

The Right to Development under International Law: Reflections from the European Union and Nigeria

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Table of Contents

2	Introduction	1
3	Chapter one.....	5
3.1	Introduction	5
3.1.1	Human rights and the concept of development under international law	6
3.1.1.1	The Declaration on the Right to Development (DRD).....	9
3.1.1.1.1	Human rights and resources	21
3.1.1.1.1.1	Conclusion.....	26
4	Chapter two	28
4.1	Introduction	28
4.1.1	Nigeria.....	29
4.1.1.1	European Union.....	35
4.1.1.1.1	Corruption and human rights.....	41
4.1.1.1.1.1	Conclusion.....	45
5	Chapter three	47
5.1	Introduction	47
5.1.1	Responsibility for protection of human rights under international law	48
5.1.1.1	Current regulatory mechanisms for transnational corporations	55
5.1.1.1.1	Conclusion.....	66
6	Conclusions	70
7	Bibliography.....	78

Executive Summary

The thesis examines the status of the right to development under international law. The provisions of the Declaration on the Right to Development are examined in detail. The thesis from this examination finds that economic resources, democratic governance and international cooperation are necessary for the realization of the right to development. The thesis, however, identifies the possible obligation of states to provide resources in implementing the right to development internationally as the main challenge to full legal recognition of the right to development. The thesis then examines one solution to overcome this challenge through cooperation that does not translate to outright provision of finances; joint action in curbing corruption and human rights violations perpetrated by transnational corporations. This is accomplished through the comparator jurisdictions of Nigeria and the European Union.

The thesis examines Nigeria's and the European Union's human rights commitments. The level of their human rights compliance is gauged through an analysis of their human rights record together with social and economic indicators. The thesis finds that Nigeria's compliance with her human rights commitments is being hampered by poor governance unlike the European Union. The thesis finds that the European Union can assist Nigeria in meeting her human rights commitments by curbing corruption in oil extraction; the main avenue through which Nigeria generates revenue. This, the thesis found will contribute to human rights protection in Nigeria; including enhancement of the inhabitants' way of life. This ultimately is an example of the purpose of the right to development. The thesis by this conclusion adds to the continuing discourse on the right to development as a way in which the substance of the right can be crystallized.

1 Introduction

The right to development has been the subject of discussion within the human rights field for several decades; Rajeev Malhotra in his article traces the emergence and progression of the right to development from 1948 to 1990 through discussions in various procedures and consultations undertaken by the United Nations (UN)¹. Further the UN established an “intergovernmental working group on the right to development” in 1998 which has held several sessions from 2000 – 2014 in regard to different issues regarding the right including monitoring efforts by states to actualize the right². The discussions intensified after the adoption of the United Nations’ “Declaration on the Right to Development”³. The declaration emerging in the background of the Cold War, stemmed from a desire to create equal emphasis for all rights⁴. That is “civil and political rights . . . [and] economic, social and cultural rights”⁵. The South hoped that by declaring a right to development, assistance from the North would be secured to promote the growth of their economies⁶. The declaration therefore proposes a right to development that embodies all human rights and provides joint action by states as a means for implementation of the right to development⁷.

This document has prompted discussions by various authors such as David P. Forsythe who discounts the necessity of providing a right that amalgamates two distinct concepts

¹ Rajeev Malhotra, *Right to Development: Where are we today?* in Reflections on the Right to Development 127, 127 - 133 (Arjun Sengupta et al. eds., Sage Publications, 2005).

² United Nations Human Rights Office of the High Commissioner for Human Rights, Development is a Human for All, (Dec. 1, 2013) <http://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx>.

³ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) available at <http://www2.ohchr.org/english/law/pdf/rtd.pdf>.

⁴ Siddiqur Rahman Osmani, *An Essay on the Human Rights Approach to Development*, in REFLECTIONS ON THE RIGHT TO DEVELOPMENT 110, 111 (Arjun Sengupta et al. eds., Sage Publications, 2005).

⁵ International Covenant on Civil and Political Rights, preamble, Dec. 16, 1966, 14668, 199 U.N.T.S. 171 available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

⁶ Siddiqur Rahman Osmani, 111.

⁷ Declaration on the Right to Development, art.1 and art. 4.

“development and human rights”⁸. Amartya Sen believes that the purpose of development is not to generate economic resources but to remove impediments to a person’s ability to live the life he chooses⁹. Kathleen Pritchard believes the greater the monies available to a government, the more likely the government will be able to secure human rights¹⁰. Rajeev Malhotra believes that though the declaration is vague, operationalization is possible though providing clarity in its provisions¹¹.

The fear by developed countries that they will incur an obligation to finance development in poorer countries continues to create challenges to legal recognition of the right to development; for instance, it was noted that “[t]he US was clear even during the drafting stage that it would not allow the Declaration to impose obligations for the transfer of resources under the guise of a right to development”¹². As a way forward in defining the normative standards of the right to development, the thesis proposes a form of cooperation that does not translate to outright provision of financial resources to developing nations. The proposal is that joint action in curbing corruption and human rights violations committed by corporations that operate in multiple countries, especially in developing countries, will have the same effect as that proposed by the right to development. This is because corruption has been identified as an impediment to human rights protection and development. The thesis proposes that such a measure is more likely to gain political consensus than that proposed by the right to development.

⁸ David P. Forsythe, *Human Rights and Development: A Concluding View*, in HUMAN RIGHTS AND DEVELOPMENT: INTERNATIONAL VIEWS 349, 351 - 352 (David P. Forsythe ed., Macmillan Press, 1989).

⁹ AMARTYA SEN, DEVELOPMENT AS FREEDOM, 13 – 14 (Alfred A. Knopf Inc., 1999).

¹⁰ Kathleen Pritchard, *Human Rights and Development: Theory and Data in Human Rights and Development: International Views* 329, 342 - 343 (David P. Forsythe ed., Macmillan Press, 1989).

¹¹ Rajeev Malhotra, 133.

¹² Dr. Faisal Saeed, *The Right to Development as a Human Right: A critique with Reference to GA resolution 41/120*, at 11 (Dec. 1, 2013)

http://www.academia.edu/1415512/THE_RIGHT_TO_DEVELOPMENT_AS_A_HUMAN_RIGHT_a_critique_with_reference_to_GA_Resolution_41_120 .

The examination of the thesis' proposal will be based on a comparison of Nigeria and the European Union (EU). The thesis will examine Nigeria's and the EU human rights obligations through reference to treaties they have ratified. Their current economic and social capabilities will be examined by use of sources such as the United Nations' "Human Development Report[s]"¹³. The purpose of the analysis is to demonstrate that economic resources and proper governance are necessary for human rights development; a conclusion arrived at through Pritchard's and Forsythe's hypothesis mentioned before. The thesis will demonstrate a nexus created through trade between the EU, Nigeria and corporations. This nexus will thus be used to demonstrate how a political relationship between the three actors can be created to promote observance of human rights in both jurisdictions; this is the proposal articulated in the preceding paragraph. The comparison will demonstrate how cooperation in securing the right to development can be achieved. The thesis' findings will therefore add to the debate on how to clarify the provisions of the DRD. The thesis proposal is also relevant in our current world where financial aid to promote development and human rights has been waning¹⁴ by closing a gap through which economic resources are lost.

The thesis in chapter one will discuss the right to development. The chapter will discuss the Declaration on the Right to Development in detail. The chapter will lay a basis for cooperation in protection of human rights internationally. Chapter two examines the thesis' comparator jurisdictions of Nigeria and EU. The chapter will demonstrate how corruption has

¹³ United Nations Intellectual Property Project, *The UN and Human Development*, at 1 (Briefing Note No. 8, July 2009) (Dec. 16, 2013), <http://hdr.undp.org/en/media/Jolly%20HDR%20note%20%20UN%20Intellectual%20History%20Project%208HumDev.pdf> (discussing the history of the Human Development Reports including their intent of measuring development through its expression in human lives).

¹⁴ WIKTOR OSIATYNSKI, *HUMAN RIGHTS AND THEIR LIMITS*, 59 (Cambridge University Press, 2009).

led to poor provision of human rights in Nigeria and how some businesses headquartered in the EU have been implicated in this corruption. This will lay basis for exploration in chapter three of the current mechanism to regulate such businesses (“transnational corporations”¹⁵). This discussion in chapter three will usher the last part of the thesis; conclusions. Observations from the thesis’ discussions and possible solutions to challenges will be offered in this part.

¹⁵ Commission on Transnational Corporations, Report on the Special Session, March 7-18, May 9-21, 1983, at 12, E/ 1983/17/Rev. 1, Supp. No. 7 (1983) available at <http://unctc.unctad.org/data/ec101983s5a.pdf> .

2 Chapter one

2.1 Introduction

The right to development, for close to three decades, has been the subject of discussion both within the international community and among scholars. However, despite all these deliberations the right to development has not been codified into a legally binding instrument at the international level. The longevity of the deliberations on the right indicates that the fight for stronger recognition of this right under international law is not likely to abate in the near future; because the reasons which contributed to its creation in the first place, still exist today. This chapter will thus explore why the right to development was developed and why it has inspired such debate; in other words what is the relevance of the right to development to the corpus of human rights.

The first section of this chapter will address the term development and how it is connected with development; it will also address the history of the right to development. The second section of the chapter will address the Declaration on the Right to Development; a detailed analysis of its core provisions. The third section of the chapter will analyse the value added to human rights by creation of an international obligation upon developed countries to assist developing countries implement the right to development. The chapter will conclude by laying a basis for the discussion of the issues identified above within this thesis comparative jurisdiction; Nigeria and the EU.

2.1.1 Human rights and the concept of development under international law

The 1945 “Charter of the United Nations” in its preamble and article 1(3) recognised the notion of human rights¹⁶. “Human rights are . . . universal moral rights of fundamental character”.¹⁷ They represent humanity’s ideals and values¹⁸. This was aptly reflected in the 1948 “Universal Declaration of Human Rights” (UDHR),¹⁹ recognizing humanity’s ideals and values, and laid down human rights as those benefits and privileges that a human being can claim from his or her community by virtue of being human²⁰. These human rights were given stronger recognition and protection through the “International Covenant on Civil and Political Rights” (ICCPR), 1966,²¹ and the “International Covenant on Economic, Social and Cultural Rights” (ICESCR) also of the same year²². These three instruments do not provide a right to development.

Provisions alluding to development as a human right under international law, according to Rajeev Malhotra begun through “the Philadelphia Declaration adopted by the General Conference of the International Labour Organisation (ILO) in May 1944: All human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual freedom in conditions of freedom and dignity, of economic security and equal opportunity”²³ (emphasis mine). Though the provision does not mention the word development, the highlighted sections represent characteristics of what we shall be later

¹⁶ Charter of the United Nations, (Jun. 26, 1945) <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

¹⁷ Wiktor Osiatynski, 1.

¹⁸ Wiktor Osiatynski, 1.

¹⁹ Universal Declaration of Human Rights, G.A. Res. 217(III) [A], U.N. Doc. A/RES/217(III)[A] (Dec. 10, 1948) available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

²⁰ Wiktor Osiatynski, 1.

²¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 14668, 199 U.N.T.S. 171 available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

²² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 14531, 993 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/pdf/cescr.pdf>.

²³ Rajeev Malhotra, 129.

discussed as the right to development. Malhotra continuing with the history of the right claims articles 22, 28 of the UDHR, and article 55 of the Charter of the United Nations laid a basis for what later become the right to development²⁴. Article 22 of the UDHR provides, “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation in accordance with the organization and resources of each state, of the economic, social rights and cultural rights indispensable for his dignity and the free development of his personality”²⁵ (emphasis mine). Though this provision explicitly uses the term development, here it merely plays the descriptive role of indicating that the individual should be free to advance or grow his personality as opposed to growth in finances. The underlined sections above represent facets of the right to development that will be later in the chapter.

Article 28 of the UDHR provides, “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”²⁶ (emphasis mine). Development is not mentioned in the article but it introduces yet another key notion of the right to development; that is the international governance structures should be enabling of rights implementation. This will be discussed later in the chapter. In the same vein, article 55 of the Charter of the United Nations provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

²⁴ Rajeev Malhotra, 129.

²⁵ Universal Declaration of Human Rights, art. 22.

²⁶ Universal Declaration of Human Rights, art. 28.

(c) solutions of international economic, social, health, and related problems; and inter- national cultural and educational cooperation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.²⁷

This article is quite comprehensive; it extols respect for human rights, social growth and international co-operation in solving social, economic and cultural problems. Development is explicitly mentioned in the article, it seems to relate to economic and social conditions but a proper definition of it is not offered.

Daniel Egiegba Agbibo describes development as “the process of allowing and encouraging people to meet their aspirations; or it implies basic changes in social structures, attitude, as well as the acceleration of economic growth, cutback on inequality and alleviation of absolute poverty”.²⁸ This description by Agbibo closely resembles that which was provided by Amartya Sen. Sen advances the hypothesis that true development is not achieved by merely increasing the financial wealth of a person, but by increasing the opportunities that afford him freedom to live the life that he chooses.²⁹ Sen provides examples of obstacles to his conception of development as: famine, lack of proper access to health care, water, nutrition, sanitation, education, unemployment, social security, and denial of civil liberties³⁰. These are circumstances that the ICCPR, ICESCR and other human rights instruments seek to eliminate. These two definitions also incorporate various characteristics of the international instruments that Malhotra proffered as precursors to the right to development.

²⁷ Charter of the United Nations, art. 55.

²⁸ Daniel Egiegba Agbibo, *Between Corruption and Development: The Political Economy of State Robbery in Nigeria*, 108 J. BUS. ETHICS, Issue 3, 325-345 (2012) available at http://download.springer.com/static/pdf/675/art%253A10.1007%252Fs10551-011-1093-5.pdf?auth66=1386612047_8cff37cf74ea2b156807212e87e5fc72&ext=.pdf .

²⁹ Amartya Sen, 13 – 14.

³⁰ Amartya Sen, 15.

Malhotra notes that the “Commission on Human Rights” first referred to a right to development in a resolution in 1977³¹; the commission later in 1979, accepted that there was indeed a right to development which meant that opportunities for advancement on an equal basis where as much an entitlement of humans as of states. Malhotra asserts that, “[t]hese resolutions and the discussions that followed, paved the way for the preparation of the Declaration on the Right to Development . . .”³²

Already from the various definitions and legal provisions proffered, it can be surmised that development touches on civil rights and liberties as well as social, economic and cultural rights. This conclusion ushers a more detailed analysis of the right to development.

2.1.1.1 The Declaration on the Right to Development (DRD)

To situate the debate on the DRD it is important to note that human rights had been divided into different categories; Stephen Marks notes that “first generation” rights are those articulated in the ICCPR, political and civil rights which protect persons from state arbitrariness³³. He further expounds that “second generation” rights as those rights found in the ICESCR and comprise social, economic and cultural rights, which are claims that persons make against the state³⁴. Thereafter, he notes that the DRD was introduced “in the 1970s and 1980s as one of several rights belonging to a third generation of human rights”.³⁵ He described these rights as “solidarity rights belonging to peoples and covering global concerns like development, environment, humanitarian assistance, peace . . .”³⁶ (emphasis mine). This category of rights emerged following “recognition that certain rights affect groups of people

³¹ Rajeev Malhotra, 127.

³² Rajeev Malhotra, 127.

³³ Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, *138 (2004) (Westlaw 17 HVHRJ 137).

³⁴ Stephen Marks, *138.

³⁵ Stephen Marks, *138.

³⁶ Stephen Marks, *138.

rather than individuals”.³⁷ Karel Vasak (in Sumudu Atapattu) “argued for the recognition of third-generation rights, which in his view, could not be accommodated within the first and second generation rights and could only be achieved through the solidarity of all states concerned”.³⁸ However, this addition of a third category of rights, according to Osiatynski, is yet to gain wide acceptance; “Western democracies do not recognize third-generation rights as human rights”³⁹.

