entities, proposing considerations they can apply for the design of human rights policies. The development of a locally adapted tool such as the Danish Tools is recommended for a systematic and effective dissemination of advice to corporations on their corporate obligation for human rights.[21] All policies must include the explicit use of the term human rights, and a commitment to respect all human rights and international human rights standards. This commitment will be verified in the Business Review reporting. It should be noted that although CSR policies and their application

[20] Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' **(**21 March 2011) A/HRC/17/31 [UN Guiding Principles] 19 (Commentary on para 19).

[21] The Danish Institute for Human Rights (DIHR) and The International Corporate Accountability Roundtable (ICAR) 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (June 2014).

set a good foundation for appreciation of a duty beyond profit making, CSR policies should not be confused with human rights policies, unless particular effort has been made to incorporate human rights obligations into a CSR policy. Human rights policies may be found in the business entity's statements of business principles, in codes of conduct or other values-related literature, in stand-alone statements on company websites or in other public corporate responsibility documentation.[22] The policy should be adopted by the directors, committing the company to respect international human rights standards.

Second, the directors of the company or other business entity, as guardians and decision makers, ought to be held responsible to ensure that laws, regulations and guidelines set to safeguard human rights are upheld. The Companies Act (2015) of Kenya provides a general duty of care and skill which is too broad and may not be adequate to enable directors to see how to fulfill their duties so as to ensure respect for human rights in their companies.[23] A proposal has been made to specifically require directors to consider the interests of stakeholders in decision-making.[24] Directors, as managers of potential risks of the business entity, should be required to establish a monitoring and evaluation system to recognise risks that are harmful to the company, including human rights risks, and to address them early. The reporting requirement in the Companies Act (2015) requires directors to provide in their report a Business Review outlining social and community issues.[25] It has been proposed that this provision be amended to specifically include human rights impacts of the company. The effectiveness of directors in ensuring that the business review is carried out and presented appropriately will be assessed through the report produced, approved by the directors and verified by an independent party.

Third, reporting should be applied as a means to ensure that the existing obligations are well understood and complied with. An elaborate reporting process required for presenting the Business Review will enable business entities to develop a culture of respect for human rights as

[22] United Nations Global Compact Office and Office of the United Nations High Commissioner for Human Rights, 2011 A Guide for Business How to Develop a Human Rights
Policy available at <*http://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pdf*>, accessed on March 2014.

[23] Section 106 makes provision for a duty of directors to exercise reasonable care, skill and diligence. Some considerations to have in mind when proposing what an ideal guide for directors on their human rights responsibilities: the nature of the duties, and whether they would be the same as duties to shareholders; the basis of the duties, whether tort or corporate law, and which stakeholders the duties would be owed to. (Page 14 on Overarching Principles).

[24] Chapter 8, 8.4.3.

[25] Section 371 (5)(b).

it offers a means to establish, evaluate and review the operations of the business regularly. A recommendation is made that companies be required to refer to the Global Reporting Initiative (GRI), and use it as a guide for their reporting on activities, issues or concerns that could result in significant economic, environmental and social impact.

A summary of the GRI process to be applied in reporting on exercise of corporate human rights obligations:

a) Identify significant aspects which are the topics considered potentially important to show impact of the organisation's activities.[26]
b) Determine boundaries or the sphere of influence, delineating exactly where the impacts occur, whether within or outside the organisation.[27]
c) Conduct a qualitative and quantitative assessment of the significant aspects to determine materiality and the need for reporting of each relevant aspect, assess each topic on its influence on stakeholder assessments and decisions' and effect on the organisation's economic, environmental social and human rights impacts.[28]
d) Engage with stakeholders, both internal, such as employees, suppliers and external, such as communities affected by the operations of the business entity, in a systematic, two-way and objective dialogue, either continuously or specifically for purposes of reporting if there was no need to engage them earlier.[29]
e) Validate the report, giving a reasonable and balanced analysis of the potential impacts of all possible material aspects, both positive and negative, with the aim of finalising the report content.30
f) Require the senior decision makers of the organisation, the directors, to approve the report before its publication.
g) Review the report after publication, identify material aspects and review stakeholder feedback given in the previous period with the aim of better preparing for the current reporting cycle.
h) Carry out independent third party verification of the report.
i) The state should require a compliance report to be kept and submitted by the company whenever it requires a permit or approval from the state.

