

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

**USING CORPORATE GOVERNANCE AS A TOOL TO ENSURE COMPLIANCE
WITH CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN KENYA**

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G62/64879/2010

A thesis submitted in partial fulfillment of the requirements for the award of the degree of Master
of Laws of the University of Nairobi

Supervisor

Dr. Collins Odote

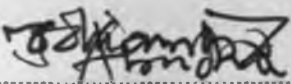
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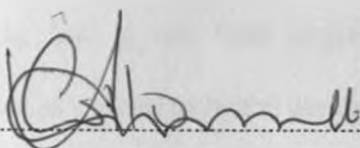
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ABSTRACT

This study examines the application of corporate governance as a tool for ensuring corporate compliance with the constitutional environmental rights in Kenya. The rationale for this assessment is founded on the need to balance the regulation of corporate environmental impact with the important role of companies in the economy and society hence the need to sustain their operations.

The thesis argues that environmental regulation as traditionally applied in Kenya under the framework law, Environmental Management and Coordination Act (EMCA) and as buttressed by sectoral legislation on the environment, presents two problems in relation to corporations. Firstly, the law as has been implemented has failed to control corporate environmental degradation as evidenced by the persistence of such degradation demonstrated in this study. This signifies inadequacy in the legal framework thereof. Secondly, the framework law presents potential harm of purely external (command-and-control) regulatory approach which can drive corporations out of business and even the market entirely. This is detrimental to the economy. If unaddressed, this approach may be transited into the implementation of the right to clean and healthy environment under the Constitution of Kenya, 2010 which is yet to take root. This situation therefore justifies an alternative approach for the actualization of the constitutional environmental rights. The balance required, the study argues, can be achieved by innovatively addressing the implications of constitutional environmental rights on corporate governance through the internalizing the former in the latter as the alternative approach.

In pursuing its objective, this study examines the recognition of the right to a clean and healthy environment, and its potential challenges and implications on corporate governance in Kenya. The thesis proceeds from the organizing hypothesis that constitutional environmental rights have

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This study examines the application of corporate governance as a tool for ensuring corporate compliance with the constitutional environmental rights in Kenya. The rationale for this assessment is founded on the need to balance the regulation of corporate environmental impact with the important role of companies in the economy and society hence the need to sustain their operations.

The thesis argues that environmental regulation as traditionally applied in Kenya under the framework law, Environmental Management and Coordination Act (EMCA) and as buttressed by sectoral legislation on the environment, presents two problems in relation to corporations. Firstly, the law as has been implemented has failed to control corporate environmental degradation as evidenced by the persistence of such degradation demonstrated in this study. This signifies inadequacy in the legal framework thereof. Secondly, the framework law presents potential harm of purely external (command-and-control) regulatory approach which can drive corporations out of business and even the market entirely. This is detrimental to the economy. If unaddressed, this approach may be transited into the implementation of the right to clean and healthy environment under the Constitution of Kenya, 2010 which is yet to take root. This situation therefore justifies an alternative approach for the actualization of the constitutional environmental rights. The balance required, the study argues, can be achieved by innovatively addressing the implications of constitutional environmental rights on corporate governance through the internalizing the former in the latter as the alternative approach.

In pursuing its objective, this study examines the recognition of the right to a clean and healthy environment, and its potential challenges and implications on corporate governance in Kenya. The thesis proceeds from the organizing hypothesis that constitutional environmental rights have

fundamental legal implications on corporate governance. It argues that such implications have to be considered as external costs which must be internalized by corporations to meet the demands of constitutional environmental rights in Kenya. This internalization marks the optimal interaction between corporate governance and constitutional environmental rights in Kenya.

The hypothesis is proved by assessing data obtained through library, documentary and Internet research. The findings indicate that, optimally, the constitutionalization strengthens the framework law on environmental protection. It also strengthens corporate law in relation to corporate environmental management and compliance. Particularly, the right, if optimally internalized, shall contribute to corporate environmental management in Kenya by: enhancing the enforcement of environmental law; ensuring environmental accountability; improving access to information; public participation in environmental decision-making and access to environmental justice.

Furthermore, the thesis incorporates arguments suggesting a positive relationship between explicit constitutional environmental rights and corporate environmental performance. On this aspect, the study argues that constitutionally compliant corporations in Kenya will have minimal, if any, negative environmental impact and rank higher on comprehensive environmental indicators.