These assertions by Vasak and Osiatyński are of vital importance in the discussion that will follow as they point to two opposing ideologies whose effects are visible in the text of the DRD. The DRD was adopted through a resolution of the General Assembly of the UN in 1986⁴⁰. As an indicator of future challenges to legal recognition of the right, the declaration was not adopted by consensus; there were 8 abstentions, 1 vote against and 146 votes in favour of the declaration⁴¹. The countries that abstained are Denmark, United Kingdom, Finland, Federal Republic of Germany, Japan, Iceland, Israel, and Sweden with the United States of America voting against the declaration⁴². The text of the DRD will now be examined.

It can be surmised from the preamble of the DRD that its first main goal is the advancement of humanity through a holistic implementation of the rights recognised in the ICCPR and the

³⁷ Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law*, 16 TUL. ENVTL. L.J. 65, *109 (2002) (Westlaw 16 TLNELJ 65).

³⁸ Sumudu Atapattu, *109.

³⁹ Wiktor Osiatynski, 89.

⁴⁰ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) available at <http://www2.ohchr.org/english/law/pdf/rtd.pdf>.

⁴¹ Rajeev Malhotra, 132.

⁴² United Nations, Voting record on the Declaration on the Right to Development, <http://unbisnet.un.org/> (from the main page, under voting record heading, follow the new browse list search hyperlink, enter the UN resolution symbol A/RES/41/128 in the query box and click on the search tab, follow the hyperlink under the corresponding resolution symbol that is displayed).

ICESCR⁴³. Article 1(1) of the DRD supports this assertion: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”⁴⁴. This lumping together of rights is reiterated in article 6(2) which provides, “equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights”⁴⁵. This provision echoes the desire of the global South that was mentioned earlier in this chapter.

The DRD wished to correct a historical misconception as Siddiqur Rahman Osmani explains; the UDHR intended implementation of all rights to be conducted in a holistic manner⁴⁶. However due to ideological differences between the North and the South during the Cold War, two separate international instruments prescribing different rights were adopted thereby creating a division that resulted in civil and political rights being lauded over economic, social and cultural rights⁴⁷. The result was that the human rights agenda progressed at a much faster pace than the development agenda⁴⁸. Malhotra claims that by sealing the gap that had been created by adoption of the ICCPR and ICESCR, “[t]he right to development . . . formalized the notion of indivisibility of human rights”⁴⁹. Article 9(1) reinforces this by providing, “All the aspects of the right to development set forth in the present Declaration are indivisible and

⁴³ Declaration on the Right to Development, preamble.

⁴⁴ Declaration on the Right to Development, art. 1(1).

⁴⁵ Declaration on the Right to Development, art. 6(2).

⁴⁶ Siddiqur Rahman Osmani, *An Essay on the Human Rights Approach to Development*, in REFLECTIONS ON THE RIGHT TO DEVELOPMENT 110, 110 (Arjun Sengupta et al. eds., Sage Publications, 2005).

⁴⁷ Siddiqur Rahman Osmani, 110.

⁴⁸ Siddiqur Rahman Osmani, 110.

⁴⁹ Rajeev Malhotra, 132.

interdependent and each of them should be considered in the context of the whole”.⁵⁰ J.

Oloka-Onyango supports the foregoing assertions in a blunt but interesting way:

Put another way, what difference does it make if you are starved to death (a violation of your economic rights), or die from torture (a civic freedom violation)? The net effect is that you are dead, and the death is certainly not the result of natural causes. Ultimately, of what help is the categorization of rights if you are in a situation of conflict (a violation of the right to peace), your environment is despoiled, or you are dying from poverty, and consequently denied the right to development?⁵¹

This illustration clearly demonstrates why any classification of rights is false. Additionally, article 1(1) adds a new value in creating the obligation to include people in the processes that lead to realization of the rights; participation thus becomes a constitutive element of the right to development. This is supported by Malhotra who believes the right to development is not only an end in itself (as a human right) but it is also “an enabling or framework right”⁵². This therefore means that the right to development is a tool which persons can utilize to obtain human rights, including the self-standing right to development. However, the right to development itself is not described; the provision only lists the process and the end results of actualization of the right. Arjun Sengupta (in Malhotra) tries to offer such a definition by claiming that “the right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realized”⁵³. It has been noted that “what constitutes development is largely subjective, and in this respect development strategies must be determined by the people themselves and adapted to their particular

⁵⁰ Declaration on the Right to Development, art. 9(1).

⁵¹ J. Oloka-Onyango, *Reinforcing Marginalized Rights in an age of Globalization: International Mechanisms, Non-state Actors, and the struggle for Peoples’ Rights in Africa*, 18 AM. U. INT’L L. REV. 851,*858 (2003) (LexisNexis 18 Am. U. Int’l L. Rev. 851) <http://www.lexisnexis.com/hottopics/lnacademic/>.

⁵² Rajeev Malhotra, 132-133.

⁵³ Rajeev Malhotra, 140.

conditions and needs. No one model of development is universally applicable to all cultures and peoples”⁵⁴.

Further, this provision declares the right to development as inalienable. Osiatyński, defining inalienability, quotes John Locke, “nobody can transfer to another more power that he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or to take away the life or property of another”⁵⁵. Osiatyński took this to mean that inalienability prescribes a ban against people waiving their human rights. Therefore according to this understanding, inalienable rights cannot also be restricted unless by law⁵⁶. Article 1(1) further identifies the right holders as individuals (human person) as well as groups of individuals (peoples). Rights accruing to peoples are further emphasized though article 1(2) which states, “The human right to development also implies the full realization of the right of peoples to self-determination, which includes . . . the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”⁵⁷.

Unfortunately, peoples, is not defined in the DRD. Osiatyński offers minorities as such a group⁵⁸. He notes that it has been previously thought that securing every person’s right, coupled with non-discrimination also secured the rights of minorities⁵⁹. However this changed after it emerged that more positive measures were needed to safeguard the way of life of

⁵⁴ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights Resolution 198/45, ¶155, (1991) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G90/136/48/PDF/G9013648.pdf?OpenElement>.

⁵⁵ Wiktor Osiatyński, 4.

⁵⁶ United Nations Human Rights Office the High Commissioner, *Right to Development at a Glance*, (Nov. 18, 2013), http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf.

⁵⁷ Declaration on the right to Development, art. 1(2).

⁵⁸ Wiktor Osiatyński, 87.

⁵⁹ Wiktor Osiatyński, 87.

indigenous communities which did not wish to join mainstream society.⁶⁰ For instance, he argues, that governments may be called upon to institute special measures to ensure minorities are represented in political institutions where they would be best placed to advance their interests.⁶¹ In line with Osiatyński's contention, it has been noted that lack of inclusion of indigenous populations in political processes has resulted in "destruction, degradation and removal of natural resources, water, wildlife, forests and food supplies from indigenous lands either through commercial exploitation or incompatible land use . . . removal of indigenous people from their lands; and their displacement or pre-emption from the use of their lands by outsiders"⁶².

The second main feature of the DRD is the imposition of a duty against states to secure progressive implementation of the right to development on the basis of effective participation, equality and non-discrimination; Article 2(3) provides, "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom"⁶³. This obligation is reiterated in article 8 which specifically mentions that "[e]ffective measures should be undertaken to ensure that women have an active role in the development process"⁶⁴.

Effective participation means that people must not only be given access to the policy formulation processes but also sufficient information to allow them to make meaningful

⁶⁰ Wiktor Osiatyński, 87.

⁶¹ Wiktor Osiatyński, 87-88.

⁶² U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶105.

⁶³ Declaration on the Right to Development, art. 2(3).

⁶⁴ Declaration on the Right to Development, art. 8(1).

contributions. Showing how crucial participation is it has been noted that there is a link “between political participation, the right to work, and equal access to resources . . .”⁶⁵

This provision is similar to article 3(1) which provides that “states have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development”.⁶⁶ A state’s obligation at the national is clear as that relates to article 2(3). Article 3(3) and article 4 point to a state’s obligations at the international level; they in part provide that “[s]tates have the duty to cooperate with each other in ensuring development and eliminating obstacles to development”⁶⁷ and “[s]tates have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development”⁶⁸. These two provisions create an obligation among states to join efforts in effecting development in the world. However the exact nature of that association is not defined; what are examples of hurdles to development and proposals on how they should be eliminated or what is the exact nature of assistance is the international community required to give to developing countries to aid their development. Examples of obstacles to development have been offered as “concentration of economic and political power in the most industrialized countries . . . the restrictions on transfers of technology, certain forms of protectionism, and the adverse effects of the consumption patterns of the more industrialized countries”⁶⁹. In terms of the form that that international cooperation can take article 32 of the “Convention on Persons with Disabilities” offers some guidance⁷⁰;

⁶⁵ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶114.

⁶⁶ Declaration on the Right to Development, art. 3(1).

⁶⁷ Declaration on the Right to Development, art. 3(3).

⁶⁸ Declaration on the Right to Development, art. 4(1).

⁶⁹ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶168.

⁷⁰ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>.

Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programs and best practices; facilitating cooperation in research and access to scientific and technical knowledge; providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies⁷¹.

The examples illustrate that the provisions of the DRD are vague and may point to the reason why developed states are hesitant in accepting a legally binding right to development.

Moreover, through the foregoing provisions, the DRD creates a multiplicity of duty bearers; individuals, states and the international community. In terms of responsibility, where does the back stop. Even though it declares the state as the main duty bearer, are there situations where if the national state is unable to meet its obligations, the DRD obligates the international community to pick up the slack? Additionally, when can individuals be said to have infringed the right to development?

Additionally, through articles 2(3) and 3(3), the DRD proposes that states have a right to development. This goes against the traditional view of states under human rights law as guarantors of human rights and not the holders of the rights⁷². This provision creates an interesting legal challenge; Sumudu Atapattu articulates it as, “The question arises whether states can be beneficiaries as well as the guardians of the right. How can a violation of this right be established?”⁷³ In other words, in what circumstances can a state claim its right to development has been violated; could it be where developed countries refuse to grant legitimate requests by developing countries for financial assistance in development projects or could it be that a developing country can claim that the existing global trade system is

⁷¹ Convention on the Rights of Persons with Disabilities, art. 32.

⁷² Wiktor Osiatyński, 27 – 28.

⁷³ Sumudu Atapattu, *117.

detrimental to its development agenda (as article 3(3) by pushing for “a new international economic order” suggests⁷⁴). Malhotra explains that article 3(3) was motivated by the desire by countries which had just emerged from colonial rule in the 1960s to create a trade system that favored their developmental efforts⁷⁵. He noted that developed countries were opposed to this idea as they feared it would impose an obligation upon them to provide financial or other assistance to the South.⁷⁶ This means that any of the scenarios suggested above where states can claim a breach of the right to development are unlikely to gain traction and acceptance by developed countries. In fact, protests have been made to the notion of states as right holders⁷⁷. This confusion on the exact obligations imposed upon states by the DRD at the international level may be the main impediment to legal recognition of the right to development.

It has been suggested that guidance in interpretation of the DRD can be sought from reference to other human rights instruments such as “the Universal Declaration of Human Rights, International Covenants on Human Rights, the Proclamation of Tehran of 1968, the Declaration on Social Progress and Development . . . and the Universal Declaration on the eradication of Hunger and Malnutrition . . .”⁷⁸ Perhaps due to the fact that there may exist myriad perceptions of the concept of development, it has been suggested that implementation can occur through formulation of guidelines that lay down “minimum standards” of development⁷⁹. In that regard it has been suggested that measurements to gauge progress of

⁷⁴ Declaration on the Right to Development, art. 3(3).

⁷⁵ Rajeev Malhotra, 129-130.

⁷⁶ Rajeev Malhotra 130.

⁷⁷ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶79.

⁷⁸ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶19.

⁷⁹ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶73.

implementation of the right be designed⁸⁰; possibly looking at “conditions of life; conditions of work; equality of access to resources; and participation”⁸¹. In that regard, “the High Level Task Force on the Implementation of the Right to Development” in its report of 2010 considers possible measurements for the right to development⁸². The following countries offered their views on the indicators:

“The United States of America . . . reiterat[es] its concern with regard to the criteria evolving into a legally-binding instrument. It noted that development is a strategic, economic and moral imperative that should be viewed as an on-going adaptive process and long-term endeavour”⁸³. Stating a similar view, the European Union said “The Union’s discourse is not within the realm of a legally-binding instrument. The draft set of criteria . . . should be used as a basis for the elaboration of a set of standards for the implementation of the right to development with the aim of mainstreaming the right to development in the policies of actors at all levels”⁸⁴. Providing an opposite view, “Nigeria . . . on behalf of the African Group . . . [said] the efforts made by the task force and the Working Group would constitute the commencement of the much-desired process to delineate standards, which should eventually evolve into a legally-binding international instrument”⁸⁵.

Ultimately, the foregoing shows much remains to be done in implementing the right to development. In that regard and as noted above, the obligations imposed upon developed

⁸⁰ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶171.

⁸¹ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶172.

⁸² Report of the High-Level Task Force on the Implementation of the Right to Development, sixth session, January 14-22, 2010, ¶¶62-69 U.N. Doc. A/HRC/15/WG.2/FT/2 (2010) available at www2.ohchr.org/english/issues/development/right/docs/A-HRC-15-WG2-TF-2.doc.

⁸³ Report of the High-Level Task Force on the Implementation of the Right to Development, ¶12.

⁸⁴ Report of the High-Level Task Force on the Implementation of the Right to Development, ¶13.

⁸⁵ Report of the High-Level Task Force on the Implementation of the Right to Development, ¶14.

countries by the DRD to provide assistance to developing countries to support their developmental efforts may be the most challenging to international recognition of the right to development. The question thus arises; is this necessary? Or must the provisions be coached in mandatory terms? How important are economic resources in securing human rights? These questions will be dealt with later in the chapter.

What is clear from the foregoing is that there has been a sustained movement for legal recognition of the right to development. It has also been established that the intention of the proponents of the right, developing countries, was “for an international order in which effective international co-operation would reduce the perceived unfairness of the prevailing economic order”⁸⁶. Developing countries still grapple with underdevelopment. This means that this push for a legally enforceable right to development is likely to persist until a workable solution is reached. Anja Lindroos (in Atapattu) notes, “no progress – on the right to development - can be made unless the right is acceptable to both the North and the South”⁸⁷. However, she further notes “since the debate is politically important to the South it can hardly be ignored by the North”⁸⁸. Despite the lack of legal recognition, Lindroos claims that the right to development is now “recognised as a comprehensive economic, social, cultural and political process which pursues constant improvement of the well-being of human beings”⁸⁹.

This claim by Lindroos is supported by the fact that the right to development has been referenced in a number of international documents; For instance, “the Rio Declaration on

⁸⁶ MARGOT SALOMON, *GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW*, 50 (Oxford University Press, 2007).

⁸⁷ Sumudu Atapattu, *122.

⁸⁸ Sumudu Atapattu, *122.

⁸⁹ Sumudu Atapattu, *122.

Environment and Development of 1992 ... which in Principle 3 provide that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”⁹⁰. Similarly, according to Stephen Marks, “the 1993 Vienna Declaration and Programme of Action recognised the right to development as a universal and inalienable right and an integral part of fundamental human rights”⁹¹. The right to development is also mentioned in the “Declaration and the Program of Action adopted at the World Summit for Social Development”⁹². This declaration adopted in 1995 stated that, “we are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people”⁹³.

Additionally, in 2003 the Commission on Human Rights “request(ed) its Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document establishing . . . an international legal standard of a binding nature, guidelines on the implementation of the right to development . . . based on the Declaration on the Right to Development, including issues which any such instrument might address”⁹⁴. The right to development is also mentioned in “the Millennium Declaration, the 2002 Monterrey Consensus, the 2005 World Summit Outcome Document and the 2007 Declaration on the Rights of Indigenous Peoples”⁹⁵. However, despite recognition in all these instruments, the right to development is not yet legally enforceable. Only the African Charter on Human and Peoples' Rights, a

⁹⁰ Sumudu Atapattu, *119.

