

**EXAMINING THE RESPONSIBILITY OF THE KENYAN STATE FOR NON-STATE
VIOLATION OF HUMAN RIGHTS**

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DECLARATION

I **KELLEN GICUKU NJUE** do hereby declare that this is my original work and that it has not been submitted for a degree in any other university.

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This Thesis has been submitted for an examination with my approval as the University Supervisor.

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ABSTRACT

Development of Human rights law adopted a state-centred approach based on the powerful nature of the state. The state was seen as the major violator of human rights due to the substantial role that it played in provision of services to its populace. However, the situation has changed whereby very powerful non-state actors with significant potential to violate human rights have evolved. The human rights law seems to still over-rely on the doctrine of state responsibility to realize human rights.

Though the applicable national and international legal framework recognizes that non-state actors are required to respect human rights, the Kenyan policy and institutional framework to ensure compliance focuses on the state and there is need for improvement.

Despite the duty of none state actors to respect human rights, the state has the primary responsibility to ensure that people within its jurisdiction enjoy human rights.

DEDICATION

This study is dedicated to my husband John Kimathi, and to my children Evans, Riley and Joy.

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I specially thank my supervisor Mr. Muthomi Thiankolu. Despite his busy schedule he availed himself to discuss my work and guide me all through. He was also very patient with me, understanding and supported me a lot in shaping my ideas throughout this research.

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ACRONYMS AND ABBREVIATIONS

AG	Attorney General
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
FGM	Female Genital Mutilation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
KNHRC	Kenya National Human Rights Commission
NGOs	Non-Governmental Organizations
NSAs	Non State Actors
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
US	United States

LIST OF STATUTES

International Instruments

African Charter on Human and People's Rights, 1986

International Convention on Economic Social and Cultural Rights (1966)

International Covenant on Civil and Political Rights (1966)

The Rome Statute, 1998

United Nations Charter, 1945

Universal Declaration of Human Rights, 1948

National Statutes

Commission on Administrative Justice Act, No. 23 of 2011

Constitution of Kenya, 2010

Environmental Management Coordination Act, Chapter 387 Laws of Kenya

Factories Act, Chapter 514, Laws of Kenya

Kenya National Human Rights Commission Act of 2011

Penal Code, Cap 63 Laws of Kenya

LIST OF CASES

Kenyan Cases

1. *Beatrice Abongo v National Oil Corporation*, HCCC No. 1268 of 2004
(Unreported)
2. *C.K & 11 others v Commissioner of Police & 3 other* [2014] eKLR
3. *Erad Suppliers & Generals Contractors Limited v National Cereals and Produce Board*, Supreme Court of Kenya, Petition No. 5 of 2012 (unreported)
4. *Gitobu Imanyara & 2 others v Attorney General*, [2013] eKLR
5. *In The Matter of the Interim Independent Electoral Commission* [2011] eKLR
6. *Katet Nchoe & Another v Republic*, [2011] eKLR
7. *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR
8. *Kenya Bus Service Ltd v National Oil Corporation*, High Court Misc. Application Number 13 of 2005 (unreported)
9. *Kenya Medical Research Institute v Attorney General & 3 others* [2014] eKLR
10. *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2011] eKLR
11. *Richard Nduati Kariuki v Leonard Nduati Kariuki & another* [2006] eKLR
12. *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR
13. *United States International University v The Attorney General*, High Court Petition No. 170 of 2012 (unreported)

International Cases

1. *Alix Jean Carmichele v The Minister of Safety and Security* [2001] ZACC 22
2. *CAS v Romania*, 26692/05, 2012
3. *Ghia Van Eeden v Minister of Safety and Security* [2002] ZA SCA
4. *Gonzalez & others (“Cotton Field”) v Mexico*, Inter- Am. Ct.H.R [2009]
5. *Government of South Africa and others v Irene Grootboom and other* [2000] ZACC
6. *HL Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons* [1957] 1QB
7. *Jessica Lenahan (Gonzales) v United States*, Inter- Am. Ct.H.R No. 80 (2011)
8. *MC v Bulgaria*, ECHR 39272/98, 2003
9. *Sahid Goekce (deceased) v Austria* CEDAW/C/39/D/5/2005
10. *The Atlantic Star* [1973] 1Q.B.364
11. *The Vienna Intervention Centre against Domestic Violence v Austria*
CEDAW/C/39/D/6/2005
12. *Velasquez-Rodriguez v Honduras*, Inter-Am.Ct.H.R (Ser.C) No.4 (1988)

Chapter 1

INTRODUCTION AND STATEMENT OF THE PROBLEM

1.1 Introduction

The concept of 'human rights' encompasses basic standards of treatment to which all human beings are entitled, without discrimination on the basis of their nationality, origin, race, colour, gender, economic status or religion among other grounds.¹ Human rights are premised on the idea that human beings have inherent dignity which entitles them to equal and inalienable rights in order to preserve their self-worth and promote social progress.² The phrase 'human rights' has been defined to include civil, cultural, economic, political and social rights.³

The struggle for recognition of human rights evolved as people 'struggled for a life of dignity' in a changing environment.⁴ Due to the central role played by human rights in preservation of human dignity and order in the world, it is important that mechanisms are put in place to punish offenders and deter all potential violators. Where there are rights to be observed, respected and fulfilled, it is also important that there are duty bearers to make the rights meaningful.⁵

¹ Article 2 of the Universal Declaration of Human Rights (1948).

² Preamble to the Universal Declaration of Human Rights (1948).

³ J.Biegon & G. Musila (eds), *Judiciary Watch Report: Judicial Enforcement of Socio- Economic Rights under the New Constitution, Challenges and Opportunities for Kenya* (Vol 10, 2011) Kenya Section of ICJ pp 20-21.

⁴ R.Smith & C. Anker, *The essentials of Human Rights*. (Hodder Arnold, London, 2005) P.151.

⁵ A. Kuper (ed), *Global Responsibilities: Who Must Deliver on Rights?* (Routledge, Taylor & Francis Group, New York, 2005) pp 5.

Over decades the state has been at the centre of formulation and implementation of human rights law to ensure their realization. This is on the basis that the state offered so many essential services and wielded so much power that would result to massive violations of human rights if abused.⁶ However, the private sector has developed to such an extent that the state has found it necessary to privatize most of the essential services; a development which has increased the chances of non-state violations of human rights.⁷ Nevertheless, human rights law has not changed to reflect these developments and continues to depend on the state to protect rights-holders even when the state has lost so much power.

To ensure that all violators are held accountable for violations of human rights there is need to go beyond the traditional notion of state responsibility and consider the role of non-state actors in realization of these rights.

The history of human rights indicates that they were meant to be respected by all members of the society. The UDHR from the onset prescribed that every member of the society, legal or natural, individual or an association of persons has a role to play to make human rights a reality in the world.⁸ Despite this, there is over-reliance on the state slowing down realization of human rights.

While the primary responsibilities and obligations remain with the state, it is important to bear in mind that non-state actors have a big role to play to ensure realization of human

⁶ H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) p 85.

⁷ H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) p 85.

⁸ Preamble to the Universal Declaration of Human Rights (1948).

rights.⁹ The Constitution of Kenya 2010 provides for application of the Bill of Rights to state and non-state actors. However, the policy, legal and institutional framework is not adequate to ensure compliance with human rights standards by the non-state actors.

1.2 The Problem

Development of the human rights regime adopted a state-centred approach. When the idea of protection of human rights was first conceived, it was aimed at protecting people from abuse by the state that had so much power.¹⁰ This is deciphered from the formulation of the documents ranging from the Magna Carta in 1215, to the French Declaration of the Rights of Man and the Citizen, to the US Bill of Rights in 1791¹¹ whose objective was to check on the excesses of the states concerned.

With time, non-state actors have developed to a level whereby, they increasingly pose a high risk to realization of human rights in such a big way that has caused concern to the world.¹² State power has progressively weakened giving way to these other sources of authority. The state is no longer the only one that exercises a lot of power over its citizenry. Therefore, there is need for enhancing accountability by non-state actors for violations of human rights.

⁹Icelandic Human Rights Centre, 'The Role of Non-State Entities' < www.humanrights.is/the-human-rightsproject/humanrightscases> accessed 7 July, 2013.

¹⁰ S. Danailov, The Accountability of Non-state Actors for Human Rights Violations: The Special case of Transnational Corporations <http://www.humanrights.ch/upload/pdf/000303_danailov_studie.pdf> accessed 8 July 2015.

¹¹ United Nations 'Brief History of Human Rights'. < <http://www.humanrights.com/what-are-human-rights/brief-history/magna-carta.html>> accessed 30 June 2015.

¹² H.Steiner, P.Alston and R.Goodman, *International Human Rights in Context: Law and Politics* (3rd Edition, Oxford University Press 2007) p 85.

1.3 Objectives

1.3.1 Main objective

To examine the liability of the state for non-state violation of human rights and to provide recommendations for enhancing accountability by non-state actors for violations of human rights.

1.3.2 Specific objectives

- a) To analyse the legal framework on accountability of non-state actors for violation of human rights.
- b) To analyse the legal framework on responsibility of the state for non-state violation of human rights.
- c) To make recommendations on enhancing non-state actors' compliance with human rights standards.

1.4 Hypotheses

- i. It is not sufficient to only focus on the role of the state in order to achieve full realization of human rights.
- ii. There is need to strengthen the state systems of ensuring non-state respect for human rights.

1.5 Justification

The Universal Declaration of Human Rights (UHDR), which is seen as the foundation of the modern human rights law, brings obligates 'every organ of the society' to respect

human rights.¹³ Since enactment of the UHDR, the duty of non-state actors to respect human rights largely remains blurred.¹⁴ Attempts have been made to elevate the place of human rights in order to ensure respect by non-state actors, but there is still need for improvement.

The Constitution of Kenya 2010 provides that the Bill of Rights ‘applies to all law and binds all state organs and all persons.’¹⁵ The word ‘person’ includes ‘a company, association or other body of persons whether incorporated or unincorporated’.¹⁶ This definition means that a person includes the NGOs, transnational corporations, paramilitary groups and any other form of organized groups.

Despite these Constitutional provisions, Kenyan courts have held that ‘human rights are only applicable as against the state.’¹⁷ This position by the Court is a draw back to the gains made on the fight for human rights. It only considers the state’s primary responsibility to protect and fails to appreciate the role of non-state actors in realization of human rights.

The efforts and the policies on protection of human rights have been concentrated on the role of the state.¹⁸ This study therefore seeks to clarify the extent of the role of the state and that of non-state actors in realization of human rights. It also examines whether there is

¹³ Preamble to the UDHR (1945).

¹⁴ Global Business Responsibility Resource Centre, ‘ Human Rights’ <www1.umn.edu/humanrts/links/gbrhumanrts.html> accessed 7 July 2013.

¹⁵ Article 20(1) of the Constitution of Kenya 2010.