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In conclusion, the thesis argues that constitutionalizing environmental protection represents a potentially transformative process, capable of reconfiguring legal systems and processes on environmental protection and corporate governance to place priority on corporate sustainability. The thesis argues that constitutionalizing environmental rights in Kenya has the broader implication of requiring internalization thereof as externalities in corporate governance. The

DEDICATION

To my father, Hezekiah Abudho Origa and my mother Rose Akinyi Abudho

The essence of education made sense because of the invaluable support

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This dissertation was a product of interactions of the foregoing contributions – in their intellectual, emotional and material forms - from all the above-mentioned persons. However, any errors and inaccuracies in this thesis remain solely mine.

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LIST OF ABBREVIATIONS

ACX	Africa Carbon Exchange
ADR	Alternative Dispute Resolution
CBD	Convention on Biological Diversity
CERES	Coalition for Environmentally Responsible Economies
CKRC	Constitution of Kenya Review Commission
CMA	Capital Markets Authority
CPB	Cartagena Protocol on Biosafety
CSR	Corporate Social Responsibility
CSO	Civil Society Organization
DJSI	Dow Jones Sustainability Index
EIAs	Environmental Impact Assessments
EIS	Environmental Impact Statement
EMCA	Environmental Management and Coordination Act
EMP	Environmental Management Plan
ETS	Emissions Trading Schemes
EMAS	Eco-Management and Audit Scheme
EMS	Environmental Management Systems
EPS	Environmental Policy Statement
ESSD	Environmentally and Socially Sustainable Development
EU	European Union
FAO	Food and Agriculture Organization
FTAs	Free Trade Agreements
GHGs	Green House Gases
GRI	Global Reporting Initiative

HRC	Human Rights Council
IAS	International Auditing Standards
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic Social and Cultural Rights
ICPAK	Institute of Certified Public Accounts of Kenya
ICT	Information and Communications Technology
IBLF	International Business Leaders Forum
IEL	International Environmental Law
IFAS	International Financial Accounting Standards
IFC	International Finance Corporation
IFIs	International Financial Institutions
IFRS	International Financial Reporting Standards
IK	Indigenous Knowledge
ILEG	Institute for Law and Environmental Governance
ILO	International Labour Organisation
IMF	International Monetary Fund
IPRs	Intellectual Property Rights
IPSAS	International Public Sector Accounting Standards
ISO	International Standardization Organization
JSE	Johannesburg Stock Exchange
KEBS	Kenya Bureau of Standards
KNCHR	Kenya National Commission on Human Rights
LDCs	Least Developed Countries
MAI	Multilateral Agreement on Investment

MEAs	Multilateral Environmental Agreements
NCC	National Constitutional Conference
NEMA	National Environmental Management Authority
NGO	Non-Governmental Organization
NPS	Non-Point Source
NQI	National Quality Institute
OECD	Organization of Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PWC	Price Waterhouse Coopers
RDED	Rio Declaration on Environment and Development
RI	Responsible Investment
SAPs	Structural Adjustment Programmes
SCF	Sustainable Corporate Finance
SEA	Strategic Environmental Assessment
SEC	Securities and Exchange Commission
SoE	State of the Environment
SRSG	Special Representative of the Secretary General
SWM	Solid Waste Management
TBL	Triple Bottom Line
TNCs	Transnational Corporations
UDHR	Universal Declaration on Human Rights
UNCED	UN Conference on Environment and Development
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change

UNGC	UN Global Compact
WCED	World Commission on Environment and Development
WEF	World Economic Forum
WTO	World Trade Organization