9.3.3. Access to Remedy

The access to remedy goal should aim to ensure that there are means for victims of corporate human rights abuses to seek redress; that victims know and can access them through simple

[26] Global Reporting Initiative 'Sustainability Reporting Guidelines: Implementation Manual' 33.
[27] Ibid.
[28] Ibid at 35.
[29] Ibid at 35.
[30] Ibid at 38.

procedures and at non-prohibitive costs. Access to remedy should be through an ideal mix of judicial and non-judicial grievance mechanisms.

For complaints that raise issues of criminal law, non-judicial mechanisms are not an option and these complaints ought to be addressed through judicial means.[31] Upon investigation of a complaint referred to it, the KNCHR may refer the matter to the Director of Public Prosecutions or other relevant authority when the findings disclose a criminal offence.[32] For all other grievances, recourse should first be had to the company operational level grievance mechanisms where available, or to the KNCHR, and only then to the courts, if still unresolved. The KNCHR Act provides that the KNCHR shall investigate complaints and provide appropriate redress where necessary, or make recommendations for improvement of the functioning of state organs.[33] The Commission may also make recommendations it deems necessary to the complainant, governmental agency or other entity of other means it proposes for settling a matter referred to it or for obtaining relief.[34] The state organ, public office or organisation is expected to make a report to the Commission outlining the measures it will take, or has taken in response to the complaints made against it.[35] Failure of the violator of human rights to remedy the breach will be reported to the National Assembly for it to take action[36] and a finding that person, an officer or employee of the state organ, public office or organisation was guilty of misconduct, shall be reported to the relevant authority.[37]

As the national human rights institution, the KNCHR's role is to support both government and business to quicken the uptake of responsibilities under the UN Guiding Principles as a way of enhancing realisation of human rights. The KNCHR is expected to review corporate laws, regulations and policies with a view to enhancing their human rights responsiveness.[38] To this end, the KNCHR should submit regular reports to parliament for deliberations on proposed actions and possible laws or amendments that would bring about the realisation of corporate obligation for human rights, and to inform the legislative mandate of the

[31] Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/11/13(22 April 2009) para 91.
[32] Section 41 of the KNCHR Act.
[33] KNCHR Act Section 8(d) – (e).
[34] Section 41(c).
[35] Section 42.
[36] Section 42(4).
[37] Section 44.
[38] Ibid, see the Economic, Social and Cultural Department.

government on the subject. This will result in the harmonisation of national legislation, regulation and practices with the international human rights instruments to which the state is a party. The KNCHR should also follow up the response of government, government ministries and businesses to issues raised and recommendations made on human rights obligations. In this regard, the KNCHR provides training on business and human rights; and monitors the conduct of business and provides feedback to government and businesses. It is proposed that a more concrete way of ensuring the uptake of the Guiding Principles is to incorporate them in the Action Plan for implementing the Constitution, outlining the specific actions to be carried out by the different role players, having the Ministry of Justice and Constitutional Affairs as the custodian department in charge of ensuring implementation of the Plan, and the KNCHR as the overall overseer playing the role of advisor and monitor as it is already doing.

A proposal is made for the KNCHR, in its advisory role to the government, to initiate dialogue with the relevant government departments and recommend the use of international standards in negotiating terms with potential investors.[39] An example is the United Nations Principles for responsible contracts: integrating the management of human rights risks into state-investor contract negotiations: guidance for negotiators (the Guide).[40] These Principles are outlined in an addendum to the UN Guiding Principles on Business and Human Rights[41] and their application will enable the state to integrate human rights considerations into contracts, thereby making human rights demands on potential foreign investors. The Guide refers to ten principles, their key implications and a recommended checklist of issues that should be considered in the negotiations.[42] This Guide ought to be applied by the relevant government departments when reviewing all potential investments and the KNCHR can monitor to ensure it is applied appropriately. In view of the ongoing wave of foreign investments in the agricultural sector, in mining, infrastructure and potential oil and gas production, such focused negotiation is essential if the dignity of the person is not to be disregarded in the search for economic gain and prosperity.

[39] For example the United Nations 'Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators' A/HRC/17/31/Add.3 (25 May 2011) para 15.The Danish Institute for Human Rights in consultation with the ICC Working Group on Business and Human Rights for the International Coordinating Committee (ICC) of NHRIs, 'Business and Human Rights: A Guidebook for National Human Rights Institutions' (2013) at 30 gives State-Investor Contracting as an example of an area where policy coherence can be enhanced.
[40] The UN Principles for responsible contracts, ibid.
[41] Ibid.
[42] Ibid at 7.

To ensure that KNCHR plays its part effectively as a National Human Rights Institute (NHRI), it is recommended that the staff be continuously capacitated to deal with complaints of corporate human rights violations and to assist victims to obtain redress. It is also recommended that the government ensures that it is well funded and financially independent to be able to implement its mandate under the Constitution.