¹⁶ Article 260 of the Constitution of Kenya 2010.

¹⁷ *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR. Though some earlier decisions like *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2011] eKLR were in favour of horizontal application of human rights.

¹⁸ Article 8 (1) (f) of the Constitution. The mandate of the Kenya National Human Rights Commission which was created to oversee compliance with human rights standards in Kenya is limited to public institutions.

a fundamental difference in the nature of the obligations of the state and that of non-state actors. The study will also find out whether focusing on the state responsibility is sufficient to ensure that the objective of guaranteeing human rights and fundamental freedoms in various legal instruments is met.

The motivation of this research is the conviction that enjoyment of human rights or lack of it is a result of actions or omissions for which the state alone is not responsible. This research is important to clarify that though the state has the primary responsibility to ensure achievement of human rights standards, non-state actors also have a big role to play to ensure realization of these human rights.

The duty of the state to protect against human rights violations is well established but the law in Kenya has not provided sanctions in the event that this duty is breached. This research will make recommendations for a framework to deal with the breach of the duty to protect by the state.

1.6 Theoretical Framework

1.6.1 Social Contract Theory

The social theory holds that a government draws its legitimacy from a presumed agreement between it and its citizens. The citizens give up their rights to protect themselves and their property and in return the government undertakes to ensure that the citizen's rights, fundamental freedoms and interests are protected from breach by third parties.¹⁹

¹⁹ B. Bix, *Jurisprudence: Theory and Context* (5th Edition ,Sweet & Maxwell 2009) p 142-143.

Thomas Hobbes defines a social contract as ‘the mutual transferring of right’.²⁰ This occurred when human beings communally agreed to lay down their rights to all things for the sake of peace and to allow the government to protect their interests. According to Hobbes, human beings are made equal in terms of skills and strength such that ‘the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others’.²¹

Therefore, Citizens have a legitimate expectation that the government will do all that is necessary to ensure that they enjoy their rights. Failure by government to protect the citizens will take the society back to the rule of the jungle commonly referred to as the ‘survival for the fittest’. In the state of nature everyone had a right to everything and had the liberty to self-preservation which made life ‘solitary, poor, nasty, brutish and short.’²² The government comes in to create order and maintain peace. However, Hobbes view of the sovereign having absolute authority is against the rule of law and democracy which are vital for enjoyment of human rights.

John Locke, postulates that life in the state of nature was perfect and complete since man was free to conduct his affairs as he deemed fit and required a government for the protection of property only.²³ The individual retained the other rights like right to life and liberty which were considered natural and inalienable. This study applies Locke’s

²⁰<http://oregonstate.edu/instruct/phl201/modules/Philosophers/Hobbes/hobbes_social_contract.html> accessed 29 January 2014.

²¹<http://oregonstate.edu/instruct/phl201/modules/Philosophers/Hobbes/hobbes_social_contract.html> accessed 29 January 2014.

²²<<http://www.sparknotes.com/philosophy/hobbes/section2.rhtml>> accessed 30 January 2014.

²³M. Elahi, ‘Social Contract Theory’

<https://www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau> accessed 19 March 2014.

perspective of natural and inalienable rights that are inherent in human beings and which cannot be taken away by the sovereign. However, Locke's view fails to take in to account the measures that the modern state takes to address the welfare of its people.²⁴

Jean Jacques Rousseau, the challenges resulting from population increase, contributed to competition for resources which made people to surrender their rights to the community to guarantee their rights, freedoms and equality.²⁵ The sovereignty remained with the people. This is the concept that is adopted by the Constitution of Kenya²⁶ Rousseau's view of the state, law and government as being one and the same thing is not reflective of the modern scenario where the three components are totally different. A government is the administrative organ of the state; whereas the law lays down the guiding principles to the government while conducting the affairs of the state.

Using theory, this study will show the importance of government's role to protect individuals from infringement of their human rights by others in order to maintain social order and progress.

1.6.2 Corporate Citizenship Theory

The concept implies that corporations are legal entities with rights and duties which makes them 'citizens' of states they operate in.²⁷ It refers to the extent to which businesses are socially responsible for meeting legal, ethical and economic responsibilities placed on

²⁴ Article 43 of the Constitution of Kenya 2010, provides for the economic and social rights whose objective is to improve the welfare of the citizenry.

²⁵ M. Elahi, 'Social Contract Theory'

https://www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau accessed 19 March 2014.

²⁶ Article 1 of the Constitution of Kenya bestows sovereignty to the people of Kenya.

²⁷ C. Marsden, *The new Corporate Citizenship of Big Business: Part of the Solutions to Sustainability?* (Business and Society Review, 2000) p15.

them. This is in appreciation of the need to inculcate a culture for businesses to create higher standards of living and quality of life in the communities in which they operate, while still preserving profitability for shareholders.²⁸

As the demand for socially responsible corporations increases, investors, consumers and employees are more willing to use their individual power to punish companies that do not share their values. The European Union has in the past imposed trade sanctions against Indonesia, China and Burma for having widespread human rights violations.²⁹ Corporations must therefore be ready to meet the consequences of their human rights violations. As corporate citizens, they have a responsibility to uphold human rights in their spheres of influence.³⁰

1.6.4 Justice

As mentioned under the social contract theory, human beings surrendered their rights to the sovereign (referred to as the state or the government in this study) for purposes of protection and order in the society. Human beings are self-centered creating conflict of interests in sharing the public good brought about by the synergies that create the state.³¹

John Rawls views justice as fairness to the advantage of everyone.³² To him, Justice can only be achieved within well laid down and agreed principles and procedures that

²⁸ <<http://www.investopedia.com/terms/c/corporatecitizenship.asp>> accessed 14 July 2013.

²⁹ <<http://www.investopedia.com/terms/c/corporatecitizenship.asp>> accessed 14 July 2013.

³⁰ H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) p 1390.

³¹ ³¹ M. Elahi, 'Social Contract Theory'

<https://www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau> accessed 19 March 2014.

³² J. Rawls, *A Theory of Justice* (Revised Edition, Belknap Press of Havard University Press Cambridge, Massachusetts, 1999) p 53.

encompass the rule of law.³³ The theory of justice will flow throughout this study since clamor for human rights, is a clamor for social justice that ensures a close-knit society.

1.6.5 Rule of Law

Human rights and freedoms ought to be based on the rule of law if they are to be effective and enforceable.³⁴ The phrase ‘rule of law’ refers to an environment where individual rights are determined by clear and fair legal rules and not the arbitrary actions of any authority over them.³⁵ It can also be taken to mean a set of rules of fairness applicable everywhere to safeguard justice and protect human rights. This environment provides equal protection by the law and equal application of the law to all.

Human rights are non-discriminatory in nature and every human being is entitled to enjoy them. Respect and observance of these rights ought to apply to everyone under the concept of the rule of law. This will ensure equal application of the law to all and effective enforcement of human rights.

Protection of human rights cannot be achieved unless the system is based on the adherence to the rule of law by all players in the society.

1.7 Literature Review

The constitution of Kenya has a very elaborate and comprehensive Bill of Rights. The Constitution provides for civil and political rights, social, economic and cultural rights. If

³³ J. Rawls, *A Theory of Justice* (Revised Edition, Belknap Press of Havard University Press Cambridge, Massachusetts, 1999) p 53.

³⁴ P. Halstead, *Unlocking Human Rights*, (ed. Jacqueline Martin & Chris Turner, Hodder Education 2009) p 3.

³⁵ P. Halstead, *Unlocking Human Rights*, (ed. Jacqueline Martin & Chris Turner, Hodder Education 2009) p4.

the Bill of Rights is effectively implemented and enforced it will improve the lives of all Kenyans. Besides providing for the rights, the constitution has spelt out duties of the state and those of non-state actors to ensure realization of these rights.³⁶

This Constitution establishes the Kenya National Human Rights Commission as the human rights watchdog. However, it limits the Commission's jurisdiction to monitoring compliance with human rights standards to public entities.

Various studies have been done on the obligations of the state and those of non-state actors in the realm of human rights. This study borrows heavily from these previous writings.

Henry Steiner, Philip Alston and Ryan Goodman in their book, 'International Human Rights in context: Law and Politics' have discussed the dilemmas of rights and duties; the architecture of international institutions as well as their functions.³⁷ The book has analyzed the changing configuration of the public-private divide in human rights ordering in relation to non-state actors' role in realization of human rights. This book is useful in this study in demystifying the increasing sphere of influence of non-state actors and how this has affected achievement of human rights. The book analyses the rights and duties within the global context while the current study addresses itself to the Kenyan context.

Philip Alston in his book, 'Non State Actors and Human Rights'³⁸ examines the history of corporations and human rights. According to Alston, multinational corporations have become so powerful and if not held accountable for human rights violations, they threaten the very purpose that human rights are meant to serve. He observes that some corporations

³⁶ Article 20 (1) of the Constitution provides that the Bill of Rights binds all state organs and all persons.

³⁷ H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) pp 1385.

³⁸ P. Alston (ed), *Non State Actors and Human Rights*, (Oxford University Press, 2002).

have become more powerful than the state in which they operate. They have taken up the roles that were previously the preserve of the state hence increasing their spheres of influence. Due to the increased contact with the people, chances of them infringing their rights have also become high.

Alston has also discussed the status of NGOs in international law and their involvement in the realm of human rights and the role they play in international decision-making in an inter-state system. This book has dealt more with identification of the problem but has done very little on suggesting solutions.

John Rawls' book titled, 'A Theory of Justice,'³⁹ examines the meaning of justice and its importance as a societal fabric. With his view of justice as fairness in many aspects of the society, this book provides a foundation to this study since human rights are about the public good and equality in protection of the law. Since human rights are inherent regardless of a person's origin, gender, creed, colour and political inclination, human beings ought to be accorded the same treatment that ensures equal protection by the law. The book discusses the theory of justice in general and not exclusively with regard to human rights. It is nevertheless important in explaining the fundamental principles of justice for realization of human rights.

James Crawford book titled 'Brownlie's Principles of Public International Law'⁴⁰ provides an insight on the international human rights systems and the reason why some non-state actors are not held directly accountable for human violations under international law.

³⁹ J. Rawls, *A Theory of Justice* (Revised Edition, Belknap Press of Harvard University Press Cambridge, Massachusetts, 1999).

⁴⁰ J.Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012).

Various studies have been done in Kenya on the subject of human rights but none has focused on the responsibility of the state for non-state violations of human rights in the Kenyan context.

1.8 Research Questions

This study will be guided by the following questions:

- i. To what extent is the state responsible for non-state violations of human rights?
- ii. Is it sufficient to focus on the state responsibility as a way of ensuring compliance with human rights standards?
- iii. How can the mechanism of holding non-state actors accountable for violations of human rights be improved?