LIST OF CASES

1. *M.C. Mehta v. Union of India, A.I.R. (1987) 4 S.C.C. 463 (India).*
2. *Wangari Maathai v. Kenya Times Media Trust Ltd, (1989) H.C.K. 5403 (1989) 1 KLR (E&L) 164-174 (Kenya).*
3. *Festo Balegele and 749 others v. Dar es Salaam City Council, Civil Case No. 90 of 1991, (High Court of Tanzania) (Unreported) (Tanzania).*
4. *Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others, WP 35/1992 (India).*
5. *Juan Antonio Oposa & Others v. The Honorable Fulgencio S. Factoran, Jr & Others, GR No. 101083, 224 SCRA 793 [1993: 14-15] (Philippine).*
6. *Ms Shehla Zia and Others v. WAPDA, PLD 1994 Supreme Court 693 (Pakistan)*
7. *Social and Economic Rights Action & Centre for Economic and Social Rights v Nigeria, African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001).*
8. *Peter K. Waweru v. Republic, Miscellaneous Civil Application No 118 of 2004 Miscellaneous Civil Application No 118 of 2004, 1 KLR (E&L) 677-696 (Kenya)*
9. *Uganda Electricity Transmission Co. Ltd v. De Samaline Incorporation Ltd, Miscellaneous Cause No. 181 of 2004 (High Court of Uganda) (Unreported) (Uganda).*
10. *Minister of Water Affairs and Forestry v. Stilfontein Gold Mining Company Limited & 11 Others, Case No. 2005/7655 (South Africa) (Unreported).*
11. *Mwaniki and 2 Others v. Gicheha & 3 Others, (2006) 1 KLR (E&L) 739-748.*
12. *Charles Lekuyen Nabori & 9 Others v. Attorney General & 3 Others [2007] eKLR (Kenya).*
13. *Musa Mohammed Dagane and 25 Others v. Attorney General and Another, Constitutional Petition No. 56 of 2009 [2011] eKLR*
14. *Susan Waithera Kariuki & 4 Others Vs The Town Clerk, Nairobi City Council & 2 Others Constitutional Petition Case No. 66 of 2010 (2011) eKLR.*

LIST OF STATUTES AND INTERNATIONAL LEGAL INSTRUMENTS

(a) Statutes (with Commencement Dates)

1. Biosafety Act (No. 2 of 2009) (Kenya) (July 1, 2011).
2. Capital Markets Act (Cap. 485A Laws of Kenya) (December 15, 1989).
3. Companies Act (Cap. 486 Laws of Kenya) (January 1, 1962).
4. Corporate Manslaughter and Corporate Homicide Act 2007 (UK) (April 6, 2008).
5. Environmental Management and Coordination Act (EMCA) (Act No. 8 of 1999) (Kenya) (January 14, 2000).
6. Forest Act (Act No. 7 of 2005) (Kenya) (February 1, 2007).
7. Human Rights Act, 1998 (UK) (October 2, 2000)
8. Land Act (Act No. 6 of 2012) (Kenya) (May 2, 2012).
9. Land Registration Act (Act No. 3 of 2012) (Kenya) (May 2, 2012).
10. Mining Act (Cap. 306 Laws of Kenya) (October 1, 1940).
11. National Land Commission Act (Act No. 5 of 2012) (Kenya) (May 2, 2012).
12. Public Health Act (Cap. 242 Laws of Kenya) (September 6, 1921).
13. Retirement Benefits Act (Act No. 3 of 1997) (Kenya) (November 20, 1997).
14. Wildlife (Conservation and Management) Act (Cap. 376 Laws of Kenya) (February 13, 1976).

(b) International Legal Instruments

(i) Adopted Instruments

Universal Declaration on Human Rights, Paris, 1948.

African Convention on the Conservation of Natural Resources, Algiers, 1968.

International Covenant on Economic Social and Cultural Rights, New York, 1966.

International Covenant on Civil and Political Rights, New York, 1966.

Convention on Wetlands of International Importance Especially as Water Fowl Habitat, Ramsar, 1971.

Convention for the Protection of the World Cultural and Natural Heritage, Paris, 1972.

Convention of the Prevention of Marine Pollution by Dumping of Wastes and other Matter (as amended), London, Mexico City, Moscow, (Washington), 1972.

Stockholm Declaration on the Human Environment, Stockholm, 1972.

International Convention for the Prevention of Pollution from Ships, London, 1973.

Convention on International Trade in Species of Wild Fauna and Flora, Washington, 1973.

Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Geneva, 1977.

Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), Bonn, 1979.

United Nations Convention on the Law of the Sea, Montego Bay, 1982.

Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Regions, Nairobi, 1985.

Vienna Convention for the Protection of the Ozone Layer, Vienna, 1985.

Protocol Concerning Cooperation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region, Nairobi, 1985.

Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, Nairobi, 1985.

Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 1987.

Convention on Biological Diversity, Rio de Janeiro, 1992.

Rio Declaration on Environment and Development, Rio de Janeiro, 1992

United Nations Framework Convention on Climate Change, New York, 1992.