On the judicial mechanisms for seeking redress of corporate human rights violations, a recommendation is made to amend the Penal Code to make it suitable to applying corporate criminal liability to hold corporations liable for human rights violations. Courts in Kenya have held corporations as legal persons liable for crimes in causes of action brought under the Penal Code. Whereas corporate criminal liability presents a possible route for the punishment of corporate violation of human rights, further development of criminal law is proposed to make the law suitable for addressing corporate human rights violations. The current sentences under the Penal Code should be developed so that they serve the purpose of deterring business entities from repeating the offending actions[43] and offering redress to the victims of abuse. Examples of alternative punishment proposed to be included in the Penal Code are: restricting the place where the company can operate, banning the company from procurement opportunities, requiring the offending company to publicise the sentence or punishment given as a means of naming and shaming, confiscation of property and winding up. It is further recommended that the concept of a corporate *mens rea* or corporate intention to commit a crime be developed to make it applicable to corporations. Specific developments to the Penal Code include a provision that corporate *mens rea* will be established by proving that company policy, expressly stated or implied,[44] supported the action or actions that caused harm. A policy should be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.[45] Corporate culture can be applied to determine that the corporation was aware of the offending action.[46] Additionally, the corporate veil cannot be applied to shield persons responsible for the actions

[43] Ibid. Under the US Sentencing Guidelines Manual, para. 8D1.4(c), an offending company can be placed on probation, and the court can require it to put in place compliance and ethics programs and report on their implementation.
[44] Article 46C(3).
[45] Ibid.
[46] Article 46C(4).

resulting in violation of human rights,[47] meaning that individuals will be held responsible should they instigate, contribute to or condone action that results in violation of human rights.

Finally, it is noted that the novelty of the human rights situation created by the 2010 Constitution, the inclusion of economic, social and cultural rights, and the provision for a horizontal application for the Bill of Rights to juristic persons, will require the Judiciary to play an important role in interpreting the provisions of the Constitution specifically with regard to business entities, and also in providing adequate remedies for victims of violations. As provided by the 2010 Constitution, the exercise of any power, political or economic, whether arising from the nature of relationships between employers and employees, or business entities and the communities in which they operate, must be subject to the provisions of the Bill of Rights whose administration is entrusted to the courts. An independent judiciary will play a major role in ensuring that the Bill of Rights, which defines principles fundamental to the creation of an open and democratic society, is respected.

To augment the ongoing efforts to create a renewed and vibrant Judiciary, ridding it of the negative public image arising from allegations of corruption, specific training for judicial officers on Kenya's human rights obligations under International Law and the standards related to business and human rights is recommended, consolidating and applying best practice and legal analysis from other jurisdictions that have similar provisions in their Constitutions in order to provide a pool of comparable lessons and practices to draw from. In establishing the meaning of the horizontal application of the Bill of Rights to incorporate and unincorporated persons under Article 20 of the Constitution, it will be important for the judiciary to refer to jurisdictions with a similar horizontal application of the constitution to the private sphere in order to get examples to emulate. The Judiciary Training Institute will play an important teaching or capacity-building role to equip judicial officers with the requisite knowledge and skills to deal with this emerging field.[48] In the absence of such supporting institutions or functions, the transition from the old constitution to the new one might lack substance.[49]

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[47] Article 46C (6).

[48] Training offered at the Institute include courses in substantive law, evidence and procedure and, where appropriate, subject expertise see http://www.judiciary.go.ke/portal/page/judiciary-training-institute accessed on 6 April 2015.

[49] See Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (October 16, 2014) University of Fort Hare, Inaugural Distinguished Lecture Series on the views of the Chief Justice on the value and importance of the Institute: 'The Judiciary Training Institute (JTI) must become our institution of higher learning, the nerve centre of our progressive jurisprudence. JTI will co-ordinate our academic

9.4. Way Forward

A proposal is made to institutionalise the UN Guiding Principles and at the same time give effect to Article 20 of the Constitution, as contained in the proposed Action Plan for Business and Human Rights attached as Appendix 1. Moral obligations[50] as those that ensue from Ruggie's findings and the UN Guiding Principles have to be institutionalised through the state[51] in order to gain legitimacy and become enforceable. At the same time, implementation of the 2010 Constitution ought to provide a spur for the state to amend the Companies Act to make it require corporate accountability for human rights violations, as required under the horizontal application provision of the Constitution.