1.9 Research Methodology

The study is library based due to the nature of the subject. The materials are mainly secondary sources but primary sources will also be relied up on as much as possible. This includes text books, articles and journals by various authors and online materials.

1.10 Limitations

This study is limited by the inadequacy of materials dealing specifically with the responsibility of the state for non-state violation of human rights in Kenya. The Constitution of Kenya is relatively new and there is no local jurisprudence on its application. These limitations have been mitigated by borrowing from other jurisdictions.

The scope of the study is also limiting since it focuses on Kenya and does not consider violation by all non-state actors. Given the increasing need for a better system to enforce human rights standards against non-state actors, the study has recommended a further research on the possibility of formulating a treaty to binding non-state actors and the possibility of revising the threshold for admissibility of cases at the International Criminal Court.

1.11 Chapter Breakdown

This study comprises of five chapters. Chapter one is a broad overview of the research. It covers the background, statement of the problem, justification, objectives, hypotheses, conceptual and theoretical framework, literature review, research methodology and limitations of the study.

Chapter two comprises of the situational analysis. It analyses the evolution and the theories of human rights and the legal framework on accountability of non-state actors for these violations. It also discusses the available justice systems available for victims of human rights violations by non-state actors to get their claims vindicated.

Chapter three discusses the doctrine of state responsibility. It examines the extent to which the state is liable for non-state violations of human rights and the challenges faced by the state in enforcing human rights against non-state actors.

Chapter four analyses the gaps in the legal, policy and institutional framework that may need to be filled so as to improve accountability of non-state act actors for their violation of human rights while considering best practices from other jurisdictions.

Chapter five mainly focuses on summary of the findings, conclusions and recommendations of the study.

Chapter 2

SITUATIONAL ANALYSIS

2.1 Introduction

The concept of human rights has evolved over time and just like other facets of law, it keeps developing. It emerged from protection of individuals from state abuse to focus on holding non-state actors accountable for violation of human rights.

Non-state actors have assumed major roles in provision of services to humanity thereby making them important players in contributing to realization of human rights.¹ Services that were previously a preserve of government, like provision of water, health services and education, have been privatized over time exposing citizens to abuse of their rights by the private sector.² These services are key to ensuring realization of socio-economic rights which have been entrenched in the Constitution of Kenya 2010.³

The immense growth of corporate power necessitates creation of mechanisms to ensure that their activities are consistent with human rights standards.⁴ Their interaction affects the political, civil, social, economic and cultural spheres of human life.⁵ They get involved in violation of human rights either directly by themselves or indirectly by contracted

¹ H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) pp 1385.

² H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) pp 1387.

³ In Kenya they are embedded in the 2010 Constitution.

⁴ H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) pp 1388.

⁵ S. Danailov, The Accountability of Non-state Actors for Human Rights Violations: The Special case of Transnational Corporations <http://www.humanrights.ch/upload/pdf/000303_danailov_studie.pdf> accessed 8 July 2015.

agencies.⁶ The violations range from breach of labour relations, to environmental rights and political rights.⁷ The purpose of these corporations is to make profit at whatever cost.⁸

According to a report by United Nations Development Programme, in year 2000, ‘human rights failures in economic and social areas affected by far the largest number of people and were the most widespread across the world’s nations.’⁹ This then implies that to be able to realize the gains made on the fight for human rights, non-state actors should be held to account for their activities that violate human rights.

They also hire private security guards that may engage in torture and other violations related to their roles. When hiring staff, the corporations may also discriminate against job applicants on bases of gender, colour or origin during recruitment of employees as well as commit other unfair labour practices.¹⁰

Criminal gangs (which for the purpose of this study, include militias, terrorists groups and national liberation movements) also violate human rights by killing, kidnapping, extorting money and destruction of property.¹¹ Some of these groups go as far as trying to force their

⁶ R. Steinhardt, ‘Just Business: Multinational Corporations and Human Rights by John Ruggie’ 16 September 2013. <<http://www.ethicsandinternationalaffairs.org/2013/just-business-multinational-corporations-and-human-rights-by-john-gerard-ruggie/>> accessed 11 September 2014.

⁷ TUNEP/UNDP/DUTCH Joint project on Environmental Law and Institutions in Africa, ‘Pollution of Lake Victoria basin here in Kenya through release of industrial waste caused destruction of the ecosystem and drinking water’ Volume 1, p 21

⁸ According to Milton Friedman, the responsibility of a company is to make as much money as possible while conforming to the basic rules of the society. For further discussion on this, see W. Anderson and R. Ross, ‘The Methodology of Profit Maximization: Australian Alternative.’ <http://direct.mises.org/journals/qjae/pdf/qjae8_4_3.pdf> accessed 7 July 2014.

⁹ United Nations Development Programme, ‘Human Development Report 2000’ pp 73.

¹⁰ In *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2012] eKLR, the court observed that ‘clubs and companies wield great power over the individual citizenry, who should as of necessity be protected from such non-state bodies who may for instance discriminate unfairly, or cause other constitutional breaches.’

¹¹ <http://www.justice.gov/eoir/vll/country/canada_coi/kenya/KEN104594.E.pdf> accessed 17 October 2014.

cultures and religion on their victims.¹² The groups are sometimes more organized and lay ambush on state machinery which enables them to even kill or injure state security agents.¹³ This makes the common man who expects the state to secure and protect him more vulnerable.

2.2 Evolution and Theories of Human Rights

There are many theories that seek to explain the basis of the concept of human rights. All the theories have their strengths and deficiencies. As such, one theory cannot sufficiently explain the existence of human rights. For the purposes of this study, the natural law theory and the Value theory of human rights shall be examined.

The natural law theorists posit that human rights arose out of the observation of the fact that human beings were inclined towards following certain principles of life derived from the nature of things.¹⁴ This implies that since human beings follow a certain order of things because of their nature, there are certain rules which are critical to maintain the societal fabric,¹⁵ hence, the inherent nature of human rights.¹⁶ They are not either given or taken

¹² Report of the US State Department, Congress and other Key Stakeholders, 'The Current Situation of Human Rights Defenders in Ethiopia, Kenya, Somalia and Sudan' Washington June 2008 < <http://www.icc-cpi.int/iccdocs/doc/doc796894.pdf>> accessed 3 October 2014.

¹³ Independent Police Oversight Authority, 'Report Following Mpeketoni Attacks- 15th and 16th June 2014, Redacted Version pp 9 & 21.

¹⁴ M. Freeman, *Lloyd's Introduction to Jurisprudence* (7th Edition, London Sweet & Maxwell Ltd 2001) p 129.

¹⁵ M. Freeman, *Lloyd's Introduction to Jurisprudence* (7th Edition, London Sweet & Maxwell Ltd 2001) p 129. HLA Hart depicts human beings as being very vulnerable and having limited resources conditions which necessitates a certain degree of protection.

¹⁶ J.Biegon & G. Musila (eds), *Judiciary Watch Report: Judicial Enforcement of Socio- Economic Rights under the New Constitution, Challenges and Opportunities for Kenya* (Vol 10, 2011) Kenya Section of ICJ p 20-21. The description of human rights as 'inherent' suggests that human beings are born with the rights.

away by the state.¹⁷ The state only comes in to protect and to ensure that these rights are not taken away by third parties.¹⁸

However, natural law theory is dependent on faith and an individual's view of the universe. Human beings are of different faiths and have varied views of the universe, hence different value systems. This reasoning does not resonate with or explain the supposed universal nature of human rights.

The nineteenth century saw the positivist theorists seeking to understand the 'relationship between self and reality, the individual and the society and discovered laws of social order that had the same inevitability as the laws of nature but they did not seek these laws in natural law.'¹⁹ This explains situations where officials purported to 'declare law which already existed, whose existence was not exclusively due to a prior official's act of law-creation.'²⁰ This view echoes the position of Thomas Aquinas (one of the most prominent traditional natural law theorist) that 'positive law is derived from natural law.'²¹

The other theory that explains existence of human rights is the theory of value postulated by. The theory of value as postulated by Joseph Raz also tries to explain the emergence of

¹⁷ J. Rawls, *The Theory of Justice* (Revised edition, University of Cambridge, Massachusetts 1999) p 456. Rawls suggests that certain rights known as 'basic liberties would be protected by the state in a hypothetical social contract.' For Rawls these liberties are public good that should be enjoyed equally.

¹⁸ B. Bix, *Jurisprudence: Theory and Context* (5th Edition , London Sweet & Maxwell 2009) p 142-143. As argued by the social contract theorists.

¹⁹ M. Freeman, *Lloyd's Introduction to Jurisprudence* (7th Edition, London Sweet & Maxwell Ltd 2001) p 123.

²⁰ B. Bix, *Jurisprudence: Theory and Context* (5th Edition , London Sweet & Maxwell 2009) p 140-141.

²¹ B. Bix *Jurisprudence: Theory and Context* (4th Edition, London Sweet & Maxwell 2006) p 67. This position has not appreciated the dynamic nature of law. Law keeps changing to regulate new situations that come in the society. For example, technology is changing very fast and it is being applied in so many areas of human life. Law is being enacted to regulate this technology protect people from violation of their rights through it.

human rights.²² It is premised on the ultimate value that human lives have. According to Raz this ultimate value is ‘core and not derived.’ It is different from the value of man-made objects like cars which are valued for their use by people. According to Raz anything that is not human has instrumental value and it enjoys legal rights.

The value theory has been criticized on the basis that Raz equated legal rights of for example, corporations to human rights. This is despite him classifying human beings as having intrinsic value that is ‘core and not derived’. I also agree with the critique because human rights can only be enjoyed by human beings and they rank higher than other rights in terms of importance. In my view, this is due to the special position human beings occupy in the world. They have dominion over everything else.

The natural law theory is adopted in this study as it explains the inherent nature of human rights, a concept that flows throughout this study. On the other hand, the value theory is also adopted to the extent that it explains the importance of every human being regardless of their colour, origin, gender or any other factor that may be used as a basis for any differentiation.

Pronunciation of human rights is traced back to 539 BC when Cyrus the Great was the King of Persia.²³ His decrees to free the slaves in the city of Babylon, give them the

²² Foundations of human rights, < <http://philosophy.uchicago.edu/news/files/Lubenow%20AbstractLarger.pdf> > accessed 30 June 2015, p 4.

²³ United Nations ‘Brief History of Human Rights’. < <http://www.humanrights.com/what-are-human-rights/brief-history/magna-carta.html> > accessed 30 June 2015.

freedom to religion of their choice and to establish racial equality among others are recognized as the world's first charter of human rights.²⁴

Subsequently, human rights were expressed in other documents like the Magna Carta in year 1215, followed by the Petition of Rights in 1628, the US Constitution in 1787, the French Declaration of the Rights of Man and the Citizen in 1789 and the US Bill of Rights in 1791.²⁵ Among these documents the US Constitution is seen as the greatest contributor to the development of human rights as it provided for the basic rights of the citizens.²⁶ During this period all the efforts to recognize human rights were made by individual states, giving the impression that human rights were perceived to be an issue of domestic concern.