⁹¹ Stephen Marks, *139.

⁹² Sumudu Atapattu, *120.

⁹³ Sumudu Atapattu, *120.

⁹⁴ Stephen Marks, *139.

⁹⁵ United Nations Human Rights Office of the High Commissioner, *The Right to Development at a Glance*, (Nov. 18, 2013) http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf.

regional instrument, in article 22 (2) recognises the right to development⁹⁶. This makes the right to development a binding right or obligation only on parties to the African Charter.

2.1.1.1.1 Human rights and resources

In the preceding section, the thesis mentions that the most problematic aspect of the right to development is the creation of an obligation upon developed countries to aid the developmental efforts of the developing countries. The question to ask is, is this concept new under international law? And why is it important for development and consequently protection of human rights?

The connection between resources and provision of human rights is articulated by Article 2 (1) of the ICESCR, where each state to the Covenant “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognized in the present Covenant . . .”⁹⁷ identifying some of these rights, Article 11 (1) of the same Covenant states, “The State Parties . . . recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of these rights, recognizing to this effect the essential importance of international co-operation based on free consent”⁹⁸. These provisions lay the stage for international cooperation in provision of social, economic and cultural rights. It suggests that for these rights to be realized globally, co-operation is essential. The next question is why are resources important for rights protection?

⁹⁶ African Charter on Human and Peoples’ Rights, art. 22(2), Jun. 27, 1981, OAU Doc. CAB/LEG/ 67/3 available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

⁹⁷ International Covenant on Economic, Social and Cultural Rights, art. 2(1).

⁹⁸ International Covenant on Economic, Social and Cultural Rights, art. 11(1).

Arjun Sengupta (in Malhotra) advances the idea that apart from crafting proper policies to guarantee the right to development, economic wealth is also a necessary component towards the realization of the right⁹⁹. Sengupta notes that implementation of some human rights require more economic resources than others¹⁰⁰. He claims that civil rights require substantially less resources to implement than socio-economic and cultural rights. He therefore claims that “economic growth is not only instrumentally relevant, but it is sufficiently critical for the realization of the right to development to be an end in itself”¹⁰¹. For instance, in examining state regulation of public justice systems (civil and criminal), Cass R. Sunstein, found “they require taxpayers to devote a great deal of money for administration of justice”¹⁰². An example he gave is, “if the government wants to protect people from unreasonable searches and seizure, it will have to expend resources to train, monitor and discipline the police”¹⁰³.

In contradiction to the foregoing, Sen argues that growth of financial ability does not necessary translate to a growth in an individual’s personality because there are many variables that affect this dynamic¹⁰⁴. He therefore argues that the conception of development should be more than a mere preoccupation with increasing a nation’s economic resources. Sen however concedes that the real value of wealth is in its ability to afford a person the opportunity to live the life he chooses; it increases his options¹⁰⁵.

⁹⁹ Rajeev Malhotra, 142.

¹⁰⁰ Rajeev Malhotra, 141.

¹⁰¹ Rajeev Malhotra, 141.

¹⁰² Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* 56 SYRACUSE L. REV. 1, *7 (2005) (Westlaw 56 SYRLR 1).

¹⁰³ Cass R. Sunstein, *7.

¹⁰⁴ Amartya Sen 14-15.

¹⁰⁵ Amartya Sen, 15.

Providing an intermediate view between the two previous authors, David P. Forsythe's argument for the protection of human rights in the developing world, is based on political choices formed through proper information that in turn translate into proper public policies as opposed to an increase in national wealth.¹⁰⁶ In his words, "the key variable in the mix of factors affecting human rights is the political space in which decisions are made about who participates in policy decisions and who benefits from socio-economic development"¹⁰⁷. Forsyth thus believes a better understanding of this variable is critical to the protection of human rights in developing countries as opposed to a focusing on wealth creation¹⁰⁸. Forsythe does make an interesting point; which should precede the other, an effective democracy or human rights. The weakness in his hypothesis is that in order to secure political governance that makes decisions in the best interest of their electorate, there must be vibrant civil and political freedom; a process that requires funds as Sengupta has pointed out. In fact it has been noted that "To be fully effective, democracy itself depends upon . . . the employment of such rights as freedom of expression, freedom of association and of free elections"¹⁰⁹.

Forsythe also finds fault with the definition advanced by agencies of the UN that development is a wide concept incorporating within it not only economic factors but also human rights values¹¹⁰. He claims this leads to confusion of what he believes are two distinct concepts; "development and human rights"¹¹¹. Forsythe believes development already adheres to human

¹⁰⁶ David P. Forsythe, 350.

¹⁰⁷ David P. Forsythe, 350.

¹⁰⁸ David P. Forsythe, 350.

¹⁰⁹ U.N, Centre for Human Rights, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, ¶148.

¹¹⁰ David P. Forsythe, 351 - 352.

¹¹¹ David P. Forsythe, 351.

rights standards, and therefore formulating development in that manner is tenuous¹¹². But is this true; should each of the two distinct ideas Forsythe identified be looked at in isolation? This chapter has already mentioned that creation of two separate instruments to guarantee the rights identified in the UDHR led to emphasis on some rights over development; it therefore implies that the two concepts as identified by Forsythe pursue different goals and only by looking at them together can a common goal be established. It also does not detract from either concept to look at the two in a holistic manner.

Additionally, Forsythe's claim that economic resources are only minimally relevant to human rights implementation, questions the long tradition; reflected in a number of human rights instruments, including the DRD, of providing financial assistance to countries to promote observance of human rights. These instruments include article 56 of the Charter of the United Nations¹¹³. Additionally, the Committee on Economic and Social Rights has made statements to the same effect in general comment number 15("To comply with international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires State parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries"¹¹⁴) and 12 ("States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency . . . each state should contribute to this task in accordance with its

¹¹² David P. Forsythe, 352.

¹¹³ Charter of the United Nations, art. 56 ("All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.").

¹¹⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) ¶31, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en

ability”¹¹⁵). It can be surmised that these instruments have noted a correlation between availability of economic resources and the ability to implement human rights. The right to development therefore aptly covers Forsythe’s concern. The right places responsibility upon citizens to elect representatives that will make proper policy decisions based on available resources to implement human rights. Kathleen Pritchard supports the conclusion made. Pritchard claims that “economic and political systems are interdependent and that human rights conditions are often the result of this interaction”¹¹⁶. In a study carried out by Pritchard to establish the relationship between economic development and human rights, she found that to a great extent, the higher a country’s gross national product is, the greater the observance and respect for civil, political rights, as well as socio-economic rights¹¹⁷. The reverse she found is also true; the lower a country’s gross national product the poorer the country ranks in its observance of all types of human rights¹¹⁸.

From the foregoing discussions, two principles clearly emerge; there exist a long held understanding in the international community that international co-operation is necessary for economic growth and that economic growth is crucial to peoples’ right to human rights. This is more so relevant today in the era of globalization where the economic fates of many countries are intertwined. An example of this is the financial crisis that engulfed many countries of the world in 2008. The World Bank notes that:

More than four years after the global financial crisis hit, high-income countries struggle to restructure their economies and regain fiscal sustainability. Developing countries, where growth is 1-2 percentage points below what it

¹¹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to adequate Food (arts. 11) ¶38, U.N. Doc. E/C.12/1999/5 (May 12, 1999) available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f5&Lang=en

¹¹⁶ Kathleen Pritchard, 329.

¹¹⁷ Kathleen Pritchard, 333-335.

¹¹⁸ Kathleen Pritchard, 333-335.

was during the pre-crisis period, have been affected by the weakness in high-income countries¹¹⁹

It is also undeniable that human rights can only be secured effectively through sufficient financial resources; this goes equally for civil and political rights as well as economic, social and cultural rights. Therefore, the economic capability of a country, impacts on the manner that it is able to execute its obligations under international and domestic law. Economic might is intrinsically linked with development (denoting provision of the rights).

2.1.1.1.1 Conclusion

This chapter has demonstrated that the right to development was proposed as a bridge between the rights that guarantee civil liberties and those that guarantee social, economic and cultural rights. It has been shown that categorisation of rights is false because human rights are interrelated and indivisible. It has been shown that the right to development is a right in itself but also a tool through which all other rights can be achieved. It brings with it assurances of “equality, non-discrimination, participation, transparency and accountability, as well as international cooperation . . . and the rule of law and governance, at all levels . . .”¹²⁰

The characteristics listed are constitutes of what Siddiquir Rahman Osmani calls the “human rights approach to development”¹²¹. However the chapter also identified weaknesses of the right to development and concluded that the content of the right to development has to be clarified. Among the provisions that need to be clarified are those that impose a duty on states to jointly secure the right to development; it has been shown that economic resources are necessary in human rights implementation and thus why assistance to countries which lack these resources is necessary. Despite the demonstrated necessity, the issue will remain whether or not this is an obligation that developed countries will wish to incur under the right

¹¹⁹ World Bank, Global Economic Prospects, Volume 6, January 2013: Assuring Growth Over the Medium Term, (Oct, 5, 2013), <https://openknowledge.worldbank.org/handle/10986/12124>.

¹²⁰ Report of the Working Group on the Right to Development, seventh session, January 9-13, 2006, ¶40 U.N. Doc. E/CN.4/2006/26 (2006) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/34/PDF/G0611034.pdf?OpenElement>.

¹²¹ Siddiquir Rahman Osmani, 112-118.

to development; or are there other means through which human rights can be secured without an outright obligation to provide financial assistance that may be more acceptable to both developed and developing countries.

This assertion lays a basis for further analysis of the right to development in our two comparator jurisdictions; Nigeria and European Union. The questions the thesis will answer in demonstrating a relationship between resources, governance and human rights protection in the comparator jurisdictions will be; what is the status of human rights protection in Nigeria and the European Union? How has good governance and resources contributed to this status?

3 Chapter two

3.1 Introduction

In the foregoing chapter, this thesis briefly defined the concept of human rights; it discussed the notion of development under international law, the right to development, and the relevance of economic resources and international cooperation in the implementation of human rights including the right to development. This chapter will continue to examine the issues of human rights and its relationship to economic resources through the dual hypothesis advanced by Kathleen Pritchard and David P. Forsythe; this chapter will continue to advance the notion that economic resources, international co-operation and proper governance, all aspects of the right to development, are the only way to ensure the respect of human rights in the developing world. The thesis will adopt proper governance to mean “democratic governance”¹²². Jack Mangala describes this as “[a] concept whose central objectives are tailored towards political freedom, human rights, and the end of discrimination”¹²³. Adel Abdellatif (in Jack Mangala) also defines it as “a reform agenda that aims at building institutions and rules that are not just efficient but also fair, and that are developed through a democratic process in which all people have a real political voice”¹²⁴. This chapter will seek to demonstrate the validity of the theory articulated above through the comparative jurisdictions of Nigeria and the European Union.

The first section of this chapter will look at Nigeria; her legal and social conditions, the human rights status of the country and her challenges to full implementation of human rights including the right to development. The second section of the chapter will conduct a similar analysis in the European Union. The third section of the chapter will make conclusions from

¹²² Jack Mangala, *Africa-EU Partnership on Democratic Governance and Human Rights*, in AFRICA AND THE EUROPEAN UNION: A STRATEGIC PARTNERSHIP, 69, 74 (Jack Mangala ed., Palgrave Macmillan, 2013).

¹²³ Jack Mangala, 74.

¹²⁴ Jack Mangala, 74.

the results of the analysis whether indeed there is a nexus between economic capability, democratic governance and respect for human rights including the right to development. The section will set basis for discussion in the next chapter on how international cooperation can be achieved to tackle challenges to the right to development through a common problem that the two comparative jurisdictions share.

3.1.1 Nigeria

Nigeria, according to the World Bank, has a population of 158 million¹²⁵. “Nigeria became independent on October 1, 1960”¹²⁶. The 1999 constitution establishes it as a federation¹²⁷. Nigeria has ratified amongst other international human rights instruments the ICCPR and the ICESCR; (She ratified the ICCPR on July 29, 1993¹²⁸ and the ICESCR on the same date¹²⁹). Nigeria is a member of the African Union¹³⁰ and is a party to a number of African Union human rights instruments including the African Charter on Human and Peoples’ Rights (Nigeria ratified the treaty on June 22nd 1983¹³¹). This Charter in article 22 (2) recognises that “states shall have the duty, individually or collectively, to ensure the exercise of the right to development”¹³².

Additionally, chapter four of the 1999 constitution prescribes a list of fundamental rights and freedoms; amongst them the right to human dignity, personal liberty, fair trial rights, labor

¹²⁵ World Bank, *Nigeria Overview*, (Nov. 8, 2013), <http://www.worldbank.org/en/country/nigeria/overview>.

¹²⁶ AKPENINOR JAMES OHWOFASA, *DEMOCRACY AND ISSUES OF GOVERNANCE IN AFRICAN POLITICS: THE NIGERIAN PERSPECTIVE I* (Bookwright Nigeria, 2007).

¹²⁷ CONSTITUTION OF NIGERIA (1999), §2(2) and 3(1), (Oct. 18, 2013) http://www.nigerstate.gov.ng/epubl/Niger_constitution_1999.pdf.

¹²⁸ United Nations, *Status of the International Covenant on Civil and Political Rights*, (Nov. 18, 2013), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

¹²⁹ United Nations, *Status of the International Covenant on Economic, Social, and Cultural Rights*, (Nov. 18, 2013), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>.

¹³⁰ African Union, *List of Countries which have Signed, Ratified/Acceded to the Constitutive Act of the African Union*, (Nov. 18, 2013), <http://www.au.int/en/sites/default/files/Constitutive%20Act%20-%20Final.pdf>.

¹³¹ African Union, *List of Countries which have Signed, Ratified/Acceded the African Charter on Human and Peoples’ Rights*, (Oct. 18, 2013), <http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples%27%20Rights.pdf>.

¹³² African Charter on Human and Peoples’ Rights, art. 22(2).

rights, freedom of speech and freedom from discrimination¹³³. Through articles 16 to 18 the state is obligated to direct its policies towards provision of amongst others education, food, shelter, health services, and opportunities for employment¹³⁴. The Nigerian constitution thereby provides for protection of civil, political, economic, social and cultural rights.

The 1999 constitution also prescribes general principles for governance which will be pertinent to our analysis. Article 4(1) prescribes that “Nigeria shall be a State based on the principles of democracy and social justice”¹³⁵. Article 16(1) (b) provides “the State shall . . . control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity”¹³⁶. The foregoing international and regional treaties together with the Nigerian constitution create obligations on Nigeria to fully implementation all the human rights they prescribe including the right to development.

In terms of its economic situation: Nigeria produces 3.22 per cent of the world’s petroleum output¹³⁷. To illustrate this Robert I. Rotberg states, “In 2005, Nigeria exported \$47 billion worth of petroleum and gas”¹³⁸. He further noted that her “oil and gas . . . provid[e] for 20 per cent of the Gross Domestic Product, 65 per cent of budgetary revenues, and 95 per cent of foreign exchange earnings”¹³⁹. Providing slightly different data, World Bank states that Nigeria’s “Oil accounts for 90% of the country’s exports and provides about 75% of the consolidated budgetary revenues”¹⁴⁰. The Bank also states that Nigeria has “the largest natural

¹³³ CONSTITUTION OF NIGERIA (1999), art. 33 - 42.

¹³⁴ CONSTITUTION OF NIGERIA (1999), §17 and 18.

¹³⁵ CONSTITUTION OF NIGERIA (1999), §14(1).

¹³⁶ CONSTITUTION OF NIGERIA (1999), §16(1) (b).