The Commission charged with the implementation of the Constitution, the CIC, developed a Public Service Delivery (the Change Management Framework) among the administrative procedures and institutional structures for implementing the Constitution.[52] The Change Management Framework involves development of an action plan that concretely and logically identifies the sequence of activities and responsible actors to act as an implementation roadmap. A similar framework for the implementation of the Constitution in the private sector is proposed. The proposals are made to be fulfilled by the relevant government departments and agencies as part of the on-going efforts to implement the 2010 Constitution.

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networks, our networks with progressive jurisdictions, our training by scholars and judges, starting with our own great scholars and judges. In our training to breathe life into our constitution our jurisprudence cannot be legal-centric; it must place a critical emphasis on multi-disciplinary approaches and expertise.'

[50] Contrasted with legal obligations; the UN Guiding Principles do not give rise to any legal obligations.

[51] See Surya Deva 'Treating Human Rights Lightly: A Critique of the Guiding Principles' Complicity in Undermining the Human Rights Obligations of Companies' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 78-104.

[52] See Commission for the Implementation of the Constitution Quarterly Report July - September 2013, 11.

APPENDIX

Action Plan for Business and Human Rights

The objective of the proposed Action Plan on Human Rights and Business is to offer a means to facilitate the integration of human rights obligations in business entities. It offers a guide of the actions that the state can take in playing its oversight role. The Government of Kenya has responsibility to protect against violation of human rights, and this duty includes an obligation to ensure that human rights are not violated by anyone, including corporations and business entities. The Action Plan aims to provide a roadmap to offer guidance for corporations on how to execute their responsibility to respect.

Appreciation of the Constitution of Kenya as a change driver for corporate change

The present situation in Kenya has the advantage that the complete absence of a business and human rights component in the national policy for implementing the Constitution offers an opportunity for a comprehensive and action plan to be developed and integrated into the national strategy and action plan. The obligations and responsibilities of all parties involved are consolidated plan to avoid the efforts being scattered and subsumed in numerous departments of government that may have a role to play.[1]The aim of the proposed action plan is to make expectations on the question of human rights clearer. Towards this end, the democratic values dignity, equality and freedom, highlighted in the 2010 Constitution as national values and principles of governance[2] ought to be recognised as part of the legal system. These principles should be applied in the interpretation of the Constitution and the enactment, application and interpretation of any law, giving the courts a fundamental duty to use them to give meaning to cases before them and in doing so guide the private sector to develop a better understanding of its role in the protection of human rights.

In projecting its future and the plan for growth and improvement, the Government espouses a Human Rights Based Approach to development in the Constitution, highlighting principles that should guide all government planning.[3]The proposed action plan for implementing the Constitution's provisions that relate to corporations will outline what could be

[1] Human rights and the UK Private Sector op cit at 59.
[2] Article 10.
[3] Vision 2030 Second Medium Term Plan 2013 – 2017 at 106.

done to ensure that the human rights based development intended by the state finds meaning in business entities, and impacts the lives of individuals, including the most vulnerable. The proposed action plan brings together the different players, outlining their roles and proposing practical means of ensuring that human rights duties and obligations are understood and adhered to by the different parties.

Clearer guidance and support for business and human rights will be given in the form of legal certainty [the bearing of relevant corporate laws on human rights, jurisdiction and accessibility of courts, access to alternative avenues for access to remedy] and a policy framework that is clear and coherent and informed by the government's human rights obligations. Other useful means of ensuring corporate respect for human rights include withholding support from companies that fail to comply with required guidelines[4](by pegging the issuance of necessary operational licenses on the entity's compliance with human rights) and a clear reporting mechanism outlining what is to be reported and how. In a number of jurisdictions, mostly in Europe, governments have attempted to develop action plans to implement the UN Guiding Principles in their jurisdictions.[5] In making the proposal below for an action plan that is applicable in the context of Kenya, reference is made to the National Policy and Action Plan,[6] drafted to implement the 2010 Constitution and a toolkit prepared by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable.

Ownership of the action plan

The process of developing the action plan for implementation of the UN Guiding Principles for Business and Human Rights must involve all relevant stakeholders; stakeholder approval is important to legitimise the action plan once finalised and render it credible.[7] Views and suggestions must be solicited from all stakeholders, making it necessary to conduct a

[4] Ibid at 63.
[5] The Danish Institute for Human Rights (DIHR) and The International Corporate Accountability Roundtable (ICAR) 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (June 2014) 11.
[6] Office of the Attorney General and Department of Justice 'National Policy and Action Plan for Human Rights' Unnumbered Sessional Paper of 2013 available at *http://justice.go.ke/images/downloads/Sessional-Paper-National-Policy-and-Action-Plan-For-Human-Rights.pdf*, accessed on 7 August 2014. (Document on file with author)
[7] Resolution to Act 'National Action Plan Monitoring and Evaluation Toolkit' **(**October 20, 2013) 15.