World War I and World War II changed this earlier perspective and nations came together to find a solution to the suffering caused by the war. Building from the foundation of the earlier generations, the United Nations Charter was formulated in 1945 and the Universal Declaration of Human rights followed very closely in 1948.²⁷ Many countries that have an elaborate Bill of Rights in their Constitutions have used the UDHR as their benchmark.²⁸ Other than the UDHR, treaties that followed like the ICCPR, ICESCR and CEDAW have

²⁴ The decrees of Cyrus the Great were recorded in the Akkadian language on a baked-clay cylinder that was later referred to as the 'Cyrus Cylinder.'^{<<http://www.humanrights.com/what-are-human-rights/brief-history/magna-carta.html>>} accessed 30 June 2015.

²⁵ United Nations 'Brief History of Human Rights'^{<<http://www.humanrights.com/what-are-human-rights/brief-history/magna-carta.html>>} accessed 30 June 2015.

²⁶ United Nations 'Brief History of Human Rights'^{<<http://www.humanrights.com/what-are-human-rights/brief-history/magna-carta.html>>} accessed 30 June 2015.

²⁷ Drafting of the UDHR documents was characterized by lengthy debates over the basis for human rights. For example, the debate over universality of human rights and cultural relativism. Which culture would be used as a yardstick to come up with one standard for the world and whether this meant that some cultures were more superior than others. For details on this debate see; Susan Watz, *Universality of Human Rights*, (Volume 6, Issue 3 1999) The Journal of the International Institute.

²⁸ J. Biegon & G. Musila (editors), *Judiciary Watch Report: Judicial Enforcement of Socio-Economic Rights under the New Constitution, Challenges and Opportunities for Kenya* (Vol 10, 2011) Kenya Section of ICJ, p 27.

also been paramount to shaping these countries' Constitutions.²⁹ It is important to note that the level of domestication vary from state to state. ³⁰This implies that even though the natural law theorists depict human rights as being universal, they are subject to the discretion of the individual states to adopt and inscribe them in their constitutions. This in a way gives the state the power to decide the kind of rights to be enjoyed within its jurisdiction.

In Kenya, between 1978 and 2001 human rights were grossly abused by the state.³¹ Many people found themselves without a remedy since the same state that abused their rights also made it difficult to access justice due to systems failure and lack of confidence in the judiciary.³² The fundamental rights and freedoms of the individual were subject to public interest.³³ The problem with this was that violations were done in disguise for the protection of public interest, which was not well defined in the then constitution. This provision was used by the state to harass, torture and arrest people arbitrarily.³⁴

The need to have a modern democratic nation which balances democratic governance, respect for human rights and the entrenchment of the rule of law with an independent

²⁹ The ICCPR and the ICESCR were formulated to give effect to the UDHR by translating it in to a legally binding document. They all find their basis on the UDHR. See J.Biegon & G. Musila (editors), *Judiciary Watch Report: Judicial Enforcement of Socio- Economic Rights under the New Constitution, Challenges and Opportunities for Kenya* (Volume 10, 2011) Kenya Section of ICJ, p 17.

³⁰ J.Biegon & G. Musila (editors), *Judiciary Watch Report: Judicial Enforcement of Socio- Economic Rights under the New Constitution, Challenges and Opportunities for Kenya* (Vol 10, 2011) Kenya Section of ICJ, p 27.

³¹ K. Adar & I. Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001, *African Studies Quarterly* 5(1). <<http://web.africa.ufl.edu/asq/v5/v5i1a1.htm>> accessed 8 October 2014.

³² Kenya National Commission on Human Rights, *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, p 29.

³³ Article 70 of the 1969 Constitution of Kenya.

³⁴ K.Adar & I. Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001, *African Studies Quarterly* 5(1). <<http://web.africa.ufl.edu/asq/v5/v5i1a1.htm>> accessed 8 October 2014.

judiciary, hence, triggered a struggle for a new constitutional dispensation.³⁵ To reduce the mischief of using state machinery by those in power to oppress the people, the Constitution of Kenya 2010 stipulates that a right or fundamental freedom shall not be limited unless the limitation is for the protection of human dignity, equality and freedom and taking in to account relevant factors.³⁶

The Constitution of Kenya 2010 has an elaborate Bill of Rights and it expressly provides that the fundamental freedoms and rights provided in the Constitution belong to each individual and are not granted by the state.³⁷

2.3 International Legal Framework on Accountability of Non-State Actors

Most of the international human rights standards were set through treaties and conventions.³⁸ These instruments of international law are only binding against the ratifying states at the exclusion of non-state actors. However, the language in the instruments reviewed in this study, suggest that non-state actors have an obligation to respect human rights.

2.3.1 Universal Declaration of Human Rights

The preamble to the UDHR provides that the responsibility to promote, respect and observe human rights is with ‘every individual and every organ of society.’³⁹ The phrase ‘every organ of the society’ implies that both the state and non-state agencies being organs

³⁵ Kenya National Commission on Human Rights Report, *implementation of the Provisions of the International Covenant on Civil and Political Rights*, April 2012, p 29.

³⁶ Article 24 of the Constitution of Kenya 2010.

³⁷ Article 19(3) of the Constitution of Kenya 2010.

³⁸ M. Dixon, R. McCorquodale & S. Williams, *Cases and Materials on International Law* (5th Edition, Oxford University Press 2011) p 55.

³⁹ Adopted by the UN General Assembly on 16th December 1966. It took effect ten years later in 1976.

of the society are bound to adhere to human rights standards. The term ‘responsibility’ is a pointer to the fact that since all these categories of actors have a duty, then they can be held to account. Where there is a responsibility there should also be accountability.

Human rights are enjoyed within the society and the role played by each member of the society is important in ensuring their realization.⁴⁰ For the society to experience respect for human rights, its individual members must respect this societal goal.⁴¹ It then follows that if everyone has a duty to respect human rights, then they should be held to account when this duty is breached.

The declaration should not be construed to allow infringement of rights by any member of the society. It affirms that its interpretation should be within the spirit of enhancing protection of human rights in all circumstances and by all members of the society.⁴²

2.3.2 International Covenant on Civil and Political Rights

The ICCPR and the ICESCR have borrowed from the language of the UDHR on the issue of responsibility of non-state actors to respect human rights.⁴³ They both provide that nothing in their context may be interpreted as allowing state and non-state agencies to engage in any activity or to perform any act the result of which would be violation of human rights

This provision prohibits violation of human rights by all persons whether they are individuals, group of individuals, state agents or other societal outfits. However, the two

⁴⁰ Article 29 (1) of the UDHR.

⁴¹ Article 29 (2) of the UDHR subjects a person’s rights to the attainment of the rights of others.

⁴² Article 29 (1) of the UDHR.

⁴³ Article 5 (1) of the ICCPR and Article 5 (1) of the ICESCR are the same. Both covenants were adopted by the UN General Assembly in 1966 to give effect to the UDHR.

covenants have not expressly imposed a duty to respect human rights on the non-state actors like the UDHR.

2.3.3 Declaration on the Rights and Responsibilities of Individuals

The preamble to the Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, recognizes ‘the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international level.’⁴⁴

2.4. Africa Charter of Human and People’s Rights⁴⁵

This charter provides an example of an indirect duty to non-state actors to respect human rights. In article 27 (2), the Charter provides that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." Having due regard for the rights of others and bearing in mind the common interest of the society demands that one respects the rights of others as well operate within the rule of law in order to promote social justice and goodness for all.⁴⁶

However, by making reference to ‘individuals’ the Charter has addressed itself to natural persons and left out legal persons who are major contributors to violation of human rights.

⁴⁴ Adopted by General Assembly resolution 53/144 of 9 December 1998.

⁴⁵ African (Banjul) Charter on Human and Peoples’ Rights, Adopted 27 June 1981 and entered in to force 21 October 1986.

⁴⁶ J. Rawls, *The Theory of Justice* (Revised edition, University of Cambridge, Massachusetts 1999) p 456.

2.5 The Constitution of Kenya 2010

The objective of the rights enshrined under the Bill of Rights in the Constitution is to preserve human dignity, to ensure equity and social justice which entails inclusiveness and non-discrimination.⁴⁷ To achieve this objective, Article 20 (1) of the Constitution provides that ‘the Bill of Rights applies to all law and binds all state organs and all persons.’ The Constitution further provides that national values and fundamental principles including human rights⁴⁸ bind all state organs and all persons.⁴⁹ The word person includes a company, association or other body of persons whether incorporated or unincorporated.⁵⁰ This interpretation gives the state and non-state actors a role to play in the protection, respect, fulfillment and realization of human rights.

Further, the constitution guides the manner in which it shall be interpreted as one that promotes its purposes, values and principles and advances the rule of law, human rights and fundamental freedoms in the bill of rights.⁵¹

Recent court decisions demonstrate there is vertical application of human rights in Kenya.⁵² Though the court did not address itself directly to the interpretation Article 20 (1) of the Constitution the effect of the decision was that non-state actors are accountable for human rights violations. This finding appreciates the development of the human rights regime to a level where non-state actors have become major players and whose activities must be regulated with the intention of bringing them to conformity with human rights standards.

⁴⁷ Article 19 (1) of the Constitution of Kenya 2010.

⁴⁸ Article 10 (1) of the Constitution of Kenya 2010.

⁴⁹ Article 10 (2) (b) of the Constitution of Kenya 2010.

⁵⁰ Article 260 of the Constitution of Kenya 2010.

⁵¹ Constitution of Kenya 2010, Article 259 (1) (a) and (b).

⁵² *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2012] eKLR.

However, a much recent decision seems to draw back the jurisprudence. In *Uhuru Kenyatta v Nairobi Star Publications*,⁵³ the court dismissed an application seeking to declare violation of human rights against a private entity. The court found that Article 21 of the Constitution does not impose an obligation to non-state actors to respect human rights. It is apparent that the court focused on Article 21 which prescribes the duty of the state on implementation of rights but failed to appreciate Article 20 (1) which prescribes the scope of application of human rights. Any court addressing itself to Article 20 (1) as read together with Article 259 (1) (b) and Article 260 (definition of ‘person’) is likely to rule in favour of horizontal application of human rights.

2.7 Justice Systems

2.7.1 Criminal Legal system

Criminal acts amount to violation of human rights. In Kenya, the Penal Code⁵⁴ is the legislative framework that deals with the criminal responsibility of both natural and legal persons. The country has systems to prosecute criminals although many still go scot-free due to lack of evidence while there is undue delay in determination of others.⁵⁵

Whereas the Penal Code does not offer any definition of the term “person” it nonetheless anticipates the commission of an offence by a corporate body and / or a juristic person.⁵⁶ It provides that “where an offence is committed by any company or other body corporate, or

⁵³*Uhuru Kenyatta v Nairobi Star Publications* [2013] eKLR.