¹³⁷ ROBERT I. ROTBERG, COUNCIL ON FOREIGN RELATIONS, NIGERIA: ELECTIONS AND CONTINUING CHALLENGES, 3 (CSR. 27, 2007) available at <http://www.cfr.org/nigeria/nigeria/p12926#>.

¹³⁸ Robert I. Rotberg, 22.

¹³⁹ Robert I. Rotberg, 22.

¹⁴⁰ World Bank, *Nigeria Overview*, (Nov. 8, 2013), <http://www.worldbank.org/en/country/nigeria/overview>.

gas reserves in the continent”¹⁴¹. This brief economic data is meant to illustrate the major role that oil and petroleum exports play in generation of government revenue in Nigeria. This industry essentially determines how much revenue the country can generate and therefore how much revenue the country can assign to implementation of human rights. In fact in that regard, the World Bank, in 2013, provided the following outlook for Nigeria, “with these large reserves of human and natural resources, the country is posed to build a prosperous economy, significantly reduce poverty, and provide health, education, and infrastructure services to meet its population needs”¹⁴².

This is a positive outlook given by the World Bank on Nigeria’s future; but how is the country currently faring in social and economic development. Writing in 2007, Robert I. Rotberg provides the following data; Nigeria’s “infant mortality rates . . . are listed as more than ninety-seven per one thousand live births. For comparison, South Africa’s rate is fifty-four . . . Singapore’s is three . . . and the U.S. rate is seven”¹⁴³. In 2000 it had the highest maternal mortality rate in Africa¹⁴⁴. “About 30 per cent of all children under five were underweight for age of height in 2003 . . . high compared to Asia or Europe”¹⁴⁵. In 2004 there were twenty-seven physicians per one hundred thousand people”¹⁴⁶. Additionally, Rotberg claims that respect for the rule of law in Nigeria is poor; its formal and informal court systems are riddled with problems such as perceptions of impartiality and delays in provision of justice leading to a rise of vigilantism to secure life and property¹⁴⁷. Ohwofasa, writing also in

¹⁴¹ World bank, *Nigeria Overview*, (Nov. 8, 2013), <http://www.worldbank.org/en/country/nigeria/overview>.

¹⁴² World bank, *Nigeria Overview*, (Nov. 8, 2013), <http://www.worldbank.org/en/country/nigeria/overview>.

¹⁴³ Robert I. Rotberg, 24.

¹⁴⁴ Robert I. Rotberg, 24.

¹⁴⁵ Robert I. Rotberg, 24.

¹⁴⁶ Robert I. Rotberg, 24.

¹⁴⁷ Robert I. Rotberg, 21.

2007, noted that inequality in the distribution of resources and lack of opportunities for people to fend for themselves has spurred a rise in crime.¹⁴⁸

The situation articulated above has lead Rotberg to state that, “Nigeria is still a poor, struggling country, even by the standards of its continent”¹⁴⁹. And this is in spite of having a labour force of 150 million and rich earnings from oil¹⁵⁰. In fact, giving an illustration of the magnitude of the problem, Rotberg notes that despite extraction of oil from 1970 that generated 500 billion dollars social development has remained poor.¹⁵¹ This sentiment is shared by the World Bank which states that, “Despite a strong economic track record, poverty is significant . . .”¹⁵² Additionally the Bank adds, ‘In spite of successful initiatives in human development, Nigeria may not be on track for meeting most of the Millennium Development Goals (MDGs)’¹⁵³. (MDGs are a set of goals developed under the United Nations which countries have undertaken to meet by 2015; pledging to tackle amongst other issues poverty, promoting basic education and eradicating hunger¹⁵⁴) The question then to ask is why this is so? Why despite significant government revenue is the country unable to meet her social and economic needs; thereby denying her citizens the full protection to these rights accorded by the ICCPR, ICESCR, the African Charter on Human Rights and Nigeria’s constitution?

Okechukwu Oko, writing in 2010, describes how after initial jubilation at the establishment of democratic rule in Nigeria in 1999, the anticipated governmental accountability was eroded

¹⁴⁸ Akpeninor James Ohwafasa, 109.

¹⁴⁹ Robert I. Rotberg, 3.

¹⁵⁰ Robert I. Rotberg, 3.

¹⁵¹ Robert I. Rotberg, 4.

¹⁵² World Bank, *Nigeria Overview*, (Nov. 8, 2013), <http://www.worldbank.org/en/country/nigeria/overview>.

¹⁵³ World Bank, *Nigeria Overview*, (Nov. 8, 2013) <http://www.worldbank.org/en/country/nigeria/overview>.

¹⁵⁴ Millennium Project, *About MDGs* (Nov. 28, 2013) <http://www.unmillenniumproject.org/goals/>.

by corruption¹⁵⁵. He claims that “corruption is pervasive and affects all facets of Nigeria’s social, legal, political and economic institutions”¹⁵⁶. This claim is supported by Transparency International’s “Corruption Perception Index” which ranked Nigeria in the 139th position out of 176 countries in 2012¹⁵⁷. In comparison the same Index ranked all member states of the European Union, with the exception of seven, Bulgaria, Czech Republic, Greece, Italy, Latvia, Romania and Slovakia, above the 50th position¹⁵⁸. The Index proposes if a country is ranked below 50, it shows “that public institutions need to be more transparent and powerful officials more accountable”¹⁵⁹. The thesis concedes that the position on the Index does not necessarily mean that a country is poorly developed; a case in point is Italy which is listed in the 72nd position, in the 2012 Index, but most of the countries in the lower half of the Index are developing countries¹⁶⁰. The thesis bases its finding on whether or not a country is developed on World Bank classification¹⁶¹.

In further discussing corruption in Nigeria, Rotberg notes that corruption is prevalent in every sector of life and is practised by citizens, politicians and all types of government officials¹⁶². Akpeninor James Ohwofasa argues that several factors contribute towards Nigeria’s poverty but the main factor is corruption¹⁶³. Quoting another author, he states, “oil and gas have

¹⁵⁵ OKECHUKWU OKO, KEY PROBLEMS FOR DEMOCRACY IN NIGERIA: CREDIBLE ELECTIONS, CORRUPTION, SECURITY, GOVERNANCE, AND POLITICAL PARTIES 493 – 495 (Edwin Mellen Press, 2010).

¹⁵⁶ Okechukwu Oko, 495.

¹⁵⁷ Transparency International, *Corruption Perceptions Index 2012*, (Oct. 17, 2013), http://issuu.com/transparencyinternational/docs/cpi_2012_report/1?e=2496456/2010281.

¹⁵⁸ Transparency International, *Corruption Perceptions Index 2012*.

¹⁵⁹ Transparency International, *Corruption Perceptions Index 2012*.

¹⁶⁰ Transparency International, *Corruption Perceptions Index 2012*.

¹⁶¹ World Bank, *Country and Lending Groups Classifications*, (Oct. 8, 2013) <http://data.worldbank.org/about/country-classifications/country-and-lending-groups>.

¹⁶² Robert I. Rotberg, 23.

¹⁶³ Akpeninor James Ohwofasa, 115-116.

brought wealth to Nigeria but this industry has by tradition caused opportunistic corruption on a massive scale”¹⁶⁴. In the same vein Mallam Nuhu Ribadu (in Ohwofasa) notes that:

Nigeria’s basic social indicators place it among the 20 poorest countries in the world . . . despite the country’s relative oil wealth. The resultant effect of these abuses was that even institutions responsible for the custody of law and order became vulnerable and overwhelmed by vices, such as corruption, greed and economic mismanagement, which made Nigeria a safe haven for all forms of economic and financial crimes.¹⁶⁵

Nigeria has made attempts to fight corruption; “The Nigerian Extractive Industries Initiative”¹⁶⁶ was launched in 2004 to deal with massive misuse of the country’s oil revenues¹⁶⁷. (The larger “Extractive Industries Transparency Initiative (EITI) is a global coalition of governments, companies and civil society working together to improve openness and accountable management of revenues from natural resources”¹⁶⁸). “The Economic and Financial Crimes Commission Act” was enacted to deal with corruption in the larger society¹⁶⁹. Nigeria is also as a party to the “African Union Convention on Preventing and Combating Corruption” is obligated to implement the provisions of the treaty¹⁷⁰. Nigeria has also joined “the Attorney General and Justice Ministers’ Accra Declaration on Collaboration against corruption issued in 2001” whose purpose is to strengthen efforts by the countries to curb corruption¹⁷¹. This declaration was created under the “Economic Community of West African States (ECOWAS)” of which Nigeria is a member¹⁷². Ijeoma Opara notes that

¹⁶⁴ Akpeninor James Ohwofasa, 116.

¹⁶⁵ Akpeninor James Ohwofasa, 119.

¹⁶⁶ EITI, *Nigeria EITI: Making Transparency Count, Uncovering Billions*, 1 (2012) (Nov. 20, 2013), http://eiti.org/files/NEITI-EITI-Core-Audit-Report-Oil-Gas-2009-2011-310113-New_4.pdf.

¹⁶⁷ EITI, *Nigeria EITI: Making Transparency Count, Uncovering Billions*, 1.

¹⁶⁸ EITI, *What is the EITI?* (Dec. 1, 2013) <http://eiti.org/eiti>.

¹⁶⁹ Oko Okechukwu, 505.

¹⁷⁰ African Union, *List of Countries which have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption*, (2013), (Dec. 16, 2013), <http://www.au.int/en/sites/default/files/Corruption.pdf>.

¹⁷¹ Ijeoma Opara, *Nigerian Anti-Corruption Initiatives*, 6 J. INT’L BUS. & L. 65, *78 (2007) (Westlaw 6 HOFJIBL 65).

¹⁷² Ijeoma Opara, *78.

Nigeria's problem is not a lack of legislation targeting corruption but that the legislation has not been properly utilized¹⁷³.

The foregoing indicates that protection of human rights does not depend on their inclusion in national constitutions; the mechanism through which human rights are exercised at the national level¹⁷⁴. Rather it depends on the nature of the national political system and the social circumstances of the citizens and how they view their political system, be they elite or ordinary citizens¹⁷⁵. History has shown that human rights are respected in a democracy with proper separation of powers and with checks and balances against government power¹⁷⁶. This argument certainly is true of Nigeria. We see that the Nigerian constitution aptly provides for the protection of human rights and the natural resources that belong to the people (Article 17(2)(d) of the Nigerian Constitution provides that "exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented"¹⁷⁷). However as shown above, due to the poverty that the people suffer, lack of properly functioning courts; and a ruling elite that plunders its country's wealth, protection and in any event, full realization of human rights is impeded.

3.1.1.1 European Union

The EU is composed of the following 28 countries: "Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom"¹⁷⁸. The EU was initially formed to foster peace in Europe but eventually transformed into an economic

¹⁷³ Ijeoma Opara, *82.

¹⁷⁴ Wiktor Osiatynski, 71.

¹⁷⁵ Wiktor Osiatynski, 71.

¹⁷⁶ Wiktor Osiatynski, 71.

¹⁷⁷ CONSTITUTION OF NIGERIA (1999), §17(2) (d).

¹⁷⁸ European Union, *Country Facts*, (Nov. 19, 2013), http://europa.eu/about-eu/countries/index_en.htm.

partnership¹⁷⁹; together the EU represents a major trading bloc in the global economic system¹⁸⁰.

Laying a principle of foreign policy, the agreement establishing the EU provides;

In its relations with the wider world, the Union shall ... contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter¹⁸¹ (emphasis mine).

The highlighted segments of the quote signify that the EU is interested in advancement of international law, sustainable development, safeguarding human rights and abolishing poverty (these segment will be of relevance to this thesis in chapter three). This policy statement signifies that the EU is not only interested in ensuring these issues are addressed within its economic zone but also in the rest of the world. In terms of the human rights instruments applicable to EU member states: “The Charter of Fundamental Rights of the European Union of 2000 will be legally binding in all member states of the EU . . . EU institutions are thus bound by the Charter. The charter has six chapters dealing with dignity, freedoms, equality, solidarity, citizens’ rights, and justice”¹⁸².

Further, in their individual capacity all EU member states have ratified the 1950 Council of Europe “Convention for the Protection of Human Rights and Fundamental Freedoms”¹⁸³. Additionally, there is indication that the EU as an organisation will accede to the same

¹⁷⁹ Euoprean Union, *How the EU Works: History*, (Dec. 1, 2013) http://europa.eu/about-eu/eu-history/index_en.htm.

¹⁸⁰ Euoprean Union, *How the EU Works: Facts and Figures*, (Dec. 1, 2013) http://europa.eu/about-eu/facts-figures/index_en.htm.

¹⁸¹ Consolidated Version of the Treaty on European Union, art. 3(5), October 26, 2012, 2012 O.J. C326/13 at 17 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0013:0046:EN:PDF>.

¹⁸² Wiktor Osiatyński, 28.

¹⁸³ Council of Europe, *Status of the Convention for the Protection of Human Rights and Fundamental Freedoms*, (Oct. 12, 2013), <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=1&DF=&CL=ENG>.

treaty¹⁸⁴. EU member states have also ratified the ICCPR¹⁸⁵ and the ICESCR¹⁸⁶. There are a number of avenues for EU inhabitants to redress for human rights violations. For instance, the European Court of Human Rights is quite active in human rights litigation; Luzius Wildhaber provides that “the European Convention on Human Rights has brought into being the most effective international system of human rights protection ever developed”¹⁸⁷. The Council of Europe has a charter which provides for economic, social and cultural rights¹⁸⁸. In relation to corruption, the Council of Europe also has a criminal and civil treaty to check the vice¹⁸⁹.

In terms of its social and economic situation; The EU’s gross domestic product in 2012 was bigger than that of the United States of America; it was 12 945 402 million euros¹⁹⁰. It is also noted that “with just 7% of the world’s population, the EU’s trade with the rest of the world accounts for around 20% of the global exports and imports”¹⁹¹. EU was also a leading importer in 2011 “accounting for 16.4% of global imports . . . and the biggest exporter, accounting for 15.4% of all exports”¹⁹². In terms of its social development, the United Nations Human Development Index 2010 ranked all the EU members states (with the exception of

¹⁸⁴ Council of Europe, *European Convention on Human Rights: Accession of the European Union*, (Nov. 20, 2013), <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>.

¹⁸⁵ United Nations, *Status of the International Covenant on Civil and Political Rights*, (Nov. 18, 2013), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

¹⁸⁶ United Nations, *Status of the International Covenant on Economic, Social, and Cultural Rights*, (Nov. 18, 2013), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>.

¹⁸⁷ EUROPEAN COURT OF HUMAN RIGHTS, *THE CONSCIENCE OF EUROPE: 50 YEARS OF THE EUROPEAN COURT OF HUMAN RIGHTS*, 162 (Jonathan L. Sharpe et al eds., Third Millennium Publishing Ltd., 2010) available at http://www.echr.coe.int/Documents/Anni_Book_Chapter13_ENG.pdf.

¹⁸⁸ The European Social Charter (revised), May 3, 1996, STE. No. 163, (Nov. 20, 2013), <http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/escrbooklet/English.pdf>.

¹⁸⁹ Criminal Law Convention on Corruption, Jan. 27, 1999, STE No. 173, (Nov. 20, 2013), <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm> and the Civil Law Convention on Corruption, Nov. 4, 1999, STE No. 174, (Nov. 20, 2013) <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

¹⁹⁰ European Union, *The Economy*, (Nov. 19, 2013) http://europa.eu/about-eu/facts-figures/economy/index_en.htm.

¹⁹¹ European Union, *The Economy*.

¹⁹² European Union, *The Economy*.