'stakeholder-mapping' exercise prior to conducting the baseline study, to ensure that all relevant persons and entities are involved.[8]

Although all relevant stakeholders in the business and human rights discussion should be involved in the development of the action plan, for purposes of clarity and focus, it is important that a specific entity or government department takes ownership of the process. In a meeting of civil society leaders from African countries to dialogue on the question of business and human rights,[9] the general view held representing the African perspective was that it was preferable to have the NHRIs take charge of putting together the national action plans for implementing the UN Guiding Principles on business and human rights rather than having a government department do it. This was because being champions of human rights; NHRIs had the necessary experience in developing action plans in other areas and therefore had the expertise to lead the process also in the area of business and human rights.[10] It is through institutions that compliance with norms is effected; there must be institutions to ensure that the Guiding Principles are put into practice in the specific state contexts.[11] The KNCHR would be the best example of such an institution in Kenya.

Alternatively, if for reasons of inadequate capacity or any other challenges the KNCHR were unable to take up this leadership role, it could be taken by a government ministry or department that is central in the business and human rights discussion, or by a representative number of the departments most linked with the subject. An ideal entity in Kenya would be the Office of the Attorney General and the Department of Justice, which took charge of developing the current National Policy and Action Plan for Human Rights. The Department of Justice would be the ideal entity on grounds that it has already undertaken the human rights assessment on a national level in the other fields and it would therefore be ideal to add the perspective of business to the existing plan.

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[8] Ibid at 13.

[9] African Civil Society Dialogue held in Accra, Ghana on 25 November 2013, as part of its African Regional Civil Society Convening on Human Rights and Business. Twenty-one civil society leaders from 13 different African countries attended. See highlights of meeting in Joanne Bauer Presentation on behalf of Centre for Applied Legal Studies, Wits University (CALS) & Partners to the UN Working Group on Business and Human Rights, Open Consultation on National Action Plans on Business and Human Rights Geneva (20 February 2014)

[10] DIHR and ICAR Toolkit op cit note 5 at 63.

[11] Carlos Lopez, 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' in Surya Deva & David Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 58-77.

An action plan that identifying a sequence of activities and responsible actors to act as an implementation road map

I. STATE DUTY TO PROTECT	Proposals for increasing corporate responsibility and accountability for human rights	Responsible Agencies and Government Departments
1. Human rights audit of laws, regulations and strategies related to trade/business/the private sector to ensure compliance with human rights: The state duty to protect the human rights of everyone from abuse includes obligation to ensure that third parties, including corporations, within its territory respect the human rights of others. This duty will find immediate application in the Government's efforts to implement the 2010 Constitution.	1) Human rights should be at the core of implementing Vision 2030 strategy. Governmental vigilance to ensure current and upcoming development projects with foreign states and companies involving infrastructure including ports and highways, railways, airports, an oil and gas pipeline among other infrastructure, investments in agribusiness do not negatively impact human rights. 2) The Proposed National Policy and Action Plan and any subsequent initiative drawn up by the Ministry of Justice to implement the Constitution should include a section on business and human rights as a specific category together with accompanying goals, timelines and agencies responsible for implementation.[1] 3) Audit of national plans and strategies related to trade and economic development to be undertaken in the baseline study to outline the human rights status of the country *vis a vis* the UN Guiding Principles on Business and Human Rights.	a) The Ministry of Justice will be the custodian department in charge of ensuring implementation of the Plan. The Ministry should conduct a stakeholder mapping exercise to identify and involve all relevant stakeholders in the baseline study. b) The KNCHR will act as the overall overseer playing the role of advisor and monitor in the implementation of the Action Plan. c) The KNHCR to conduct a human rights audit for all national strategies for trade and private sector growth such as the Ministry of Industrialisation's Private Sector Strategy to ensure they are drafted in line with the 2010 Constitution. d) The Ministry of Justice to ensure that all departments that deal with trade and business report on implementation of human rights in their operations.
2. Legal measures to ensure corporate respect for human rights	1) Legislation as an ideal means to regulate the conduct of companies and ensure they do not violate human rights; and to facilitate the creation of corporate cultures respectful of human rights by giving appropriate guidance to business entities.	a) The Ministry of Justice and Constitutional Affairs Customer Service Delivery Charter includes the harmonisation of laws with the Constitution as one of the core functions linked with the review process.