⁵⁴ Chapter 63 of the Laws of Kenya.

⁵⁵ Kenya National Human Rights Commission, ‘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 (2012) p 13.

⁵⁶ *EA Oil Refineries Ltd v. Republic* [1981] KLR 108. The appellant company was convicted by the Court for causing the death of a workman.

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 an outfit is liable unless it is demonstrated that he was not aware that the offence was being committed or he used all reasonable means to prevent its commission albeit without success.”⁵⁷ These bodies commit crimes and violate human rights through their top managers and directors who should be held accountable.⁵⁸

The criminal justice system in a democratic society should be grounded on the rule of law, a balance between the legitimate interest of the state in the observance of national laws, the fight against crime and the maintenance of internal security. Human rights of the offenders and those of the victims should also be considered.⁵⁹

2.7.2 Civil Litigation System

Kenya has a civil litigation system where victims file their claims. The system is expensive and not accessible to all victims due to its elaborate procedures and lack of affordable legal representation. Just like in other third world countries, the civil litigation system in Kenya is bedeviled with challenges of enforcement of human rights that are discussed later in chapter three of this research.

2.7.3 Transnational litigation

Transnational human rights litigation is a dispute resolution process in which courts in Country A exercise jurisdictional power to solve claims brought by citizens of Country B

⁵⁷ Section 23 of the Penal Code, Cap 63 Laws of Kenya.

⁵⁸ *HL Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons* [1957] 1QB 159 at p. 172.

⁵⁹ Kenya National Human Rights Commission, ‘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 (2012) p 16-17.

for violations of human rights that took place in Country B. Transnational litigation aims to geographically fill the gap between the place where the human rights violation took place and the place where the claims are adjudicated.

The jurisdictions that have legal systems to entertain transnational litigation are the US and the English Courts.⁶⁰ British judges adjudicated claims by South African asbestos miners because of their asbestos-related injuries and US judges adjudicated claims by groups of Burmese, Latin and Central American workers for the violations of their basic rights while working in their countries for US and European companies.⁶¹ Foreign citizens have been able to file personal injury suits against foreign companies before courts in the United States and in the United Kingdom for negligent actions and omissions committed in the country where the plaintiffs reside, seeking compensation for the infringements of their basic rights.⁶² Tort laws and specific statutes both in the United States and in the United Kingdom provide the basis for filing transnational claims.⁶³

This means that victims of human rights violations in Kenya can seek redress in English and US courts if the respondent is domiciled in these jurisdictions. However, transnational litigation is very expensive making it difficult for poor victims of human rights violations to afford the cost. Enforcement of the judgments is also not direct. In addition, it will only

⁶⁰ S. Choi & L.Silberman, 'Transnational Litigation and Global Securities Lawsuits' (Wisconsin Law Review 2009) 466. <http://hosted.law.wisc.edu/lawreview/issues/2009_2/9_-_silberman_choi.pdf> accessed 21 October 2014

⁶¹ S.Choi & L.Silberman, 'Transnational Litigation and Global Securities Lawsuits' (Wisconsin Law Review 2009) p 466.

⁶² *Schalk Willem Burger Lubbe (Suing as Administrator of the Estate of Rachel Jacoba Lubbe) and 4 Others and Cape PLC. and Related Appeals*, 4 All E.R. 268 (H.L. 2000).

⁶³ S.Choi & L.Silberman, 'Transnational Litigation and Global Securities Lawsuits' (Wisconsin Law Review 2009) p 466.

take care of violators from two jurisdictions while there are many more. These challenges impede access to justice which is paramount to ensuring realization of human rights.

2.7.4 International Criminal Court (ICC)

Under the Rome Statute,⁶⁴ the ICC has jurisdiction to try individuals over crimes of genocide, crimes against humanity, war crimes and crimes of aggression.⁶⁵ The ICC assumes jurisdiction over crimes with regard to crimes committed on the territory of a state party irrespective of the nationality of the offender or where a state that is not a party accepts jurisdiction of the court on an ad hoc basis.⁶⁶ The system is supplementary to national criminal jurisdiction.⁶⁷ National remedies must either be exhausted or it must be proven that they are not capable of according the victims justice.

Though the ICC has jurisdiction over individuals, it only handles crimes that amount to severe violations of human rights. This leaves the violations thought to be of lesser magnitude to the jurisdiction of the state. In addition, ICC does not have jurisdiction over corporations or other forms of legal persons.

2.7.5 Codes of Conduct

These are various codes of conduct that have been developed by the international community to try and persuade the business community to adhere to human rights standards. This includes the Norms on the Responsibilities of Transnational Corporations

⁶⁴ UN.Doc. A/CONF.183/9 of 17 July 1998. The Statute entered in to force on 1 July 2002.

⁶⁵ Article 5 of the Rome Statute.

⁶⁶ Article 12 of the Rome Statute.

⁶⁷ Preamble to the Rome Statute.

and other Business Enterprises with regard to Human Rights,⁶⁸ the United Nations Guiding Principles on Business and Human Rights⁶⁹ the Organization for Economic Co-operation and Development (OECD) guidelines,⁷⁰ the UN Global Compact,⁷¹ and the Global Sullivan Principles.⁷²

All these efforts have not been successful because codes of conduct are not legally binding and therefore not enforceable. They depend on the good will of the business community to adhere to them. The view of the business community has in the past been expressed as not keen to integrate human rights with business.⁷³ They may be helpful where there is also some extent of legal backing since not everything can be legislated upon.

2.8 Conclusion

It has been shown that though the traditional notion of human rights envisioned the state as the potential violator of human rights, non-state actors have become major participants in that arena. They have the potential to either facilitate realization of human rights or breach of the human rights standards. Failing to hold non-state actors accountable for human rights violations means failure to achieve their noble objective of making the world a better place for all.

⁶⁸UN Doc.E/CN.4/2006/97.

⁶⁹ Guiding Principles on Business and Human Rights
<<http://www.ohchr.org/documents/publication/guidingprinciplesBusinessHR-EN.pdf>> accessed 2 September 2013.

⁷⁰<<http://www.oecd.org/corporate/mne/1922428.pdf>> accessed 3 September,2013.

⁷¹ The UN Global Compact, <<http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/index.html>> accessed 9 August 2013.

⁷² Launched by Reverend Leon Sullivan in 1977 to urge US companies to treat African workers the same as the whites during apartheid.

⁷³ These were the views of John Ruggie on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights.

The international, regional and Kenyan legal instruments reviewed have established that they intended to bind non-state actors to adhere to human rights standards. However, there is need for improvement of the systems to make non-state actors more accountable.

CHAPTER 3

THE PRINCIPLE OF STATE RESPONSIBILITY

3.1 Introduction

The phrase ‘state responsibility’ is used interchangeably with the phrase ‘state liability’ to demonstrate the obligation of the state to account for breach of its duty to protect. The history of human rights discussed in chapter two of this study has shown that the state has been central in development of the human rights regime. Reference to human rights as ‘a common standard’ to be observed by ‘peoples of member states’ indicates that a state has a role in agreeing to implement these human rights principles (mutually with others) within its territory.¹ This demonstrates that effective protection of human rights depends on the willingness by individual states to adopt the standards and to enforce their compliance by state and non-state actors.²

The principle of state liability emanates from the nature of the international legal system, which relies on states as ‘a means of formulating and implementing rules. It arises out of the twin doctrine of state sovereignty and equality of states.’³ As equal partners with control within their territorial jurisdictions, it is presumed that states are capable of ensuring compliance with human rights by non-state actors within their borders.⁴

¹ Preamble to the Universal Declaration of Human Rights (1948).

² ‘The Role of States’

www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightscaptionsideasandfora/humanrightsactors/theroleofstates
> accessed 18 July 2013.

³ M. Shaw, *International Law* (5th edition, Oxford University Press 2003) p 541.

⁴ D. Shelton ‘Protecting Human Rights in a Globalized World’

<http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcicl/25_2/06_FMS.htm> accessed 9 July 2015.

The society allows a state to use legitimate force to protect its interests. In the event that human rights are breached, the state has powers to investigate and prosecute offenders to vindicate a victim's claim.⁵ Therefore, the society has a legitimate expectation that the state machinery will do all that is necessary to safeguard its citizen's rights.⁶ Without the protection of the state, human rights lose meaning.

3.2 Legal Framework on State Responsibility

Various treaties and conventions require the state to take appropriate measures to protect the rights enshrined in them. They impose obligations on states as the primary subjects of public international law. Effective protection of human rights depends on the compliance of each state with its human rights obligations.⁷

The Charter of the United Nations requires all member states to “promote and encourage respect for human rights and for fundamental freedoms for all’ without discrimination.”⁸

The ICCPR obligates state parties to respect and ensure that all individuals within their jurisdiction enjoy human rights by taking necessary steps in accordance with their constitutions.⁹ It further charges the state with the duty to ensure that when rights are violated the victims get effective remedies by virtue of their claims being determined by a

⁵ N. Roht, ‘State Responsibility to Investigate and Prosecute’
<<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1840&context=californialawreview>>
accessed 9th July 2015.

⁶ M. Elahi, ‘Social Contract Theory’
<https://www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau> accessed
19 March 2014.

⁷ ‘The Role of States’
>www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/humanrightsactors/theroleofstates
> accessed 18 July 2013.

⁸ Article 1 of the Charter of the United Nations (1945).

⁹ Article 2 (1) and (2) of the ICCPR (1966).

court of competent jurisdiction and enforcement of the remedy. This is to ensure that the rights are not only available in theory but also in practice. The ICCPR Human Rights Committee observed that the duty to ensure that all rights are recognized lies with the state and does not have a horizontal effect.¹⁰

The ICESCR requires the state to guarantee respect and observance of human rights by use of all appropriate means to ensure their realization.¹¹ This means that the state has an obligation to assure its citizens of respect for their rights by all members of the society.

Regionally, the African Charter of Human and Peoples Rights also identifies the role of the state in realization of human rights as fundamental.¹² This is besides recognizing the duty of individuals to other individuals and to the community at large.

The Constitution of Kenya 2010 is also cognizant of the importance of protection of human rights. It provides that the objective of protecting human rights is to preserve the dignity of human beings and to promote social justice in order to enable members of the society to realize their potential.¹³ As a result, human rights should be protected by all means since the people have donated their sovereign power to the state.¹⁴

Against this backdrop, implementation of rights and fundamental freedoms has been prescribed as the primary responsibility of the state.¹⁵ The duty of the state is not an ordinary duty but a critical one. This gives the state dominance over individuals and other

¹⁰ General Comment No.34 adopted by the ICCPR Human Rights Committee in its 102nd session in Geneva, 11-29 July 2011.

¹¹ Article 2(1) and (2) of the ICESCR (1966).