Croatia which was not a part of EU then) above 50 whilst Nigeria was ranked at 142¹⁹³. The countries were listed as having high and medium development and with life expectancy at birth for EU citizens in 2010 being over 70¹⁹⁴. Nigeria in the same report was listed as having low human development and life expectancy at birth being only 48¹⁹⁵. In 2011 the same index ranked Nigeria at position 156 and members of the EU were all once again above 50.¹⁹⁶ The highest ranked EU countries; Netherlands at four, Ireland at seven and Germany at nine had gross national income per capita of 36,402, 29,322 and 34,854 respectively as compared to 2,069 of Nigeria. In 2013 the same index ranked Nigeria at position 153 with the EU members retaining their position above 50¹⁹⁷. Netherlands at four, Germany at five and Ireland at seven had once again high gross national income per capita as opposed to that of Nigeria.

In its rankings, measuring respect for civil and political rights in the world, Freedom House, a non-governmental organisation that advocates for protection of human rights around the world¹⁹⁸, found that all EU member states were free in 2010, 2011 and 2013¹⁹⁹. Nigeria, in the same years, was ranked as partly free²⁰⁰. It is clear from the foregoing that the EU member states with the highest income, ranked favorably in the UN Human Development Index,

¹⁹³ UNDP, United Nations Development Index 2010, (Nov. 13, 2013)

http://hdr.undp.org/en/media/HDR_2010_EN_Tables_reprint.pdf.

¹⁹⁴ UNDP, United Nations Development Index 2010, (Nov. 13, 2013)

http://hdr.undp.org/en/media/HDR_2010_EN_Tables_reprint.pdf.

¹⁹⁵ UNDP, United Nations Development Index 2010, (Nov. 13, 2013)

http://hdr.undp.org/en/media/HDR_2010_EN_Tables_reprint.pdf.

¹⁹⁶ UNDP, United Nations Development Index 2011, (Nov. 13, 2013)

http://hdr.undp.org/en/media/HDR_2011_EN_Tables.pdf.

¹⁹⁷ UNDP, United Nations Development Index 2013, (Nov. 13, 2013)

http://hdr.undp.org/en/media/HDR_2013_EN_complete.pdf.

¹⁹⁸ Freedom House, *About Us*, (Dec. 2, 2013) <http://www.freedomhouse.org/about-us>.

¹⁹⁹ Freedom House, *Country Status and Ranking, FIW 1973-2013*, (Nov. 21, 2013), www.freedomhouse.org/sites/default/files/Country%20Status%20and%20Ratings%2C%201973-2013%20%28FINAL%29_0.xls.

²⁰⁰ Freedom House, *Country Status and Ranking, FIW 1973-2013*, (Nov. 21, 2013), www.freedomhouse.org/sites/default/files/Country%20Status%20and%20Ratings%2C%201973-2013%20%28FINAL%29_0.xls.

which largely measures socio-economic indicators, as well as in the Freedom House rankings which measure civil and political factors. Nigeria in comparison ranked poorly. The chapter has previously indicated that Nigeria suffers from a big corruption problem which eats away at her revenue. The central issue to these divergent results in these two territories (status of human development and human rights protection) point to economic capability and governance. It can be surmised that as states that respect civil and political liberties as indicated by Freedom House statistics, EU citizens, through active political and judicial processes are able to hold their leaders accountable in their governance. That does not seem to be the case in Nigeria. This scenario already validates Forsythe's and Pritchard's hypotheses on availability of economic resources and human rights protection. Resources are important for development and rights protection, but they can only be useful in an effective democracy.

In relation to corruption and the EU; Carolyn M. Warner claims that "corruption has persisted in the European Union because the market and political reforms associated directly and indirectly with it impel and enable some to use corruption to get ahead of their competition"²⁰¹. While corruption in the European Union may not be as pervasive as corruption in Nigeria, there are similarities. Warner gives an example:

Although the fifteen western European Union countries are wealthy democracies, they are democracies with competing political parties and politicians who need to finance their organizations and campaigns, and when the parties and politicians cannot get what they think is sufficient funding legally, they tend to turn to illegal means. And that is a major driver of corruption in the European Union²⁰².

However, to put the matter in context, Warner reminds us that "corruption is not a problem within the supranational European Union institutions such as the European Commission but

²⁰¹ CAROLYN M. WARNER, *THE BEST SYSTEM MONEY CAN BUY: CORRUPTION IN THE EUROPEAN UNION* 1 (Cornell University Press, 2007).

²⁰² Carolyn M. Warner, 2.

rather a member state problem”²⁰³. The EU as an organisation also condemns corruption; it has “the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union”²⁰⁴. This instrument adopted in 1997 criminalizes bribery involving governmental officials from within a state as well as other states of the EU²⁰⁵.

This thesis will not focus on the different aspects of corruption in the EU. It will only touch on corruption in relation to companies based in EU member countries and operating in Nigeria’s oil sector as such an analysis is directly relevant to this thesis hypothesis. Examples of such companies are Shell Nigeria Exploration and Production Company²⁰⁶, part of Shell Global which is headquartered in Netherlands²⁰⁷. Total E&P Nigeria Limited and TOTAL Upstream Nigeria Limited²⁰⁸ which are subsidiaries of the Total S.A. headquartered in France²⁰⁹. Eni, an Italian company, also operates in Nigeria through a subsidiary, Nigerian Agip Oil Company²¹⁰. The following are examples of such corruption: “In July 2004, ABB Vetco Gray, Inc. and ABB Vetco Gray UK, the US and UK subsidiaries of Swiss Company ABB Ltd, each pleaded Guilty to FCPA [Foreign Corrupt Practices Act] violations in their pursuit of oil and gas construction contract in Nigeria. The companies had paid more than US\$1 million in bribes to Nigerian officials for confidential bid information and favorable

²⁰³ Carolyn M. Warner, 7.

²⁰⁴ Eric C. Chaffee, *The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Corruption Laws in Preventing or Lessening Future Financial Crises*, 73 OHIO ST. L.J. 1283, *1300, (2012) (Westlaw 73 OHSLJ 1283).

²⁰⁵ Eric C. Chaffee, *1300.

²⁰⁶ Shell Nigeria, *About Shell: Shell Businesses: Exploration and Production* (Nov. 18, 2013)

<http://www.shell.com.ng/aboutshell/shell-businesses/e-and-p.html>.

²⁰⁷ Shell Global, *About Shell* (Nov. 18, 2013) <http://www.shell.com/global/aboutshell/contact-us.html>.

²⁰⁸ Total, *Total in the Nigerian Petroleum Industry* (Nov. 19, 2013)

http://www.ng.total.com/02_about_tepng/0207_tepngs_role.htm.

²⁰⁹ Total, *Corporate Profile: Total at a Glance* (Nov. 19, 2013) <http://total.com/en/about-total/thumbnail/total-at-a-glance>.

²¹⁰ BBC News Africa, *Nigeria Oil Firms Deflect Blame for Spills, says Amnesty* (Nov. 7, 2013, 12:59 Pm) <http://www.bbc.co.uk/news/world-africa-24839324>.

recommendations”²¹¹. “In 2003, the United States, France and Nigeria began investigations into accusations that a subsidiary of Halliburton, Kellogg, Brown and Root (KBR) paid \$180 million in bribes in an effort to win a natural gas project contract”²¹².

The foregoing incidents create a nexus between Nigeria and the EU member states in which these companies are registered and in that regard with the larger EU organisation. The EU as noted before seeks to promote viable development and human rights in the world; and these companies operate in one of the most problematic areas of Nigeria’s development; corruption in its oil sector. This creates an opportunity for these countries to work together to stem the vice. (The issue of large companies, such as the ones mentioned above, exporting corruption to countries with weaker governance structures shall be discussed in more detail in chapter three).

The foregoing two sections have touched on corruption. To understand why efforts to stem this vice in Nigeria and in the world are relevant to development and human rights protection, it is necessary to discuss corruption and its ill consequences in more detail.

3.1.1.1.1 Corruption and human rights

Thomas Kelley indicates that “corruption in the developing world emerged as a hot global topic in the 1990s. During the Cold War, the United States and other Western powers were loath to focus on corruption for fear of driving developing countries' corrupt leaders toward the Eastern bloc”²¹³. He notes that after the reunification of Germany, developed countries

²¹¹ ADEFOLAKE O. ADEYEYE, *CORPORATE SOCIAL RESPONSIBILITY OF MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES: PERSPECTIVES ON ANTI-CORRUPTION* 46 (Cambridge University Press, 2012).

²¹² Adefolake O. Adeyeye, 47.

²¹³ Thomas Kelley, *Corruption as Institution among Small Businesses in Africa*, 24 FLA. J. INT'L L. 1, * 32 (2012) (Westlaw 24 FLJIL 1).

who provided donor aid, felt empowered to address this issue on the understanding that long term stability and peace in the developing world depended on among others “political stability and economic prosperity” which corruption retarded²¹⁴. Transparency International, a prominent organisation that advocates against corruption, defines corruption as “the abuse of entrusted power for private gain”²¹⁵. Joshua V. Barr, Edgar Michael Pinilla and Jorge Finke, in their article, claim that Transparency International’s definition of corruption has found wide acceptance internationally²¹⁶. They offer two broad categorisations of corruption as “grand corruption and petty corruption” which they claim are influenced by the prevalence of corruption in all the levels of government²¹⁷. They state that:

Grand corruption involves the acts of high-level government officials who have the power to make economic policies. Typically, grand corruption occurs when an official implements or changes government policies for selfish interest and ultimately impacts the general populace. At this level, if money is involved, it is typically a substantial amount of money. Petty corruption, on the other hand, is generally considered the everyday, street-level, corruption that citizens encounter and usually involves only small sums of money and low-level officials.²¹⁸

Corruption by large companies in foreign countries, such as those provided in the previous section; represent grand corruption as defined by Barr, Pinilla and Finke. This is because, as the examples demonstrate, they involve public officials and large amounts of money.

The definitions of corruption mentioned above demonstrate the relationship and tension between development and corruption; it follows from these definitions that corruption is the adversary of development. Daniel Egiegbu Agbibo describes the anti-thesis of development as, “when the capacity for self-reliance and contentment deteriorates, typically because the

²¹⁴ Thomas Kelley, *32.

²¹⁵ Transparency International, *Keeping REDD+ Clean: A Step by Step Guide to Preventing Corruption*, 5 (2012) (Sept. 11, 2013), http://www.transparency.org/whatwedo/pub/keeping_redd_clean.

²¹⁶ Joshua V. Barr, Edgar Michael Pinilla, Jorge Finke, *A Legal Perspective on the Use of Models in the Fight Against Corruption*, 8 S.C. J. INT’L L & BUS. 267, *270 (2012) (Westlaw 8 SCJILB 267).

²¹⁷ Joshua V. Barr, Edgar Michael Pinilla, Jorge Finke, *271.

²¹⁸ Joshua V. Barr, Edgar Michael Pinilla, Jorge Finke, *271.

means to be responsible for one's own livelihood, welfare or future has been lost to corruption . . . ”²¹⁹ Okechukwu Oko asserts that “corruption retards economic growth, distorts economic and political programs, undermines efforts to create viable economic and political institutions, devalues the quality of human life, discourages foreign investment and undermines the prospects of a durable social order in Nigeria”²²⁰. In the same vein, “Kofi Annan said corruption undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish”²²¹. In fact illustrating the gravity of the problem, “[t]he World Bank estimates that 3 per cent of total global GDP is lost to corruption”²²². This recognition, of the negative impact of corruption not only on economies but also on good governance, inspired the international community in 2005 to adopt the UNCAC²²³. According to Barr, Pinilla and Finke, the Convention “offers a comprehensive set of standards, measures, and rules to strengthen a country's legal and regulatory regimes to combat corruption”²²⁴.

In further discussion of the link between corruption and human rights, Andreanna M. Truelove claims that public officials commit breaches of human rights to gain access to public funds and once the funds are accessed, they acquire the power to stifle any opposition towards their misuse of public funds, by committing further breaches of human rights²²⁵. In relation to large companies Truelove further claims that “some of the largest sources of the means and fruits of corruption are the industries that extract oil, gas, and minerals in natural resource-rich

²¹⁹ Daniel Egiegba Agbibo, 325-345.

²²⁰ Okechukwu Oko, 497 - 498.

²²¹ Adefolake O. Adeyeye, 106-107.

²²² Carolyn M. Warner, 12.

²²³ United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

²²⁴ Joshua V. Barr, Edgar Michael Pinilla, Jorge Finke, *273.

²²⁵ Andreanna M. Truelove, *Oil, Diamonds, and Sunlight: Fostering Human Rights through Transparency in Revenues from Natural Resources*, 35 GEO. J. INT'L L. 207, * 207 (2003) (Westlaw 35 GEOJIL 207).

countries”²²⁶; Nigeria, it has been shown in one such country. In 2000 Human Rights Watch (in Truelove), commenting on Angola, another oil rich country, noted that “transparency in oil revenue is a human rights issue in places like Angola, where oil revenues are used to finance civil wars in which hundreds of thousands of people die and over a million people are internally displaced”²²⁷. This example clearly illustrates how corruption is no longer an economic issue but a human rights issue quite capable of eroding the gains that the human rights movement has achieved in the last 60 years. Formulated in a different and perhaps broader terms as Professor Ndiva Kofele-Kale (in Truelove) does, it is correct to say that, “When the wealth and natural resources of a state are diverted by its leadership, the citizens are deprived of their right to full use and enjoyment of the resources. The right of a people not to be dispossessed of their wealth and natural resources is not just any ordinary human right, but the fundamental human right”²²⁸.

This assertion supports those scholars, articulated in the previous chapter, who claim that the right to development is a bridge between the rights that guarantee civil liberties and those that guarantee social, economic and cultural rights; and those authors who go even further by contending that the right to development is the overarching human right. Corruption also violates article 2(1) of the ICESCR²²⁹. In line with the discussion it is logical to conclude that grand corruption does not allow a country to maximize on its available resources, as a chunk of the resources goes into the personal pockets of a few, thus denying the majority the benefit of full realization of all the rights that the covenant provides. For example, taking the right to education, proper provision of the right by a government can have the following spillover

²²⁶Andreanna M. Truelove, *207.

²²⁷Andreanna M. Truelove, *207.

²²⁸Andreanna M. Truelove, *207.

²²⁹ International Covenant on Economic, Social and Cultural Rights, art. 2(1).

effects; individuals would be more aware of their legal rights, and thus more inclined to access public justice systems for their enforcement. Additionally a more knowledgeable citizenry may choose good leaders in elections. Good leaders will form a political administration that will make the correct legislative and policy measures to ensure a healthy economy and a country run on democratic principles. This is indeed the hallmark of the right to development as discussed in chapter one. Human rights build on each other and cooperatively they will lead to a better way of life as that advanced by Sen. It can thus be summarized that corruption is an obstacle to development and human rights protection; it can also be said that corruption is an example of an impediment to the right to development.

This section has examined the connection between corruption, economic development, and human rights. The interrelatedness of these issues means that any measure to curb the one or promote the other requires joint or equal attention to all of the issues at any level; national, regional or international. This aspect will be examined further in chapter three.

3.1.1.1.1 Conclusion

The chapter has related that there is indeed a correlation between economic resources and human rights through the comparator jurisdictions of Nigeria and the EU. It has also shown how corruption impedes development and promotes abuse of human rights. It showed examples of how corruption connects the EU and Nigeria. This therefore shows that cooperation to fight corruption and promote human rights protection is possible and necessary between the two jurisdictions. The need to curb waste of national resources is a pressing matter in today's world where as Osiatyński notes, "fewer resources are available for human rights"²³⁰. Osiatyński also noted that due to the 2008 financial crisis there is "increased

²³⁰ Wiktor Osiatyński, 59.

competition for resources rather than solidarity with the poor”²³¹. In fact Chaffe also claims that “the financial crisis resulted in part from a failure of international law. Politicians and other regulators in the United States and abroad failed to effectively work together to create a consistent and proper level of regulation for the financial institutions . . .”²³² In conclusion, in the current global make up, since there are fewer resources for granting financial aid it makes sense to protect available national resources from falling into waste; irrespective of whether the waste is occasioned by human or legal personalities through joint actions by states.