[1] The Tanzanian National Human Rights Action Plan 2013-2017 has a section on Business and Human Rights

	2) Bring together all laws that deal with trade or are business related and ensure that they express concern for human rights and are aligned with the international instruments and treaties the Government has signed.[2] 3) This law-making intervention by the government to be checked or measured by applying the principles of subsidiarity, the ideal of a free market, human dignity and the common good. 4) The particular use of the term human rights in relevant laws, corporate policies and plans and government strategies is therefore important as it raises the nature of the claims made and demands their fulfilment. 5) Laws should seek to enforce respect for human rights, and not social responsibility understood as corporate philanthropy. 6) Proposed amendment to Companies' Act to comply with the Constitution: a) Redefine directors' duties to include duty to other stakeholders: It is proposed to adopt the concept behind the constituency or shareholder statutes in the USA but addressing the following short falls" i. Require directors to consider the "human rights impact" of the companies' activities on stakeholders as opposed to merely "social issues"; ii. Require directors not only to consider but to act on	b) The KNCHR - under the Paris Principles, NHRIs ought to play an advisory role to governments, and in this role they can give opinions, recommendations or make proposals on legislative provisions, and make recommendations necessary to align them with human rights requirements, including international human rights instruments signed by the government.[3] c) The Kenya Law Reform Commission should include the Companies Act among the proposed laws required to be amended for the implementation of the Constitution. d) The corporations and business entities will be responsible for preparing the Business Review, which will be audited to ensure it reflects an accurate picture of the human rights compliance of the corporation. e) The sanctions applied against directors for violation of their obligations have to be stricter than has been the case until now.

[2] A list of all regional and international instruments the government has signed can be accessed at the Kenya Law Treaties and Agreements Database available at *http://kenyalaw.org/treaties/treaties/types/Treaties,* accessed on 7 April 2015. All laws that make provision for human rights should be identified and the obligations that exist under these laws clarified.

[3]Paris Principles [Principles Relating to the Status of National Institutions: Competence and Responsibilities] A/RES/48/134.

	shareholder interests, iii. Specify punishment for the directors' failure to comply with the law. iv. Offer guidelines on the following: • How to decide who are the relevant shareholders among the local communities; • What weight to give to shareholder interests compared to stakeholder interests; • What action to be taken in the event that stakeholder and shareholder interests conflict and cannot be reconciled? • What standard court will use in determining whether the director duly exercised his duty to consider stakeholder interests. b) Amend the Business Review provisions to require the directors of listed companies to report on the human rights impact of the company, reflecting the effort made to carry out a human rights due diligence to prepare for and mitigate against the possible negative human rights impacts and efforts to remedy any grievances resulting from the entity's operations. The resulting Business Review should be audited and presented along with the financial statements of the company.	
3. Reporting and corporate governance requirements	1) In line with the spirit of the 2010 Constitution, amend the Companies Act 2015 to expressly require reporting on human rights 2) Further clarity will be provided by applying the Global Reporting Initiative as a Guide to Reporting 3) Make human rights reporting a condition for listing: Amend NSE Act to require the Business Review to	a) The Cabinet Secretary for the Ministry of Justice by powers under the Companies Act should be required to prepare regulations regarding company reporting. b) In the Regulations, propose the use of the Global Reporting Initiative which offers comprehensive guidelines on reporting on

	be provided prior to listing outlining the Company's treatment of human rights. 4) Make licensing conditional on respect for CSR and Human Rights 5) Propose best practice CSR Guidelines for adoption by companies: The Kenya Bureau of Standards has been developing guidelines, and has also proposed the adoption of ISO 26000 as a guide for corporate reporting on social responsibility. Together with these, reference can also be made to international CSR initiatives which companies can adapt to their needs. 6) Align existing CSR frameworks of companies with the Guiding Principles.	social and human rights issues as a guide in preparing the Business Review. c) A compliance report should be kept by the corporation and required to be submitted by the company whenever it requires a permit or approval from the state.
II. CORPORATE RESPONSIBILITY TO RESPECT		
1. Proposal for companies in creating a human rights compliant culture within the organisation: The corporate responsibility to respect will ensure the creation of a corporate human rights culture within business entities.	1) Companies should carry out human rights due diligence to ascertain how they impact stakeholders.[4] Integrate the findings of human rights due diligence into corporate structures and management systems through human rights policies. 2) Drafting a public human rights policy statement expressing company's commitment to identify, prevent or mitigate human rights risks, and remediate any adverse impact it has caused or contributed to. 3) All policies must include an explicit commitment to respect all human rights 4) Human Rights Policies may be located: • in the business entity's statements of business	a) Corporations will be in charge of ensuring they devise human rights policies. Clear management responsibility shown by adoption by the directors b) Using the UN Guiding Principles on the corporate responsibility to respect, the KNCHR as advisor to business entities can offer a guide or give advice to business entities on designing a human rights Action Plan . **c)** Business Review prepared by the companies should be verified under the normal auditing processes.