¹² Article 1 of the Africa Charter of Human and Peoples Rights. The Charter was adopted in Nairobi on 22 June 1981 and entered into force on 21 October 1986.

¹³ Article 19 (2) of the Constitution of Kenya 2010.

¹⁴ Article 1 (1) & (2) of the Constitution of Kenya 2010 recognizes that the sovereign power belongs to the people of Kenya which they have donated to state organs to exercise it on their behalf.

¹⁵ Article 21 (1) of the Constitution of Kenya 2010.

non-state actors in enforcing human rights standards against them.¹⁶ It is upon the state to ensure equality before the law, equal protection and equal benefit of the law which are requisite for protection of human rights, to its populace.¹⁷

3.3 The Duty of the State to Protect against Human Rights Violations

The duty to protect requires the state to safeguard the rights-holders from infringement of their rights. It entails prevention of actions by state and non-state actors that may result in violation of human rights.¹⁸ The state is required to take all necessary steps using maximum available resources to give effect to the rights.¹⁹ The state is obligated to take preventative, protective and punitive measures against non-state abuses because it has the legal and the political means to do so.

Taking necessary measures to ensure realization of rights requires the state to create institutional machinery essential to ensure adherence to the rule of law by its agencies and non-state actors. It is not enough for the state to observe the duty not to interfere with its citizens' rights to goods of reasonable quality,²⁰ but the citizens will not realize their right unless the government puts in place systems to ensure that the goods being manufactured and sold are of reasonable quality.

Since the people donated their power to the state for protection through establishment of requisite machinery and systems, it is expected that the state puts in place adequate measures to prevent violations, conduct proper investigations when violations occur,

¹⁶ K. Obura, *the Nature of Modern Human Rights: Theoretical and Practical Perspectives* (2014) Volume 1, the *Journal of Law and Ethics*, p 134.

¹⁷ Article 27 (1) of the Constitution of Kenya.

¹⁸ *The Vienna Intervention Centre against Domestic Violence v Austria* ,CEDAW/C/39/D/6/2005.

¹⁹ Article 2(1) of ICPR and Article 2 (1) of ICESCR.

²⁰ Article 46 of the Constitution of Kenya.

facilitate access to justice and ensure expeditious judicial proceedings and enforcement of the remedies. When the state machinery fails to meet these expectations, then the state is exposed to liability depending on various circumstances.

The state is exposed for the omission of its duties and not for commission of the violations.

In the *Velasquez Rodriguez v Honduras*, the Inter-American Court of Human Rights found 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.²¹

In addition to putting the systems in place to ensure that the state observes respects and fulfils human rights; and setting up institutions to promote and monitor adherence to human rights, the state has a critical role of ensuring protection of human rights against non-state violations. One of the questions that this study is seeking to answer is the extent to which the state is liable for violations of human rights by non-state actors. This is examined in light of the duty of the state to protect and the circumstances under the state held liable for non-state violations.

Since the case law on this area is not well developed in Kenya, this study shall import from the United States of America and the Republic of South Africa. The United State of America was the first to formulate a constitution and to include the citizens' rights in that

²¹ *Velasquez Rodriguez v Honduras* Inter-Am.Ct. H.R (ser.c) No. 4 (1988: 151).

constitution. Besides, the Inter-American Court of Human Rights has adjudicated over several disputes revolving around the breach of the duty to protect by the state.²²

There are also similarities between the Constitution of Kenya 2010, the American Convention on Human Rights and the Constitution of the Republic of South Africa. Under Article 1(1) of the American Convention on Human Rights states undertake to respect the enshrined rights and freedoms and to ensure that all persons subject to their jurisdictions enjoy their rights.²³

The Constitution of the Republic of South Africa is also similar to that of Kenya with regard to the responsibility of the state to protect against abuse of human rights.²⁴ To emphasize on the importance of the role of the state to protect, the South African Constitution uses the phrase ‘must’. It provides that ‘the state must respect, protect, promote and fulfil the bill of rights.’²⁵ This connotes that the role of the state is paramount and there is no option but to oblige.

This study examines the extent of the duty of the state to protect in preventive violations, carrying out investigations, according access to justice and ensuring expeditious judicial proceedings.

²² Some of this court’s findings shall be reviewed later in this chapter.

²³ Adopted at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, and 22 November 1969. The Convention is interpreted by the Inter-American Court of Human Rights created under the Statute of the Inter-American Court adopted by the General Assembly of the Organization of American States at its 9th Regular Session held in La Paz Boliva in October 1979 (resolution 448).

²⁴ Article 7 (2) of the Constitution of the Republic of South Africa (1996) is similar to Article 21(1) of the Constitution of Kenya 2010 which bestow on the state the duty to protect human rights holders while Article 9 (1) of the South African Constitution is similar to Article 27(1) of the Constitution of Kenya that guarantees equal protection and equal benefit of the law.

²⁵ Article 7 (2) of the Constitution of the Republic of South African Constitution (1996).

3.3.1 Failure to Undertake Adequate Preventive Measures

The state has a duty to put in place mechanisms to prevent violation of rights owing to the rights surrendered to it by its citizens and on the strength of the resources within its disposal.²⁶ Prevention encompasses; engaging competent human resource, installing modern equipment and having an effective institutional framework necessitated by the prevailing circumstances. This enables state agencies to be substantially pro-active and not reactive.

Approach to various circumstances ought to be responsive to specific issues in the best way possible. Measures to be taken by the state are to be ‘determined based on the specific needs of protection of the subject of the law.’²⁷

Reports to security agents or any other organ of the state on the possibility of violation of human rights should trigger response and action by state agents. The rights-holders report to state agents for purposes of getting protection and if the state agents remain unresponsive, the rights-holder is left vulnerable to breach of their rights.²⁸

Further, the state is expected to ensure due diligence in all situations. An omission or mistake that exposes a rights-holder to violation of his rights makes the state culpable.²⁹ In *Ghia Van Eeden v Minister of Safety and Security*, the Supreme Court of South Africa

²⁶ Article 2(1) of ICCPR and Article 2 (1) ICESCR. The covenants were ratified by Kenya on 23 March 1976 and 1 May 1972 respectively. Since the duty to protect is a fundamental duty of the state under the Constitution of Kenya 2010 (as discussed earlier), the state should put enough resources to meet this obligation.

²⁷ *Gonzalez & others (“Cotton Field”) v Mexico*, Inter- Am. Ct.H.R [2009].

²⁸ *Sahid Goekce (deceased) v Austria*, CEDAW/C/39/D/5/2005, p 22.

²⁹ *Ghia Van Eeden v Minister of Safety and Security* [2002] ZA SCA 132.

found that the state through the police owed the victim a ‘duty to act positively to prevent’ the criminal’s escape.³⁰

In determining whether the state is responsible for failing to prevent violation of human rights the court ought to consider whether violation of a right occurred with the support or acquiescence of the state or the state failed to take measures to prevent it.³¹

Non-state actors operate within the jurisdiction of the state which exercises authority over them. The state has the responsibility to use its machinery to prevent violations by non-state actors. The responsibility of the state to prevent occurrence of situations that violate human rights is so important that even when the state apprehends and successfully prosecutes violators, it can be held accountable for failing to prevent the occurrence.³²

This does not guarantee a society without violations but there are circumstances that clearly show that the state had the power to prevent violations but adequate and proper action was not taken by its agencies despite their knowledge of the imminent occurrence that could culminate in violation of rights.³³

³⁰ *Ghia Van Eeden v Minister of Safety and Security* [2002] ZA SCA 25. In this case the police negligently left a security gate unlocked facilitating the escape of a dangerous criminal and a serial rapist. He was still at large two and a half months later when he raped the appellant.

³¹ *Maria Da Penha Maia Fernandes v Brazil*, CEDAW Case No 12.051 (2001).

³² Communication No. 5/2005, 39th session of the Committee on Elimination of All Forms of Discrimination against Women in relation to the case of *Maria Da Penha Maia Fernandes v Brazil*, CEDAW case No 12.051 (2001).

³³ Independent Police Oversight Authority, ‘Report Following Mpeketoni Attacks- 15th and 16th June 2014’ Redacted Version pp 9, pp 16. The report indicates that there was prior intelligence report that there was an eminent attack by the militia men (the police denied the report though).

3.3.2 Failure to Undertake Proper Investigations

The state has an obligation to conduct prompt, effective, proper and professional investigations when a victim lodges a complaint on violation of their rights.³⁴ Failure by the state to conduct proper investigations of the complaint in a wide range of human rights violations results in denial of justice since there would be no evidence to table before a court of law or any other forum adjudicating over the matter to support the victim's claim. Victims mainly rely on evidence gathered by state agents due to the expertise of its officers and the infrastructure to analyze the evidence. In circumstances where investigations by the state are found wanting, the state has been found to have negated its positive obligation to protect its citizens from violation of their rights.

In *C.K & 11 others v Commissioner of Police & 3 others*,³⁵ the police failed to conduct proper investigations into complaints of defilement by the petitioners causing them to suffer physical and psychological trauma. Failure of the police to conduct prompt, effective, proper and professional investigations in to the petitioner's respective complaints violated the victim's rights.³⁶

The objective of the investigations conducted by the state is to identify those responsible so as to prosecute them and impose appropriate punishment.³⁷ Failure by the police to do proper investigations contributes to acquittal of the accused.

³⁴ *MC v Bulgaria*, ECHR 39272/98, 2003.

³⁵ *C.K & 11 others v Commissioner of Police & 3 others*, Meru Kenya High Court Petition No. 8 of 2012.

³⁶ under the Universal Declaration of Human Rights, the African Charter on Human and People's rights and the United Nations Convention on the Rights of the child.

³⁷ *Velasquez Rodriguez v Honduras*, Inter-Am.Ct.H.R (Ser.C) No.4 (1988).

In some cases the investigating agencies ignore the information given by the victims which is crucial in assisting the court exercise its discretion based on proper information. The judicial officers then draw conclusions based on insufficient information as a result of poor investigations. In other cases investigators may present the information gathered selectively and skewed towards one side of the divide. In the end, this information is not utilized in the administration of justice which is the primary objective of carrying out the investigations leading to miscarriage of justice.³⁸

In such circumstances the state has failed in its duty to protect its people against violation of their rights despite the resources spent to maintain the relevant agencies. To avoid these lapses the state should put in place effective mechanisms to monitor performance of its agencies. State agencies also ought to work together to unify their operations towards a common goal in administration of justice. Divergent goals and disjointed efforts lead to miscarriage of justice.

The duty to investigate is not breached simply because the efforts of the state to track down the offenders are not successful, but because the efforts do not seem adequate in the circumstances. All that the Authorities are required to do is to take reasonable steps in the circumstances.³⁹

In essence, the state must be able to prove that it took all measures necessary to prevent the violation using available resources and acted promptly. To determine whether investigations were conducted promptly, consideration is made to the time taken to open

³⁸ *Alix Jean Carmichele v The Minister of Safety and Security* [2001] ZACC 22. In this case, the investigating officer failed to give all the relevant information concerning the criminal history of the offender to the prosecutor thereby occasioning the court to grant him bail.