²³¹ Wiktor Osiatyński, 59.

²³² Eric C. Chaffee, *1284

4 Chapter three

4.1 Introduction

In chapter two this thesis looked at the status of human rights in Nigeria and the EU; and how economic resources and democratic governance have impacted that status. Chapter two established that there is indeed a correlation between economic resources, democratic governance and human rights protection. The main challenge to human rights protection in Nigeria was identified as corruption which leads to squander of government revenue; thereby decreasing the amount of money available for implementation of human rights. On the other hand the EU scored favorably in provision of human rights to its inhabitants due to superior economic resources and proper governance. It can be thus be surmised that EU countries have better checks against governmental misuse of public funds; in essence EU citizens exercise more participation in governmental affairs than those in Nigeria.

Further, chapter two created a nexus between the EU and Nigeria, in the area of trade; that is Nigerian has natural resources which some companies from the EU extract and process. This, the thesis asserts creates a unique opportunity for the two jurisdictions to assist each other in honoring not only their human rights commitments but also creating an environment that will promote mutual economic benefits in trade. This brings us back to how states can cooperate to achieve the right to development. Therefore, the question is what political relationship can emerge between these two jurisdictions to bring mutual benefit to their populations.

This chapter will therefore in the first section, briefly define who has responsibility for enforcement of human rights under international law; including against “non-state actors”

under international law²³³. The second section will look at current regulatory mechanisms to curb human rights breaches by non-state actors under national, regional and international levels. This chapter will conclude by laying a basis for analysis in chapter four of the potential international measures that states can jointly take in promoting human rights beyond their own borders, thereby helping to define the content of the right to development (on international cooperation).

4.1.1 Responsibility for protection of human rights under international law

International law is composed of binding legal norms created by states targeted at certain human realities thereby ordering their own conduct and the conduct of others²³⁴. For that reason, because they willfully consent to enter into agreements, they incur the responsibility to fulfill the terms of the agreements²³⁵. States, following Oleg I. Titunov rationale, are “subjects of international”²³⁶. This is because they can take part in dealings at the international stage²³⁷. Titunov notes, that though controversial, a majority of Western legal experts list additional subjects of international law as “international organizations . . . individuals . . . [and] transnational corporations”²³⁸. These additional subjects have one thing in common, they are not states. It is important to note that in regard to individuals being subjects of international, the idea largely emerged as a result of human rights law²³⁹. Titunov gives the example of the mechanism created under the Optional Protocol to the ICCPR where individuals can lodge complaints against states for injury caused to them²⁴⁰. A similar

²³³ Phillip Alston, *The ‘Not-a-Cat’ Syndrome in NON-STATE ACTORS AND HUMAN RIGHTS* 3, 15 (Philip Alston ed., Oxford University Press, 2005).

²³⁴ Stephen Tully, *Introduction*, in *INTERNATIONAL CORPORATE LEGAL RESPONSIBILITY* 1, 45 (Stephen Tully ed., Kluwer Law International, 2012).

²³⁵ Stephen Tully, 45.

²³⁶ Oleg I. Titunov, *The International Legal Personality of States: Problems and Solutions*, 37 ST. LOUIS U.LJ. 323, *324 (1993) (Westlaw 37 STLULJ 323).

²³⁷ Oleg I. Titunov, *324.

²³⁸ Oleg I. Titunov, *325.

²³⁹ Oleg I. Titunov, *334.

²⁴⁰ Oleg I. Titunov, *334.

mechanism for adjudication of claims for rights recognized in the ICESCR exists²⁴¹. This section shall now consider the issue of other non-state actors under international law.

Phillip Alston quoting the European Commission, describes non-state actors as “groups which are created voluntarily by citizens; are independent of the state; can be profit or non-profit making organizations; have a main aim of promoting an issue or defending an interest, either general or specific; and depending on their aim, can play a role in implementing policies and defending interests . . . ”²⁴²

Alston, quoting a literary source, offers a different definition of non-state actors:

It include[s] all organizations: Largely or entirely autonomous from central government funding and control: emanating from civil society, or from the market economy, or from political impulses beyond state control and direction; [or] operating as or participating in networks which extend across the boundaries of two or more states – thus engaging in transnational relations, linking political systems, economies, societies; [or] acting in ways which affect political outcomes, either within one or more states or within international institutions – either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities.²⁴³

These two definitions taken together address some characteristics of international organizations and transnational corporations; these two were earlier suggested as possible subjects of international law. What are transnational corporations? Black’s Law Dictionary defines “multinational corporations [as] a company with operations in two or more countries, generally allowing it to transfer funds and products according to price and demand conditions, subject to risks such as changes in exchange rates or political instability – Also termed transnational corporation”²⁴⁴. The UN has described a transnational corporation as:

²⁴¹ Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, Dec. 10, 2008, Doc A/63/485 available at http://treaties.un.org/doc/Publication/CTC/Ch_IV_3_a.pdf.

²⁴² Phillip Alston, 15

²⁴³ Phillip Alston, 15-16.

²⁴⁴ Definition of multinational corporation in Black’s Law Dictionary, <http://international.westlaw.com/> (click on the law school tab, type corporation in the search box under the definitions heading, click on the search button and follow the link for the search result indicating corporation).

an enterprise comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with others.²⁴⁵

The “Organization for Economic Co-operation and Development (OECD)”²⁴⁶ refers to these corporations as “multinational enterprises”²⁴⁷. It offers this explanation, “These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways . . . [o]wnership may be private, State or mixed”²⁴⁸.

It has been said that the prominence of transnational corporations on the international arena increased with the advent of globalization²⁴⁹. Sigrun I. Skogly defines globalization as, “the internalization of capital, of production, of labor, and the all-embracing free market ideology”²⁵⁰. To Nicola Jägers, globalization means “the vast increase of global trade in the period after the Second World War [and] . . . includes technological and scientific developments that have facilitated the exchange of information and have turned the world into what is often referred to as the global village”²⁵¹. Skogly describes the effects of globalization and characteristics of transnational corporations:

Transnational corporations [word omitted] control vast volumes of capital. This accumulation of capital (in many instances larger than national economies) leaves private companies with power and choices that may be used

²⁴⁵ Commission on Transnational Corporations, Report on the Special Session, at 12.

²⁴⁶ OECD, *About the OECD* (Nov. 1, 2013) <http://www.oecd.org/about/>

²⁴⁷ OECD, OECD Guidelines for Multinational Enterprises, 17 (2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

²⁴⁸ OECD, OECD Guidelines for Multinational Enterprises, 17.

²⁴⁹ Sigrun I. Skogly, *Economic and Social Human Rights, Private Actors and International Obligations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 239, 246 (Michael K. Addo ed., Kluwer Law International, 1999).

²⁵⁰ Sigrun I. Skogly, 246.

²⁵¹ Nicola Jägers, *The Legal Status of the Multinational Corporation under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 259, 259 (Michael K. Addo ed., Kluwer Law International, 1999).

both for the benefit of individuals worldwide, but which may also in a variety of ways harm them. The companies are generally driven by the need for profit maximization, and for the pursuit of the free market. The aim is to earn as much money as possible, and to secure future profits through the free market operation of the economy, both on the national and international levels²⁵².

In summary the above descriptions and definitions provide transnational corporations as possible non-state actors, which carry out business in two or more countries. Writing in 2007, Warner quoted Transparency International which stated, “[T]here are more than 60,000 multinational corporations operating around the world with more than 600,000 foreign affiliates”²⁵³. Which country then exercises oversight over these corporations?

Stephen Tully claims that states can exercise oversight of transnational corporations in two ways; “The state of incorporation (the home state) on the basis of nationality; and the State upon whose territory the corporations conducts operations (the host state) on the basis of territorial control”²⁵⁴. This means that states exercise control over transnational corporations when they have a link with them; either territorial or national. National legislation should thus protect people from wrongful acts by “third parties”²⁵⁵ (such as transnational corporations). National legislation typically applies within the borders of a state and is enforced through governmental machinery such as courts²⁵⁶. This means that under current international norms, states are expected to safeguard their peoples’ interests and physical wellbeing; especially as there are no customary norms that impose duties upon corporations²⁵⁷. In fact Tully claims that “international law does not impose any obligation upon States to regulate corporations but allows them the freedom to regulate”²⁵⁸.

²⁵² Sigrun I. Skogly, 246.

²⁵³ Carolyn M. Warner, 80.

²⁵⁴ Stephen Tully, 47.

²⁵⁵ Stephen Tully, 38.

²⁵⁶ Stephen Tully, 38.

²⁵⁷ Stephen Tully, 38.

²⁵⁸ Stephen Tully, 45.

However J. Oloka-Onyango notes that some countries may not be able to exercise control over transnational corporations either due to a desire to attract and retain investment or lack of knowledge required to monitor specialized areas of operation²⁵⁹. Skogly mentioned that transnational corporations are primarily driven by economic considerations and now Onyango notes that these corporations have superior bargaining powers that allow them to protect their interests, some times to the detriment of host states. Skogly notes that this interest in profit making drives transnational corporations to purposefully establish business in countries with weak environmental and labor standards, thereby lowering their production costs²⁶⁰. Governments also fear that tough legislative measures against corporations might cause them to lose opportunities to create employment and development should the corporations take their business elsewhere due to these measures²⁶¹. In such circumstances, where host states, due to various motivations, lessen oversight over transnational corporations, what can happen to human rights standards?

Onyango notes that “transnational corporations . . . activities in international trade, finance, and investment have numerous implications for the observation and protection of human rights, particularly economic, social and cultural rights, and the rights of the so-called third generation”²⁶². Third generation rights as discussed in chapter one, include the right to development and the right to a clean environment. Skogly offers a more detailed breakdown of the potential human rights that these corporations may encounter in their operations:

[The] right to be free from discrimination, right to personal security, prohibition of torture and slavery, freedom from association, and the right to

²⁵⁹ J. Oloka-Onyango, *903.

²⁶⁰ Sigrun I. Skogly, 248.

²⁶¹ Sigrun I. Skogly, 248.

²⁶² J. Oloka-Onyango, *896.

form trade unions, the right to political participation, the right to work and rights at work, the right to rest and leisure, minority rights and protection of identity, the right to an adequate standard of living (including food, clothing, housing and medical care and necessary social services), the right to education, the freedom of opinion and expressions²⁶³. (The author was quoting findings from 1977 by “the Norwegian Employer’s Union”²⁶⁴).

This description provides not only socio-economic and third generation rights as indicated by Onyango above, but also civil and political rights. In essence all categories of rights, rights that are united and made indivisible through the right to development, are implicated in the activities of transnational corporations.

Skogly gives an illustration of this through an actual situation from Nigeria; serious environmental spoliation occurred in the Nigerian region of Ogoni after thirty years of oil extraction which affected the inhabitants’ ability to provide adequate food for themselves²⁶⁵. Additionally provision of health and educational services in the region was poor; therefore, being aggrieved by this situation, the inhabitants staged protests and the government responded by use of unlawful violence, arbitrary arrests and unjust prosecutions²⁶⁶. It should be noted that a number of private companies were involved in the oil extraction including “Shell Petroleum Development Company”²⁶⁷. The inhabitants of Ogoni lodged a complaint regarding this situation in the “African Commission on Human and People’s Rights” in 1996²⁶⁸. The Commission found that Nigeria had breached a number of her human rights provisions, but failed to make a similar determination on Shell’s liability in the situation²⁶⁹.

²⁶³ Sigrun I. Skogly, 241.

²⁶⁴ Sigrun I. Skogly, 241.

²⁶⁵ Sigrun I. Skogly, 242.

²⁶⁶ Sigrun I. Skogly, 242-243.

²⁶⁷ J. Oloka-Onyango, *900.

²⁶⁸ J. Oloka-Onyango, *855.

²⁶⁹ J. Oloka Onyango, * 900 – 901.

The foregoing discussion indicates that transnational corporations due to globalization have become part and parcel of the current global trade and their activities have bearing on human rights. Since it has also been noted that “economic growth is now largely derived from business activity, with private financial flows moving around the world now far exceeding official aid or grants”²⁷⁰, the relevance of business to a country’s economic outlook and thus revenue generation becomes evident. The importance and interrelatedness of economic resources, development and human rights standards, as was discussed in chapters one and two, is once again demonstrated, this time through the activities of transnational corporations in the current global make up.

It is therefore not surprising that the recognition of the significant influence of transnational corporations upon people’s lives has generated calls for international regulation of these corporations²⁷¹; some claim that the corporations play such a crucial role in fuelling economic development that their activities must be tolerated²⁷². Others find it preposterous to impose human rights obligations upon entities formed for the sole purpose of generating profits²⁷³. Others argue such a legal regime would absolve states, the traditional duty bearers, of the obligation to secure human rights in their territories²⁷⁴. However, Osiatyński notes that the consequence of lack of international regulation is that breaches of human rights law in foreign territories are not punished²⁷⁵. Osiatyński indicates that though international non-governmental organizations have been trying to highlight the more egregious breaches of

²⁷⁰ United Nations Global Compact, *Corporate Sustainability and the United Nations Post-2015 Development Agenda: Perspectives from UN Global Compact Participants and Global Priorities and How to Engage Business towards Sustainable Development Goals*, at 3 (Jun. 17, 2013) http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2013_06_18/UNGC_Post2015_Report.pdf.

²⁷¹ J. Oloka-Onyango, *898 - 900.

²⁷² J. Oloka-Onyango, *896.

²⁷³ J. Oloka-Onyango, *898 - 899.

²⁷⁴ J. Oloka-Onyango, *899.

²⁷⁵ Wiktor Osiatyński, 43.

human rights law by these private entities, this is not enough and only international regulation against misconduct would offer adequate protection.²⁷⁶

Adefolake O. Adeyeye notes that corporations can be liable, domestically, for serious human rights crimes such “as crimes against peace, war crimes and crimes against humanity”²⁷⁷. What this means essentially is that direct responsibility for corporations might not be such a foreign concept; Adeyeye proposes that international criminal law can be used as an example in fashioning direct responsibility for corporations²⁷⁸.

Therefore what are the current mechanisms that are geared towards checking conduct of transnational corporations as it relates to human rights and corruption?

4.1.1.1 Current regulatory mechanisms for transnational corporations

This section will categorize the regulatory mechanisms into those created by multilateral agreements, national level regulation and regulatory frameworks created by private entities such as non-governmental organization.

a) Mechanisms created through multilateral agreements

Tully notes that there have been a number of attempts to regulate the conduct of transnational corporations under international law²⁷⁹; for instance, he notes that the UN made such an attempt in 1977 through a “Draft Code of Conduct on Transnational Corporations”²⁸⁰. The attempt failed but it was influenced by a desire to control activities of corporations within

²⁷⁶ Wiktor Osiatyński, 43.

²⁷⁷ Adefolake O. Adeyeye, 105.

²⁷⁸ Adefolake O. Adeyeye, 129 – 130.

²⁷⁹ Stephen Tully, 39.

²⁸⁰ Stephen Tully, 39.

territories of “developing and Socialist States”²⁸¹. Adeyeye claims that efforts to create instruments to combat corruption in foreign countries increased in the 1990s due to protests by American companies that their “Foreign Corrupt Practices Act” prejudiced them against similar companies from developed nations²⁸².

There are a number of multilateral agreements that deal with corruption; The United Nations Convention against Corruption was formulated to provide consistency in combating corruption internationally²⁸³. The treaty provides a framework in which best practices and policies, including multilateral cooperation, in fighting corruption are codified²⁸⁴. The treaty proposes criminalization of some acts such as “bribery of national public officials, foreign public officials or officials of public international organizations . . .”²⁸⁵. The parties to the treaty are also obligated to criminalize offences created under it which are perpetrated by corporations²⁸⁶. The treaty prohibits “tax deductibility for bribes . . .”²⁸⁷. Adeyeye notes that the treaty’s impact is principally felt domestically due to its reliance upon national legislation to fight corruption which limits its ability to fight corruption beyond the territories of the member states²⁸⁸.