[4] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework A/HRC/17/31 (Guiding Principles) 19 (Commentary on Para 19)

	principles • in codes of conduct or other values-related literature • in stand-alone statements on company websites or in other public corporate responsibility documentation.[5]	
2. Directors as guardians of human rights	The directors as the decision makers of the company ought to be held responsible to ensure that laws, regulations and guidelines set to safeguard human rights are upheld. a) A proposal has been made amend Companies' Act to specifically require the directors to consider the interests of stakeholders in decision-making. b) A proposal has been made to amend the Business Review to specifically report on human rights impacts of the company.	Directors, as managers of potential risks of the business entity, should be required to: a) Endorse the proposals made to create a corporate culture of human rights within the corporation; b) Establish a monitoring and evaluation system to recognise risks that are harmful to the company, including human rights risks, and to address them early.
3. Tracking and reporting performance	A recommendation for companies be required to use the Global Reporting Initiative (GRI) as a guide for their reporting on activities, issues or concerns that could result in significant economic, environmental and social impact.[6] A summary of the GRI process to be applied in reporting and preparing the Business Review: 1) Identify significant aspects - topics that reflect the impact of the organisation's activities.[7] 2) Determine sphere of influence; delineate exactly where the impacts occur, whether within or outside	a) The state can use reporting requirement as a means to ensure that the existing obligations are well understood and complied with and to develop a culture of respect for human rights. b) Directors of corporations will ensure that reporting on human rights is carried out as required under the Business Review.

[5] United Nations Global Compact Office and Office of the United Nations High Commissioner for Human Rights, 2011 A Guide for Business How to Develop a Human Rights Policy available at <*http://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pdf*>, accessed on 1 March 2014

[6] This would be in line with the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD), National Investment Policy Guidelines which propose that governments encourage compliance with high standards of responsible investment and corporate behaviour, through incorporating existing standards into regulatory initiatives, and/or turning voluntary standards (soft law) into regulation (hard law).

[7] Global Reporting Initiative 'Sustainability Reporting Guidelines: Implementation Manual' 33

	the organisation.[8] 3) Conduct a qualitative and quantitative assessment of the significant aspects to determine materiality and the need for reporting of each relevant aspect; assess each topic on: • influence on stakeholder assessments and decisions • effect on the organisation's economic, environmental and social and human rights impacts. 4) Engage with stakeholders, both internal, such as employees, suppliers and external, such as communities affected by the operations of the business entity, in a systematic, two-way and objective dialogue, either continuously or specifically for purposes of reporting if there was no need to engage them earlier.[9] 5) Validate the report, giving a reasonable and balanced analysis of the potential impacts of all possible material aspects, both positive and negative, with the aim of finalising the report content.[10] 6) Require the senior decision makers of the organisation, the directors, to approve the report before its publication. 7) Review the report after publication, identify material aspects and review stakeholder feedback given in the previous period with the aim of better preparing for the current reporting cycle. 8) Carry out independent third party verification/audit of the report.	

[8] Ibid
[9] Ibid p35
[10] Ibid p38

	9) The state should require a compliance report to be kept and submitted by the company whenever it requires a license/permit or approval from the state.	
III. ACCESS TO REMEDY		
a) Proposals for procedure for access to means of redress Access to remedy goal aims to ensure that there are means for victims of corporate human rights abuses to seek redress, that victims know and the can access them e.g. owing to simple procedures and non-prohibitive costs. Complaints will not normally be framed in human rights terms.[11] This also calls for vigilance on the part of the business entities to treat all complaints that might negatively impact on human rights seriously, whether or not the complaints were properly formulated in human rights terms.	1) Upon investigation of a complaint referred to it, where findings disclose a criminal offence the KNCHR will refer the matter to the Director of Public Prosecution.[12] 2) For all other grievances, recourse should first be had to the company operational level grievance mechanism, then to the KNCHR and to the courts if still unresolved. Encourage operational level dispute resolution mechanisms. Advantages of internal company-level mechanisms include: • The familiarity of the contesting parties and the mediator/corporation would mean that they know more about the circumstances giving rise to the conflict than an outsider such as the court would, and therefore there is an assumption that they would be keener on arriving at an amicable solution that reduces the tensions created by the dispute • It makes possible an analysis of company operations to pick out recurring trends to identify and correct negative practices.[13] • The direct nature of the solution also presents an immediate means of addressing negative impacts	a) The KNCHR will investigate complaints and provide appropriate redress where necessary, or make recommendations for improvement of the functioning of state organs.[19] b) At the company level, the stakeholder relationships committee appointed under the proposed amended Companies Act will have the mandate to: i. Prepare the business review outlining the human rights policies of the company and action taken to conduct an impact assessment, to mitigate and remedy any grievances resulting from its activities. ii. Identify the principal stakeholder risks and uncertainties facing the company, including human rights risks iii. Establish a monitoring and evaluation system to recognise risks that are harmful to the company, and to address them early. iv. Establish and provide information about stakeholders with whom the company has contractual or other arrangements which are