³⁹ *CAS v Romania* 26692/05, 2012 para 70-71 and 83.

investigations, take statements from the witnesses and forward the cases to the prosecutor among other factors.⁴⁰

3.3.3 Failure to Facilitate Access to justice

Fundamental rights and freedoms and the rule of law are vital checks and balances in any civilised society but meaningless without access to justice or the practical means of understanding and enforcing the law.⁴¹ It is the duty of the state to facilitate access to justice by putting in place the structures that enable victims of human rights violations to get their claims vindicated.

John Rawls, views justice as fairness in a society that consists of free and equal persons, of political liberties, equal opportunities and cooperative arrangements that benefit the more and the less fortunate members of the society.⁴² Access to justice is the glue that holds together the fundamental rights and freedoms without which injustice and oppression become rampant.⁴³ It recognizes that everyone is entitled to the protection of the law and that rights are meaningless unless they can be enforced.

The Constitution of Kenya 2010 obligates the state to ensure access to justice for all persons.⁴⁴ The ICCPR obligates the state parties to ensure that any person whose rights or freedoms are violated gets an effective remedy administered by a competent court of law.⁴⁵

⁴⁰ *CAS v Romania* 26692/05, 2012 para 83.

⁴¹ *Ndyanabo v Attorney General* [2002] TZA 2.

⁴² J. Garret, 'Rawls Mature Theory of Social Justice: An Introduction to Students' 24th August 2005 <<http://people.wku.edu/jan.garrett/ethics/matrawls.htm#2ndprin>> accessed 10 August 2014.

⁴³ J. Garret, 'Rawls Mature Theory of Social Justice: An Introduction to Students' 24th August 2005 <<http://people.wku.edu/jan.garrett/ethics/matrawls.htm#2ndprin>> accessed 10 August 2014.

⁴⁴ Article 48 of the Constitution of Kenya 2010.

⁴⁵ Article 2 (3) of the International Convention on Civil and Political Rights(1966).

Access to justice includes; putting the appropriate infrastructure in place, removing all barriers to justice and meeting justice needs through an independent judiciary, transparent, affordable and efficient process.⁴⁶

Remedies are also not material unless they are enforced. A court order does not add any value to the victim unless it is either obeyed by the offending party or enforced by the state enforcement agencies. Remedies are not useful in any way unless they are enforced to meet the objectives for which they were issued.⁴⁷

3.3.4 Failure to Conduct Expeditious Judicial Proceedings

The objective of following a judicial process is adherence to the rule of law to get a remedy for violations. It is necessary that judicial proceedings are expedited by all means to ensure that the victim's rights are vindicated when evidence is available and to enable victims start healing from the emotional and psychological stress early.

Delayed prosecutions lead to loss of evidence since witnesses may lose account of what transpired, some may die while others may relocate to areas that make it difficult to trace them. Speedy prosecution of human rights violators conveys the message that the society condemns such actions.⁴⁸ Judicial decisions help to deter potential violators of human

⁴⁶ UNDP, 'Access to Justice in the Asia Pacific: A Review of Experiences and Tools from the Region' 2012 <http://asiapacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/Democratic%20Governance/APRC-DG-2012-A2J_Assessments.pdf> accessed 25 August 2014.

⁴⁷ *Jessica Lenahan (Gonzales) v United States* Inter- Am. Ct.H.R No. 80 (2011).

⁴⁸ *Alix Jean Carmichele v The Minister of Safety and Security* [2001] ZACC 22.

rights owing to the consequences.⁴⁹ It also sets an acceptable code of conduct among the people who do not desire to be in conflict with the law.

The state ought to ensure enhanced coordination among law enforcement agencies and judicial officers to protect and support victims of various forms of human rights violations. Judicial system is a process that involves a number of government agencies including the police, the court and the prison all playing different but complementary roles.

3.4 Challenges of State Responsibility

The state has a responsibility to put in place adequate measures to protect rights-holders from violation of their rights. However, various challenges have affected the state's ability to effectively meet these obligations.

Powerful non-state actors go beyond the ability of the state to regulate their activities.⁵⁰ The technical capacity of the Kenyan government officials to deal with situations arising out of the activities of some of the non-state actors does not develop to the extent that it can handle this challenge. This coupled with unfavourable policies pushed by the development partners and investors make it difficult for the state to fully enforce human rights standards.⁵¹

Violation of human rights by powerful private entities has in some incidences gone unpunished in Kenya.⁵² In these instances, government agencies seem unwilling to pounce

⁴⁹ *Jessica Lenahan (Gonzales) v United States* Inter- Am. Ct.H.R No. 80 (2011).

⁵⁰ D. Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights'(2005), *Melbourne Journal of International Law* Vo 5, p 92.

⁵¹ J. Rono, *The Impact of the Structural Adjustment Programme on Kenyan Society*, *Journal of Social Development in Africa* ,Vol 17 (2002), p82-85.

⁵² The US Department of State, 2010 Human Rights Report: Kenya, April 11 2010, p44- 46.

on the investors as this may be seen as going against the government policy of attracting and retaining investors.⁵³ This endeavor to retain Kenya's competitiveness as an investor destination is at the expense of adherence to human rights standards.⁵⁴

The vice of corruption has also jeopardized the states responsibility to protect. In this regard, the government becomes reluctant to send a message of corporate accountability because those in power are often the most direct beneficiaries of corporate activity through corruption.⁵⁵ In other cases, government agencies are used by these powerful non-state actors to oppress the rights-holders. For example, workers labour rights are violated and then the employers use their resources to marshal security agents to arrest and torture the workers when they go on strike.⁵⁶ This creates an enabling environment for the culture of impunity.

Global technology that has revolutionized information and communication has limited the ability of government to regulate.⁵⁷ Information flows freely across borders and very fast. Violations of human rights can be perpetrated using this avenue. Currently, there are also avenues like face-book and twitter which people use as platforms to communicate to the

< <http://www.state.gov/documents/organization/160127.pdf>> accessed 18 August 2015. There have been cases of violation of human rights in the economic processing zone and in the agricultural plantations.

⁵³ International Federation for Human Rights in Cooperation with the Centre for Research on Multinational Corporations, 'Economic Development or Human Rights? Assessing the Impact of Kenya's Trade and Investment Policies and Agreements on Human Rights, p23.

< http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDHKenya_41.pdf > accessed 19 August 2015.

⁵⁴ P.Alston, *International Human Rights in Context* (Oxford University Press, 2004) pp1388. Competition among potential host countries discourages measures that may push up operational costs, consequently making one country less attractive than another.

⁵⁵ <<http://www.aljazeera.com/indepth/opinion/2013/04/201341103110790388.html>> accessed 7 September 2013.

⁵⁶ The US Department of State, 2010 Human Rights Report: Kenya, April 11 2010, p44- 46.

< <http://www.state.gov/documents/organization/160127.pdf>> accessed 18 August 2015.

⁵⁷ Globalization and the Environment, International Federation of Social Workers, 23 February 2012 <<http://ifsw.org/policies/globalisation-and-the-environment/>> accessed 7 October 2014.

world.⁵⁸ The state monitoring systems are not always upgraded to be able to nab the offenders. Laws and legal systems do not always develop at the same pace with technology leaving some of the aspects unregulated. This leaves a gap in protection of human rights in the sense that since there is no law in place, then there is also no available remedy.

In addition, criminal gangs and militia men have increasingly continued to violate human rights. Though there is the criminal justice system in place, there is a challenge as many of them go unidentified and therefore unpunished.⁵⁹

3.3 Conclusion

Various legal frameworks have shown that the Kenyan state has an onerous task of ensuring realization of human rights. Besides the respect, fulfilment and promotion of human rights, the state has an obligation to protect rights-holders against violation of their rights by non-state actors. Where it is demonstrated that violation of rights by non-state actors occurred because the state did not take appropriate measures to protect the rights-holder against the violation, the state may be held responsible.

While discharging the duty of protection the Kenyan state is faced with challenges that compromise enforcement of human rights. This creates a culture of impunity because non-state actors violate human rights without facing the consequences. As such, there is need to strengthen the systems of the state in order to facilitate better accountability by non-state actors.

⁵⁸ Globalization and the Environment, International Federation of Social Workers, 23 February 2012 <<http://ifsw.org/policies/globalisation-and-the-environment/>> accessed 7 October 2014. This does not mean that technology is all together bad. It has helped in sharing experiences and in bringing to the attention of the international community the violation being perpetrated against through the media and the internet.

⁵⁹ The US Department of State, 2010 Human Rights Report: Kenya, April 11 2010, p44- 46. < <http://www.state.gov/documents/organization/160127.pdf>> accessed 18 August 2015.

CHAPTER 4

TOWARDS BETTER ACCOUNTABILITY OF NON-STATE ACTORS

4.1 Introduction

Chapter two of this research has demonstrated that non-state actors have a potential to violate human rights. The international legal framework and the Constitution of Kenya 2010 reviewed provide for accountability of non-state actors for violation of human rights but the available justice systems are expensive and inaccessible to victims in many respects.

The state has the primary obligation to protect rights-holders from violation of their rights by non-state actors by taking all appropriate measures but it is necessary to also have approaches outside the state responsibility.¹ Since the state ought to operate within the law, it is important that the activities of non-state actors are regulated by enforceable legal obligations that ensure compliance with human rights standards. This is partly achievable if the state has adequate control over non-state actors. It is also necessary for the state to find a way of seeking assistance from the international community to deal with violations by non-state actors who are beyond the control of the state.

¹ Article 21 (1) of the Constitution of Kenya 2010.

4.2 Legal, Policy and Institutional Interventions

4.2.1 Kenya National Human Rights Commission

The Kenya National Human Rights Commission (KNHRC)² was established to create a culture of respect for human rights by state and non-state actors within the republic.³ This is in tandem with Article 20 (1) of the Constitution in terms of its application to state and non-state actors. KNHRC is empowered to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.⁴

Article 2(a), (c), (d) and (e) of the Constitution implies that KNHRC was established to monitor compliance with human rights standards by all persons.⁵ However, Article 8 (1) (f) of the Constitution provides that once complaints are received and investigations are carried out, recommendations for compliance shall only be made to public institutions.⁶

This negates the object of the Commission of monitoring observance of human rights in both public and private institutions and all spheres of life. It completely waters down the right of every person to report violation or intended violation of their rights to KNHRC.⁷ It implies that reports of abuse against non-state institutions will not be acted upon. This limitation is a blow to the role of the state as a protector of human rights.

² Article 59 (1) of the Constitution of Kenya 2010.

³ Article 59 (2) (a) (b) and (d) of the Constitution of Kenya 2010 and Section 8 (1) (a), (b) and (c) of the Kenya National Commission of Human Rights Act, 2011.