The African Union Convention on Preventing and Combating Corruption (2003) briefly mentioned in chapter two, is aimed at preventing corruption by government officials and does

²⁸¹ Stephen Tully, 50.

²⁸² Adefolake O. Adeyeye, 105-106.

²⁸³ Adefolake O. Adeyeye, 126.

²⁸⁴ Adefolake O. Adeyeye, 126.

²⁸⁵ Adefolake O. Adeyeye, 127.

²⁸⁶ Adefolake O. Adeyeye, 127.

²⁸⁷ Adefolake O. Adeyeye, 127.

²⁸⁸ Adefolake O. Adeyeye, 127-128.

not prescribe liability upon corporations for corrupt practices²⁸⁹. Quoting an observer in his book, Adeyeye notes:

The Convention ought to have dealt specifically with this, because the offering of bribes to public foreign officials, including officials of public international organizations, is at the root of many corrupt administrations in Africa. Such corrupt practices usually are intended to retain business or other undue advantage in relating to the conduct of international business, including the provision of international aid²⁹⁰.

Adeyeye also notes that the 1966 “Organization of American States Inter-American Convention against Corruption”, does not adequately deal with corruption that occurs across borders²⁹¹. Such bribery is only criminalized among those states that recognize it as such; and the only other measure that relates to that form of bribery merely directs states to encourage companies to maintain transparent accounting practices and to put in place measures to identify corruption by their employees²⁹².

“The Council of Europe Criminal Law Convention on Corruption”, 1998, makes bribery of government officials, domestic and external, an offence which state parties have to punish in an effective manner in their domestic jurisdictions²⁹³. Under the convention, “Legal persons may be held liable for criminal and non-criminal sanctions, including monetary sanctions”²⁹⁴. The organization also has a “Civil Law Convention on Corruption”²⁹⁵. Those injured by corrupt practices can make civil claims under structures established for that purpose by their countries²⁹⁶.

²⁸⁹ Adefolake O. Adeyeye, 106.

²⁹⁰ Adefolake O. Adeyeye, 114.

²⁹¹ Adefolake O. Adeyeye, 107-108.

²⁹² Adefolake O. Adeyeye, 107-108.

²⁹³ Adefolake O. Adeyeye, 110 - 111.

²⁹⁴ Adefolake O. Adeyeye, 111.

²⁹⁵ Eric C. Chaffee, *1302.

²⁹⁶ Eric C. Chaffee, *1302.

The OECD, an interstate organization that was set up in 1961 to foster development in its member states,²⁹⁷ has created a number of instruments to deal with corruption involving foreign governmental officials²⁹⁸. The most notable of these instruments are “the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”²⁹⁹, and the “OECD Guidelines for Multinational Enterprises”³⁰⁰. OECD suggests that prior to the formulation of these instruments corruption in business was the norm and even encouraged through tax laws in many countries³⁰¹. “The OECD Anti-Bribery Convention and related instruments were established due to serious moral and political concerns about such business practices, and their negative effect on good governance, economic development and a level playing field for international competition”³⁰². OECD claims that the convention is the sole global instrument aimed at the “supply-side of foreign bribery”³⁰³. France, United Kingdom, Netherlands and Germany are among the members of the OECD that have signed the convention³⁰⁴. They are also members of the EU.

The OECD Guidelines for Multinational Enterprise form “part of the OECD Declaration on International Investment and Multinational Enterprises”³⁰⁵. The guidelines, addressed to multinational enterprises, are recommendations which reflect proper and accepted standards

²⁹⁷ OECD, *About the OECD: History* (Nov. 1, 2013) <http://www.oecd.org/about/history/>.

²⁹⁸ See OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents* (2011) http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

²⁹⁹ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, 6.

³⁰⁰ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, 39.

³⁰¹ OECD, *Recommendation of the Council on Tax Measures for further Combating Bribery of Foreign Public Officials in International Business Transactions*, 1 (2009) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44176910.pdf>.

³⁰² OECD, *Recommendation of the Council on Tax Measures for further Combating Bribery of Foreign Public Officials in International Business Transactions*, 1.

³⁰³ OECD, Working Group on Bribery in International Business Transactions, *Consultation Paper: Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after adoption*, 4 (2008) <http://www.oecd.org/daf/anti-bribery/39882963.pdf>.

³⁰⁴ Eric C. Chaffee, *1293.

³⁰⁵ Stephen Tully, 53.

of conducting business in line with international law³⁰⁶. These guidelines are formulated by “the governments of countries from which a large share of international direct investment originates and which are home to many of the largest multinational enterprises”³⁰⁷. These guidelines are however voluntary and therefore do not attract any legal consequences³⁰⁸; except that States which accept obligations imposed by the guidelines must actualize them³⁰⁹. Larry Cat Backer, examining two cases arbitrated in the United Kingdom through this mechanism finds that the mechanism “suggests the importance of soft law principles as a substitute for hard law in weak government areas, and the power of transnational legal standards to supplement and supplant national standards”³¹⁰.

The instruments discussed above have various limitations in checking unlawful conduct by corporations, either they do not adequately address such conduct or if they do, their impact is limited by territory.

b) Mechanisms created by national legislation

The most famous of this type of legislation is the “Alien Tort Statute (ATS)”³¹¹; this American legislation was formulated in 1789³¹². It provides that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of

³⁰⁶ OECD, *OECD Guidelines for Multinational Enterprises*, 3 (2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

³⁰⁷ OECD, *OECD Guidelines for Multinational Enterprises*, 3.

³⁰⁸ OECD, *OECD Guidelines for Multinational Enterprises*, 17.

³⁰⁹ Stephen Tully, 53.

³¹⁰ Larry Cat Backer, *Rights and Accountability in Development ('Raid') v Das Air and Global Witness v Afrimex: Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 Melbourne J. of Int'l Law 258, *280 (2009) (LexisNexis 10 Melbourne J. of Int'l Law 258) <http://www.lexisnexis.com/hottopics/lnacademic/>.

³¹¹ Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 Berkeley J. Int'l L. 259, *259 (2012) (LexisNexis 30 Berkeley J. Int'l L. 259) <http://www.lexisnexis.com/hottopics/lnacademic/>.

³¹² Jodie A. Kirshner, *270.

the law of nations or a treaty of the United States”³¹³. Claims of breach of international customs may also be adjudicated under the statute³¹⁴. According to Tully, a claim has to be lodged under the statute within ten years from the date the injurious conduct occurred³¹⁵. The claimants under the statute have to be foreigners³¹⁶. According to Tully claimants can allege “torture, summary execution, disappearance, prolonged arbitrary detention, genocide, war crimes, crimes against humanity, and slavery. Private actors may be liable for piracy, slavery, war crimes and genocide. However, fraud, breach of fiduciary duty and misappropriation of funds are not breaches of the law of nations”³¹⁷. Therefore according to Tully, allegations of corruption against transnational corporations cannot be brought under the statute.

According to Jodie A. Kirshner, the statute allowed foreign claimants to sue corporate entities in the American courts as long as they could establish a claim under international law³¹⁸. For instance in “*Filartiga v. Pea-Irala*” the court gave redress to a Paraguayan family for torture of their son³¹⁹. “*Doe v. Unicol*” extended liability for breach of human rights law to corporate entities³²⁰. However “*Kiobel v. Royal Dutch Petroleum*” reversed this, finding that international law does not assign liability to companies for breach of its provisions³²¹. The court found, as described by Tully, “Since no international tribunal had yet found corporations to be liable for violating customary international law . . . violations of international law by

³¹³ Jodie A. Kirshner, *270.

³¹⁴ Stephen Tully, 41.

³¹⁵ Stephen Tully, 42.

³¹⁶ Stephen Tully, 43.

³¹⁷ Stephen Tully, 43.

³¹⁸ Jodie A. Kirshner, *270.

³¹⁹ Jodie A. Kirshner, *270.

³²⁰ Jodie A. Kirshner, *273.

³²¹ Jodie A. Kirshner, *278.

corporations do not give rise to subject matter jurisdiction under the ATCA”³²². The United States of America’s Supreme Court also made a determination on the same case in 2013³²³;

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required³²⁴.

Employees, agents and other persons with a substantial link to companies registered in the United States of America are prohibited by the Foreign Corrupt Practices Act from offering bribes to public officers and institutions of foreign countries for business considerations³²⁵. The Act domesticates the OECD treaty relating to corruption³²⁶. Ijeoma Opara notes that the legislation was first created in 1977 not only to deal with corruption but also to redeem the image of companies in America³²⁷ and an amendment in 1998 allowed it to capture corruption originating from inside its borders as well as outside³²⁸.

The Nigerian 2000 “Corrupt Practices and Other Related Offences Act” criminalizes corruption involving corporations³²⁹. Individuals in their personal capacity, corporations, government employees and bodies are captured by the provisions of the legislation³³⁰. It therefore aptly covers any entity that can be involved in corruption in Nigeria. However

³²² Stephen Tully, 44.

³²³ John R. Crook, ed., *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: U.S. Supreme Court Unanimously Rejects Alien Tort Statute Jurisdiction in Kiobel*, 107 AM. J. INT’L L 651, *651 (2013) (LexisNexis 107 A.J.I.L. 651) <http://www.lexisnexis.com/hottopics/lnacademic/>.

³²⁴ John R. Crook, *651.

³²⁵ Adefolake O. Adeyeye, 64.

³²⁶ Adefolake O. Adeyeye, 64.

³²⁷ Ijeoma Opara, *71.

³²⁸ Ijeoma Opara, *72.

³²⁹ Adefolake O. Adeyeye, 66.

³³⁰ Adefolake O. Adeyeye, 66.

Adeyeye indicates that penalties prescribed in the legislation do not adequately capture corruption by corporations (jail time is the only penalty available for conviction under the legislation)³³¹. Moreover, Adeyeye claims that Nigeria is focused in dealing with corruption by her citizens who receive bribes from transnational corporations, rather than prosecuting the employees of the corporations that make the payments³³².

The above mechanisms are thus limited in their ability to address human rights violations either due to issues of admissibility or territorial reach of the laws.

c) Mechanisms created by private entities including non-governmental organizations

This thesis offers the United Nations Global Compact, as such a mechanism; although it is created under an interstate organization, the nature of the mechanism is similar to those created by non-governmental organizations. The compact involving corporations and individuals, “encourage[s] businesses worldwide to adopt sustainable and socially responsible policies”³³³. Ten principles with universal recognition in among other areas, the environment and corruption were formulated³³⁴; they form the benchmark by which the corporations must conduct business. Corporations which join the initiative are expected to publish annual reports to show measures they have put in place to actualize the principles³³⁵. It is a voluntary mechanism and no oversight is carried out upon the corporations that join the mechanism³³⁶. The rationale behind the framework is that if companies do not observe the principles, “the negative impacts of their operations will outweigh the positive financial and economic effect

³³¹ Adefolake O. Adeyeye, 67.

³³² Adefolake O. Adeyeye, 69.

³³³ Wiktor Osiatyński, 56.

³³⁴ Wiktor Osiatyński, 56.

³³⁵ United Nations Global Compact, *Reporting: What is a COP?* (Nov. 20, 2013)

<http://www.unglobalcompact.org/COP/>.

³³⁶ United Nations Global Compact, *About Us: Frequently Asked Questions* (Nov. 20, 2013)

<http://www.unglobalcompact.org/AboutTheGC/faq.html>.

of their investments”³³⁷. However, if the principles are followed there is potential for development for the local societies in terms of infrastructure, skilled laborers and research³³⁸.

The UN has formulated the “Guiding Principles on Business and Human Rights . . .”³³⁹ These principles were drafted by the “Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises” and endorsed by the Human Rights Council in a resolution in 2008³⁴⁰. The principles are based on a “Protect, Respect, and Remedy Framework”³⁴¹, which proposes that states protect individuals from breaches of human rights occasioned by activities of corporations, both local and foreign, and to provide adequate facilities to remedy such conduct, whilst corporations are expected to respect human rights in their operations³⁴². The principles are therefore aimed at states and corporations.

Similar to the initiative above, is the International Labor Organization’s “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”³⁴³. This declaration proposes guidelines for states, local and foreign businesses, and labor

³³⁷ United Nations Global Compact, *Development: How Business Can Support Development* (Nov. 20, 2013) http://www.unglobalcompact.org/Issues/partnerships/how_business_can_support_development.html.

³³⁸ United Nations Global Compact, *Development: How Business Can Support Development*.

³³⁹ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, at 6, Human Rights Council, U.N. Doc. A/HRC/17/31, (Mar. 21, 2011) (by John Ruggie) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/17/31.

³⁴⁰ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, at 3.

³⁴¹ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, at 3.

³⁴² Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, at 4.

³⁴³ International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, at 1 (Nov. 1977, amended Mar. 2006) http://www.ilo.org/wcmsp5/groups/public/---ed_emp/--emp_ent/---multi/documents/publication/wcms_094386.pdf.

organizations³⁴⁴. The guidelines are voluntary and deal with “employment, training, conditions of work and life and industrial relations . . .”³⁴⁵

“The Extractive Industries Transparency Initiative (EITI)” is yet another voluntary framework composed of stakeholders in the extractive industry; including states, non-governmental organizations and businesses³⁴⁶. The obligation to carry out the initiative is borne by the state³⁴⁷. The rationale behind the initiative is to increase accountability for management of revenue from natural resources by requiring governments to announce the monies received from extractive companies and the companies to announce the monies paid to governments³⁴⁸. It is hoped that this data will empower civil society and individual citizens to ask critical questions of their governments on how revenue is allocated and utilized³⁴⁹. “Publish What You Pay” is a global coalition of non-governmental organizations, pursues a similar agenda as the EITI through its work³⁵⁰.

The “Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights”³⁵¹, will be mentioned under this heading because though the principles do not create any mechanism for dealing with transnational corporations, they

³⁴⁴ International Labor Organization, at 2.

³⁴⁵ International Labor Organization, at 2.

³⁴⁶ Publish What You Pay, *Our Activities: Extractive Industries Transparency Initiative (EITI)* (Nov. 21, 2013) <http://www.publishwhatyoupay.org/activities/advocacy/extractive-industries-transparency-initiative>.

³⁴⁷ Publish What You Pay, *Extractive Industries Transparency Initiative (EITI)* (Nov. 21, 2013) <http://www.publishwhatyoupay.org/activities/advocacy/extractive-industries-transparency-initiative>.

³⁴⁸ Publish What you Pay, *Extractive Industries Transparency Initiative (EITI)* (Nov. 21, 2013) <http://www.publishwhatyoupay.org/activities/advocacy/extractive-industries-transparency-initiative>.

³⁴⁹ Publish What you Pay, *Extractive Industries Transparency Initiative (EITI)* (Nov. 21, 2013) <http://www.publishwhatyoupay.org/activities/advocacy/extractive-industries-transparency-initiative>.

³⁵⁰ Publish What You Pay, *ODI - A Study of the Coalition Model of the Publish What You Pay Campaign*, (Nov. 21, 2013) <http://www.publishwhatyoupay.org/resources/odi-study-coalition-model-publish-what-you-pay-campaign>.

³⁵¹ Oliver De Schutter et al, *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 Human Rights Quarterly 1084–1169, 1084 (2012) <http://www.lse.ac.uk/humanRights/articlesAndTranscripts/2012/HRQMaastricht.pdf>.

propose rules to deal with these entities. The principles were formulated in 2011 by experts in international law, including human rights, specialists pulled from academia, civil society organizations and United Nations agencies³⁵². The preamble of the principles notes that globalization has increased the influence of states and other non-state actors over the enjoyment of social, economic and cultural rights by people outside their territorial jurisdictions³⁵³. Therefore, the “principles aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights”³⁵⁴. The principles create an obligation on states not only to respect all human rights domestically but also extraterritorially³⁵⁵.