[11] Ibid para 31.
[12] Section 41 of the KNCHR Act. See also Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/11/13(22 April 2009) para 91
[13] Ibid para 29.

	thereby containing the resulting harm.[14] 3) The Commission may also make recommendations it deems necessary to the complainant, governmental agency or other entity of other means it proposes for settling a matter referred to it or obtaining relief.[15] 4) The state organ, public office or organisation is expected to make a report to the Commission outlining the measures it will take, or has taken in response to the complaints made against it.[16] 5) Failure of the violator of human rights to remedy the breach as proposed will be reported to the National Assembly for it to take action[17] and a finding that person, an officer or employee of the state organ, public office or organisation was guilty of misconduct shall be reported to the relevant authority.[18]	essential to the business of the company and any company matters that are likely to significantly impact them; v. Develop stakeholder policies and particularly the human rights policy of the company and develop board procedures regarding communication of the policies and policy statements vi. Provide periodic information about stakeholder policies and the extent to which the policies have been successfully implemented.
b) Non Judicial mechanism for access to remedy: the KNCHR	To ensure that KNCHR plays its part effectively as a NHRI, it is recommended that: 1) The staff be continuously capacitated to deal with complaints of corporate human rights violations, and to assist victims to obtain redress. 2) The government ensures that it is well funded and financially independent to be able to implement its mandate under the Constitution, 3) Submit regular reports to parliament for deliberations to inform the legislative mandate of the government	As the national human rights institution, the KNCHR supports both government and business entities to quicken the uptake of responsibilities under the UNGPs as a way of enhancing realisation of human rights.

[19] KNCHR Act Section 8(d) – (e)
[14] Ibid, see section on 'State -based non-judicial grievance mechanisms', Commentary on para 29.
[15] Section 41(c)
[16] Section 42
[17] Section 42(4)
[18] Section 44

	on the subject. 4) Follow up the response of government, government ministries and businesses to issues raised and recommendations made on human rights obligations. 5) Provide training on business and human rights; monitor the conduct of business and provide feedback to government and businesses.	
c) Judicial remedy: applying corporate criminal liability to hold corporations liable for human rights violations Corporations in Kenya have held corporations as legal persons liable for crimes in courses of action brought under the Penal Code. Proposed developments of criminal law to address corporate human rights violation:	a) Develop the current sentences under the Penal Code to serve the purpose of punishing business entities for violation of human rights, deterring them from repeating the offending actions.[20] b) Amend Penal Code to include the following alternative/additional punishments for corporate violators of human rights: • Restricting the place where the company can operate, • Banning the company from procurement opportunities • Requiring the offending company to publicise the sentence or punishment given as a means of naming and shaming • Confiscation of property • Winding up c) Developing the concept of a corporate mens rea or corporate intention to commit a crime: • Corporate mens rea will be established by proving that company policy, expressly stated or implied,[21] supported the action or actions that caused harm.	The Kenya Law Reform Commission to undertake the process of amending the Penal Code.

[20] Ibid. Under the US Sentencing Guidelines Manual, para. 8D1.4(c), an offending company can be placed on probation, and the court can require it to put in place compliance and ethics programs and and report on their implementation.
[21] Article 46C(3).

	• A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.[22] • Corporate culture can be applied to determine that the corporation was aware of the offending action.[23] d) The corporate veil cannot be applied to shield persons responsible for the actions resulting in violation of human rights,[24] meaning that individuals will be held responsible should they instigate, contribute to or condone action that results in violation of human rights.	
d) Capacity of judicial officers	Specific training for judicial officers on Kenya's human rights obligations under International Law and the standards related to business and human rights is recommended, consolidating and applying best practice from other jurisdictions in order to provide a pool of comparable lessons and practices to draw from.	Judicial Training Institute

[22] Ibid.
[23] Article 46C(4).
[24] Article 46C(6).

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