⁴ Article 59 (2) (e) of the Constitution of Kenya 2010 and Section 8 (1) (d) of the Kenya National Commission of Human Rights Act, 2011.

⁵ This is the same provision replicated in Section 8 (1) (a) – (d) of the Kenya National Human Rights Commission Act.

⁶ This is the same provision replicated in Section 8 (1) (a) – (d) of the Kenya National Human Rights Commission Act.

⁷ Article 59 (3) of the Constitution of Kenya 2010.

There is need to expand the role of the KNHRC to cover violation of human rights by non-state actors. KNHRC requires powers to investigate reports on these violations, secure appropriate redress and make recommendations on improving adherence of human rights standards by non-state actors. This will empower the Commission to monitor the level of compliance with human rights standards by all institutions. In addition, before licences on activities considered high risk on violation of human standards are issued, applicants should seek clearance from KNHRC as regards compliance with human rights standards.

4.2.2 Extra- Territorial Obligations of States

Private transnational corporations are one category of non-state actors that violate human rights. They wield so much power, making it difficult for the state to enforce human rights standards against them. Most of them are domiciled in states that have adequate policy, legal and institutional capacity to control them.⁸ These countries of origin have an extra-territorial obligation to ensure businesses incorporated or domiciled within their jurisdiction respect human rights.⁹ To be able to reign on these corporations, it is paramount that Kenya seeks assistance from their countries of origin.

⁸ Although international law is based on sovereignty and equality of members and extraterritorial exercise of power is seen as infringing on the host country's sovereignty, human Rights are seen as an international rather than a national policy. For more discussion on the subject see: Surya Deva, Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?

<<http://celrl.law.unimelb.edu.au/files/dmfile/download1ad31.pdf>>

⁹ The Global Initiative for Social, Economic and Cultural Rights, 'Legal Accountability of Non-State Actors for Human Rights Violations Abroad: Developments During March 2014 in Geneva'

<http://globalinitiative-escr.org/legal-accountability-of-non-state-actors-for-cross-border-human-rights-abuses-developments-during-march-2014-in-geneva/#_ftn4> accessed 10 October 2014.

This has been interpreted to be part of the appropriate measures that the state is obligated to put in place policies and other measures to ensure compliance with human rights standards.¹⁰

4.2.3 Administrative Procedures

Administrative regulation presents an option to enforce compliance with human rights standards by non-state actors. Compliance with human rights standards should not be a matter of choice and should be incorporated within the enterprise risk management system.¹¹

Kenya has regulatory processes for the granting of licenses, permits and other forms of state approval to private corporations. Regulatory approval ought to be tailored to include compliance with human rights standards. The state may require a company to undertake a comprehensive human rights assessment, before granting a license or a permit in businesses that are likely to violate human rights. The report should indicate the mechanisms put in place to detect risks and measures put in place to mitigate the risks. This is the case in environmental regulation where environmental impact assessments reports are required before approval of projects.¹² Periodical returns and reviews should be carried out to monitor consistency.¹³

¹⁰ United Nations Human Rights, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14002&LangID=E>> accessed 20 August 2015.

¹¹ M. Taylor, L. Zandvliet, M. Forouhar 'Due Diligence for Human Rights: A Risk Based Approach, Working Paper on Corporate Social Responsibility Initiative' October 2009, p 5. <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf> accessed 20 August 2015.

¹² Part IV of the Environmental Management and Coordination Act, Cap 387 Laws of Kenya.

¹³ M. Taylor, L. Zandvliet, M. Forouhar, 'Due Diligence for Human Rights: A Risk Based Approach, Working Paper on Corporate Social Responsibility Initiative' October 2009, p10.

4.2.4 Access to Government Tenders

The Government is a major consumer of goods and services. Many service providers and traders compete to do business with the government. Public funds are spent in procurement of goods and services to facilitate smooth running of government operations and development. This makes the government an important market player. There are requirements one to qualify for a government tender.¹⁴The state can utilize this opportunity to shun companies that violate human rights in their business processes to produce their goods or deliver services.

4.2.5 Development of Industry Codes of Conduct

There is need for the state to encourage various players particularly business enterprises to engage in self-regulation. This entails specific industry players drawing codes of conduct or some ground rules for their members with an objective of encouraging respect for human rights. The industry should be motivated by the state offering some incentives for adherence to the codes, including involvement of the sector associations in key decision-making forums for the industry.

Though the industry codes of conduct are neither legally binding nor enforceable, they go a long way in supplementing the other mechanisms employed by the state.

4.2.6 Legislation on Responsibility of the State for Non-State Violations

Chapter three of this study has demonstrated that the role of the state to protect its populace from infringement of their rights is fundamental. This creates a conducive environment for

<http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf > accessed 20 August 2015.

¹⁴ Public Procurement Oversight Authority, Guidelines for Bidders, Second Edition, June 2010.

the rights-holders to enjoy their rights. It has been demonstrated that where the state breaches this duty, while it has the ability to protect, it has been held responsible in South Africa and the US. The breach includes failure to: take all reasonable measures to prevent violations of human rights, undertake proper investigations when violations occur, facilitate access to justice and to conduct expeditious judicial proceedings to bring the perpetrators to book.

The Constitution of Kenya empowers the state to enact and implement legislation to fulfil its obligations in respect of human rights and fundamental freedoms.¹⁵ The responsibility of the state for non-state violations of human rights is a critical aspect that should be legislated upon. It will help define circumstances under which the state may be held accountable for non-state violation of human rights in Kenya. It will also prescribe remedies to the rights-holders when they suffer due to breach of the duty to protect by the state.

The framework should also prescribe remedies available to the victims or their families should include compensation.¹⁶ Providing for consequences for the state's failure to protect rights-holders is likely to make the state more pro-active and responsive in discharging its duties.

4.3 Conclusion

The state has been charged with the responsibility to enforce respect for human rights by all persons through established policy, legal and institutional framework. The existing policy,

¹⁵ Article 21 (4) of the Constitution of Kenya 2010.

¹⁶ Article 10 and Article 63 of the Inter-American Convention of Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica on 22 November 1969) provides for compensation . See *Velasquez Rodriguez v Honduras*, Inter- Am.Ct.H.R (Ser.C) No. 4(1998).

legal and institutional framework is not sufficient to enforce non-state actors' compliance with human rights standards.

The duty of the state to protect has a corresponding responsibility to account when this duty is breached. The existing legal framework does not provide for remedy when the state is in breach of its duty.

CHAPTER 5

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Synopsis of the Findings

The objective of this study was to examine the responsibility of the Kenyan state for non-state violation of human rights. The hypothesis of the study was that it is not sufficient to only focus on the responsibility of the state to achieve realization of human rights. The study has shown that non-state actors have a significant potential to breach human rights.

The Constitution of Kenya 2010 binds non-state actors to respect human rights. The study has shown that the duty of non-state actors to adhere to human rights standards is secondary. This confers the duty upon the state to ensure that non-state actors respect human rights by putting in place the appropriate policy, legal and institutional framework.

The legal framework analyzed in this study has demonstrated that the duty of the state to protect rights-holders from violation of their rights by third parties is primary and paramount. The study sought to find out the extent of the state responsibility for non-state violation of human rights. The study has demonstrated that in South Africa and the US jurisdictions this responsibility has been invoked in situations where the state has failed to prevent violations of human rights, undertake proper investigations when violations occur, facilitate access to justice and conduct expeditious judicial proceedings.

The legal framework in Kenya does not provide for parameters within which to invoke the state responsibility principle in cases of breach of the duty to protect. There is need for policy, legal and institutional framework to improve compliance with human rights standards by non-state actors.

5.2 Conclusion

Development of the international human rights law as a means of holding states accountable for respect of human rights was a major achievement of the United Nations which has become difficult to sustain.¹

The focus on state responsibility has remained intact despite the changes in economic, political, social and technological environment that has continually reduced the role of the state in many spheres of human life. In the history of human rights, the state started as both a player and a regulator, wielding a lot of power to assert its policies within its territorial jurisdiction. With time the state has lost power to non-state actors necessitating considerations to ensure their adherence to human rights standards.

The hypothesis of the study was that it is not sufficient to only focus on the role of the state to be able to human rights. This is because state power is weakening to the advantage of other sources of authority that have been shown to influence and often threaten realization of fundamental human rights. In this regard, there is need to think about how best to ensure respect for human dignity. The hypothesis has been proven.

Human rights were historically granted to individuals to shield them against the state's use of excessive force. Some states' functions have now been taken over by other entities likely to violate human rights. It is then appropriate that these entities should be called upon to respect human rights and to account for breach in the best way possible.

¹ Secretary-General report on minimum humanitarian standards presented at the 54th session of the UN Commission on Human Rights (E / CN.4 / 1998 / 87).

The justice system that is available to vindicate the victims' claims is expensive and inaccessible. Legal framework that is in place to control the activities of the most powerful non-state actors is weak and has gaps. It cannot always be relied upon by every aggrieved person to obtain justice.

Dealing with violations of human rights by non-state actors requires a multi-dimensional approach due to the complexities brought about by some of them. There is need for a mix of voluntary initiatives, legally binding rules, market forces, self-regulation and collaboration with the international community.²

Despite challenges faced in enforcing human rights standards against some non-state actors, the role of the state still remains paramount. It is necessary to devise a way to reinforce the human rights system based on state responsibility.³ Even if it has been shown that the state has lost power to non-state actors, protection of human rights is still based on a state-centred approach. Since the state remains accountable for the protection of human rights, focus should first be directed at finding improving its ability to enforce human rights standards. The ability of the state to function as a coherent and viable actor, responsible for the implementation of human rights protection must also be enhanced.

All the approaches recommended in this study and the existing ones will complement each other in improving the level of respect for human rights in Kenya.

²H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law and Politics*, (3rd Edition, Oxford University Press 2007) p1390.

³ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

5.3 Recommendations

1. Amendment of the Constitution and the Kenya National Human Rights Commission Act to expand the functions of the Kenya National Human Rights Commission to exhaustively deal with complaints on violation of rights by non-state actors.
2. It is recommended that the government should avoid awarding tenders to violators of human rights.
3. The Government to consider incorporating compliance with human rights standards as a basis for regulatory approval.
4. It is important for the Government of Kenya to lobby the international community to implement the extra-territorial obligation of states to enforce human rights standards against transnational corporations.
5. Development of industry codes of conduct to be encouraged as a framework for propagating self- regulation.
6. Enactment of a legislation to provide for liability of the state for non-state violation of human rights.
7. There is need for further research on the possibility of a treaty to bind private national and transnational corporations to respect human rights.
8. There is need for further research on whether the threshold for the magnitude of the cases referred to the ICC can be reviewed to cover militia men and organized criminal gangs which Kenya is unable to control, without necessarily looking at the number of victims.

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