It should also be mentioned here that businesses sometimes impose human rights standards upon themselves³⁵⁶. Tully gives an example of such rules through the use of “codes of conduct”³⁵⁷. He describes codes of conduct as “commitments voluntarily made by corporations, associations and other entities which establish standards, values and principles to guide decision-making and conduct business activity”³⁵⁸. Though such codes minimize the need for state oversight, Tully finds that the rules can be easily tampered with to create conditions the companies find ideal, making formal regulation a necessity³⁵⁹. Additionally, Skogly finds that companies create such codes as a reaction to costly boycotts by consumers of products they feel were produced under inhumane conditions³⁶⁰; for instance during

³⁵² Oliver De Schutter et al, 1084.

³⁵³ Oliver De Schutter et al, 1085.

³⁵⁴ Oliver De Schutter et al, 1086.

³⁵⁵ Oliver De Schutter et al, 1086.

³⁵⁶ Sigrun I. Skogly, 250.

³⁵⁷ Stephen Tully, 55.

³⁵⁸ Stephen Tully, 55.

³⁵⁹ Stephen Tully, 55-56.

³⁶⁰ Sigrun I. Skogly, 250.

apartheid, consumers successfully shunned products from companies located in South Africa;³⁶¹ and Shell's services were boycotted for perceived environmental degradation³⁶².

4.1.1.1.1 Conclusion

In summary the multilateral mechanisms above that address corruption and human rights violations by transnational corporations are limited in their scope of application; the American Alien Tort Statute, the only national mechanism that allowed foreign applicants to seek redress for human rights violations by transnational corporations, is no longer available. The other mechanisms, such as the United Nations Global Compact and codes of conduct are voluntary in nature and do not attach legal consequences for non-adherence; meaning that the less ethically inclined corporations will not submit themselves to scrutiny. Another challenge emanating from these frameworks is that some corporations would be subjected to scrutiny while others are not especially in those countries where no national mechanism exists to deal with breaches of human rights; this creates double standards. Additionally, each of the mechanisms prescribes its own standards for assigning responsibility to the corporations; there is thus no unanimous standard upon which to hold corporations accountable; which means corporations are free to choose the standard they find least imposing or not at all. The justifications for creating a uniform standard applicable to all regions have thus been offered.

As a way forward, Adeyeye proposes a form of limited "direct international corporate responsibility", where the states assign responsibility to transnational corporations for human rights violations in clearly defined circumstances whilst providing an avenue for addressing

³⁶¹ Sigrun I. Skogly, 249.

³⁶² Sigrun I. Skogly, 250.

any violations that might occur³⁶³. Skogly has noted that codification of laws at the international stage is preceded by a desire of States to impose standards or values in a certain area of human life³⁶⁴. This codification is usually a political process which imposes responsibilities upon states themselves and others, thus, if states so wish it, they can create human rights obligations for transnational corporations³⁶⁵. Skogly wonders if it is expected that businesses, whether local or international, should respect national laws then why similar laws at an international level shouldn't apply to transnational corporations irrespective of the country in which they do business³⁶⁶. Skogly has raised an important point; the author posits that States cannot claim to be committed to protection of human rights in our current world whilst excluding private actors from accountability³⁶⁷.

In conclusion what would international regulation of transnational corporations operating in Nigeria but registered in the EU mean? What would be its added value in fighting corruption and enhancing human rights protection? From the foregoing discussions it is evident that the main value of such an international instrument in Nigeria would be the impact it would have on corruption in the area of oil extraction. It would mean that if the Nigerian government were unable or unwilling to deal with the supply side of corruption, an avenue for redress of the same would exist in another country. This increases the ability of Nigerians to exert a measure of control over their national resources. Such a mechanism would remove the incentive for transnational corporations to pay bribes to Nigerians officials as they may incur liability under international law. Especially as we have seen that findings of violations may negatively impact the reputation and profits of businesses.

³⁶³ Adefolake O. Adeyeye, 129.

³⁶⁴ Sigrun I. Skogly, 253.

³⁶⁵ Sigrun I. Skogly, 253.

³⁶⁶ Sigrun I. Skogly, 253-254.

³⁶⁷ Sigrun I. Skogly, 257.

This means that to attract and retain business from transnational corporations, Nigeria will be forced to deal more forcefully with corruption among its ranks. This would translate at the very least to better protection of the environment and a tightening of the gaps through which public monies are misused. International regulation of transnational corporations will not by itself translate to a complete end of corruption in Nigeria; it may stop the supply side of corruption. This will add to other measures that Nigeria has to fight corruption and secure full human rights protection. In fact Rotberg contends that by virtue of its stature in Africa, if Nigeria would deal with problems of governance and corruption, it would change the fate of the continent³⁶⁸.

The benefits of international regulation of transnational corporations for the EU would not be as visible as those in the comparator jurisdiction. The benefit would be having an international trade environment that is more predictable for its corporate citizens. Also this measure would be in line with its policy to promote human rights and sustainable development globally; a policy that was articulated in chapter two. The EU would thus be concerned with conduct of its member states in promoting human rights beyond its borders. Supporting this view, Gráinne de Búrca notes:

In external EU policies . . . [t]he EU regularly attempts to influence the conduct of many third states and regions on the protection of human rights. Human rights concerns feature centrally in EU development policy and in external trade, and they are promoted through instruments such as political dialogue, human rights clauses in bilateral agreements, and trade preferences, as well as in multilateral settings and in the EU's neighborhood policies and human rights and democratization programs³⁶⁹.

³⁶⁸ Robert I. Rotberg, 4.

³⁶⁹ Gráinne de Búrca, *The Road not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT'L L 649, *684-685 (2011) (LexisNexis 105 A.J.I.L. 649) <http://www.lexisnexis.com/hottopics/lnacademic/>

Framed in another way, it would be unconscionable for states within the EU to allow breaches of human rights by their corporate citizens in foreign countries, breaches that are prohibited within their own borders.

This means that international regulation of transnational corporations would create benefits not only for Nigeria and the EU, but also the international community. This form of international co-operation goes into the wider discussion by the thesis on the obligation created under the DRD for joint action in promotion of the right to development. It can be a measure that can be created under the right to development to effect development and human rights. This proposed measure can take advantage of already existing and functional mechanisms in national and regional levels. It is mutually beneficial and avoids the imposition of an outright obligation to provide finances to developing countries by developed countries. It thus has a better chance of achieving recognition through consensus by states than the measure currently in the DRD. More so because some developed countries, such as those in the OECD have already recognized the importance of such a measure. This conclusion lays the basis for examination in the next part of proposals for defining the scope and content on the right to development and the role the right would play in human rights protection in the future.

5 Conclusions

This thesis in chapter one and two established that human rights are ideals or virtues to which human kind aspire and are codified in various national, regional and international instruments. These rights at the international level were laid down by the UDHR but later guaranteed into two international instruments; the ICCPR and the ICESCR. This, together with opposing ideologies espoused by the North and South during the Cold War, led to unequal emphasis on different categories of rights; civil and political rights and economic, social and cultural rights. This situation, together with economic and social problems the South was facing, was the main reason for the formulation of the Declaration on the Right to Development. The thesis revealed that thus the main purpose of the Declaration on the Right to development was to offer equal emphasis on all categories of human rights and to provide for international conditions favorable to development and human rights. The thesis discussions revealed the value of viewing human rights in a holistic manner as the consequences for violation of one category of human rights can infringe the rights found in another category of human rights. This, the thesis found is one of the values that the right to development adds to the body of human rights.

The thesis in chapter one revealed that by providing the concept of the right to participation for individuals in political processes that impact their lives, the right to development adds value to the body of human rights. This concept, together with non-discrimination, equity in distribution of resources, accountability for ruling elites for their actions contribute to the protection of human rights. However, the thesis in chapter one revealed that the DRD has a number of weaknesses including: lack of description of the term development, the creation of multiple duty bearers, the absence of detailed obligations on the part of individuals and states

when acting in a collective manner, absence of detailed provisions on the nature of assistance developed countries should offer to developing countries, and the granting of a right to development to states which goes against current human rights ideology. The thesis in chapter one provided different definitions of development as given by authors to inform future definitions of the term under the right to development; the thesis revealed that in essence, development should signify provision of processes and facilities that allow human beings to live a life of dignity and of their choosing. The thesis identified corruption and poverty as hurdles to individuals leading a wholesome life. The definition of development articulated above circles back to guarantees provided by the ICCPR and the ICESCR. The definition of development the thesis found thus legitimizes the DRD's assertion that all human rights must attract equal treatment.

The thesis in line with the discussions in chapter one proposes that the responsibility borne by each of the duty bearers under the DRD should be clarified. It should clearly define what responsibilities a state, individuals and the international community have. Duties imposed upon individuals by the right to development should be narrowly defined so as to seal a gap in which a state may arbitrarily demand services from its citizens. It should provide circumstances in which groups of individuals can exercise the right to development. The purpose of the proposed clarification is to ascertain the circumstances under which the right to development can be violated. Additionally a provision with low likelihood of generating consensus, such as the creation of new global trade system, should be removed from the text (perhaps this issue is best addressed before another forum such as the World Trade Organization).

The thesis in chapter one revealed that all human rights require resources for their implementation, be they civil and political or economic, social and cultural rights. The thesis through its discussions in chapter one and two also revealed that economic resources and proper governance are necessary for human rights protection not only in developing countries but in all countries. The fear that developed countries might be obligated to provide financial and technical assistance to developing countries, the thesis asserts is the most controversial aspect of the right to development. Developed countries would probably wish to retain the status quo, for instance which is provided by the ICESCR where economic cooperation and assistance is couched in voluntary as opposed to obligatory terms. These discussions revealed resistance may become more pronounced in our current world due to challenges that both developing and developed countries are facing; as was epitomized by the economic crisis of 2008.

The thesis also proved views expounded by Forsythe and Pritchard on the relationship between human rights protection, governance and economic resources are valid; that is protection of human rights in developing countries is influenced by a ruling elites commitment to secure the same and that that economic resources are required for human rights implementation. The thesis asserts in chapter two that these views by the authors are all valid and not divergent. Taken together the views espouse the ideals of the right to development articulated in the DRD; a ruling elites that is committed to protection of human rights of necessity must be transparent, accountable to its people, treat its people in a fair manner and welcome the people's input into policies that affect their lives.

This view by the thesis is tested through the comparator jurisdictions of Nigeria and the European Union. In chapter two it is revealed that despite significant natural resources, Nigeria is grappling with poor economic and human rights conditions mainly due to corruption; a governance issue. The thesis in chapter two also revealed that EU countries enjoy significantly better economic and human rights conditions than Nigeria due to superior economic resources and governance. Though it may be possible for a country with fewer resources than the countries in the European Union to provide economic, social and cultural rights, they may not be able to provide these rights in a similar manner as in European Union countries. Alternatively, it may be argued that human beings are entitled to fullest realization of human rights and not just some measure of realization of the rights; making the need for sufficient resources necessary.

It was established that Nigeria is capable of generating economic resources that would set it well on the way of meeting its developmental needs as well as securing human rights protection, if corruption in the gas and oil sector was curbed. This is more so as this sector is her main source of governmental revenue. Additionally, the same vice impedes the effectiveness of the anti-corruption measures that she has put in place. The thesis established that some transnational corporations based in EU member states have been involved in corruption in Nigeria. The thesis revealed that this problem creates an opportunity for the two countries to cooperate in a manner that will curb corruption and improve the human rights conditions in Nigeria. This is through regulation of transnational corporations to curb corruption and human rights abuse. This thesis does not propose that Nigeria's problems with corruption and governance will be completely cured if such a mechanism existed under international law, but it will at the very least offer a remedy to persons injured by activities of transnational corporations, which would possibly prevent similar conduct in the future. So as

not to lose foreign investments, Nigeria would also be incentivized to take tougher action against corruption and breaches of human rights.

The thesis in chapter three revealed that though there are various mechanisms created by individual countries, intergovernmental organizations and non-governmental organizations, their impact on the conduct of transnational organizations is limited by creation of multiple standards for accountability, territorial applications of the laws, and the voluntary nature of some of the mechanisms. Chapter three established that in some developing countries, the ability to protect their citizens' interests is impeded by the realities of globalization and international trade. It was shown that some transnational corporations wield immense powers such that they are able to pressurize governments to adopt and maintain conditions favorable to their businesses. This therefore means, and as the thesis revealed, as there is no international treaty regulating the conduct of transnational corporations, some corporations may be able to abuse human rights, with severe consequences on the inhabitants of the countries in which they operate, and suffer no legal repercussions.

The thesis, in thus in line with similar calls by authors discussed under the chapter, proposes that an international instrument, building on the provisions provided by the various existing instruments and initiatives, is created to check corruption and human rights violations by transnational corporations. In fact such provisions can be developed and included into the UNCAC as it already deals with corruption at the international level. Remedies of a criminal and civil nature for such violations should also be included. The thesis, having revealed that developing countries might have challenges in investigation of unlawful conduct by transnational corporations proposes the creation of an enforcement mechanism at international

level with resources to conduct such investigations and enforce accountability when a state is unable to do so domestically.

Chapter three established that in some developing countries, the ability to protect their citizens' interests is impeded by the realities of globalization and international trade. It was shown that some transnational corporations wield immense powers such that they are able to pressurize governments to adopt and maintain conditions favorable to their businesses. This therefore means that as there is no international treaty regulating the conduct of transnational corporations, some corporations may be able to abuse human rights, with severe consequences on the inhabitants of the countries in which they operate, and suffer no legal repercussions.

The thesis proposes that such a measure, if it should be created, can be an example of how countries can work together to secure economic resources and human rights. This is particularly so as the thesis in chapter two revealed that corruption is a major impediment to development and human rights protection. This example can be included in future discussions on the right to development on how development and human rights can be secured through cooperation that does not involve outright provision of financial resources to developing countries; it will however have similar effects as if the aid had been given. The thesis does not assume that investigation of corruption by transnational corporations and measures to punish the same would not involve use of resources; however an international mechanism would replace the existing mechanisms and resources diverted there. Additionally the thesis proposes this measure as a way to loosen the deadlock on legal recognition of the right to development. The proposal for international regulation of transnational corporations is likely

in future to garner political consensus because already some developed countries, such as those in the OECD, are affecting such measures. This proposal also takes into consideration that currently, resources for provisions of financial assistance have lessened. Additionally, this proposal, the thesis found, has the added advantage of creating mutual benefits for all parties involved thereby increasing the likelihood of consensus.

Additionally, the thesis established there is a moral imperative to secure protection of human rights through such a measure; nations have recognized the importance of human rights and they expect that these rights should be respected at the national level, why then shouldn't they be enforced at an international level, especially when the state in which transgressions are committed is unwilling or incapable of punishing the violators. It was shown that activities of transnational corporations can have serious impact on persons' right to food, water, health, proper working conditions, property and cultural rights. International law should thus respond to the changing reality by ensuring that all gaps in which human rights violations can occur are sealed. This is a measure that will protect the spirit of human rights instruments.

This thesis does not provide that this is the only manner in which international cooperation to secure the right to development can be formulated. It can be one of the ways to deal with corruption which the thesis revealed is an impediment to the right to development. The thesis in this way shows that there can be alternative ways in which international cooperation that promotes development and human rights can be secured without inclusion of contentious provisions in the Declaration on the Right to Development. The thesis thus asserts that collective action by states to promote the right to development should remain a component of the right to development but need not be formulated in mandatory terms. This thesis therefore

proposes that though the DRD has a number of notable weaknesses, the normative underpinnings of the text are still relevant and add value to the body of human rights law. Therefore there is future need to define the content and scope of the right to development. The thesis discussions and proposals will thus inform future discussions on the breadth and width of the right to development which the thesis found has to be clarified before the right to development can become legally feasible.

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