Convention for the Establishment of Lake Victoria Fisheries Organization, Kisumu, 1994.

Lusaka Agreement on Co-operative Enforcement operations Directed at Illegal Trade in Wild Fauna and Flora, Lusaka, 1994.

United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly In Africa, Paris, 1994.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 2000.

Organization of Economic Cooperation and Development Principles of Corporate Governance, Paris, 2004.

United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Geneva, 2011.

(ii) Instrument Not Adopted

UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12, Geneva, 2003.

UN Draft Code of Conduct on Transnational Corporations, E/1988/39/Add.1, Geneva, 1988.

INTRODUCTION

(a) Background

This study examines the application of corporate governance as a tool for ensuring corporate compliance with the constitutional environmental rights in Kenya. Corporate governance in the context of this study means the systems and processes through which the corporate firm's total portfolio of assets and resources is directed and controlled to meet stakeholder interests.¹ The rationale for this assessment is founded on the need to balance the regulation of corporate environmental impact with the important role of companies in the economy and society hence the need to sustain corporate operations. This balance, the study argues, can be achieved by innovatively addressing the implications of constitutional environmental rights on corporate governance through the internalization of the former in the latter.

A growing body of evidence has attributed substantial environmental degradation in Kenya to either direct and indirect corporate anthropogenic activities. Such activities include industrial pollution through release of industrial waste into the air, land and water, soil erosion, deforestation, and damage of biodiversity. In support of this observation, Elisa Morgera has generally argued that:

“the private sector does play a crucial role in the utilization of the...[environmental]commons and may adversely affect ... environmental resources through the production of greenhouse gases, the unsustainable use of biodiversity, and the production of toxic and hazardous substances and waste, to name but a few examples.”²

¹ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and A Sample Code of Best Practice for Corporate Governance*, (Private Sector Corporate Governance Trust: Nairobi, 1999) at p. 1.

² See also Elisa Morgera, *Corporate Accountability in International Environmental Law*, (New York: Oxford University Press, 2009) at p. 5

In Kenya, some of the examples of environmental degradation attributable to corporations include the activities of the salt mining companies in Malindi,³ and the activities of numerous flower farming corporations such as Oserian Development Company Limited, Sher Karuturi and Homegrown Limited which have caused damage to the Lake Naivasha ecosystem.⁴ Furthermore, the corporations associated with solid waste management (SWM) in major urban areas in Kenya have also contributed to environmental degradation as well.⁵ In addition, the agro-based activities of Dominion Farms have similarly destroyed the environment and ecosystem within the Yala wetlands.⁶ Besides the foregoing, the emerging problem of e-waste mismanagement has also been largely attributed to corporations.⁷ In summary, corporations contribute to environmental degradation very significantly.

Corporate environmental degradation, as demonstrated above, has persisted despite the fact that there is a legal framework in place.⁸ Before the promulgation of the Constitution of Kenya 2010, environmental regulation for corporations in Kenya was largely conducted under the Environmental Management and Coordination Act (EMCA). Section 3 of EMCA provides for

³ See Kenya National Commission on Human Rights (KNCHR), *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi*, (Nairobi: KNCHR, 2006).

⁴ See for example, Food & Water Watch and the Council of Canadians, "Lake Naivasha Withering under the Assault of International Flower Vendors," (Washington DC: Food & Watch/Ottawa: The Council of Canadians, 2008). See also, Elizabeth Mwai, "Flower company accused of polluting Lake Naivasha," *The Standard* newspaper, 20th February 2010 Online Edition, at <http://www.standardmedia.co.ke/InsidePage.php?id=2000003800&cid=465&story=Flower%20company%20accused%20of%20polluting%20Lake%20Naivasha> (last accessed on April 27, 2011).

⁵ See also UNEP, *Selection, Design and Implementation of Economic Instruments in the Kenyan Solid Waste Management Sector* (Nairobi: UNEP, 2005) at pp. 24-39.

⁶ See Collins Odote *et al*, "The Implications of Property Rights for Wetlands Management in Kenya" at http://iasec2008.glos.ac.uk/conference%20papers/papers/O/Odote_122601.pdf (last accessed on September 30, 2011) at pp. 18-19.

⁷ See Mercy Wanjau, "E-Waste and Recycling: Whose Responsibility Is It?" GSR 2011 Discussion Paper under the auspices of International Telecommunications Union, Geneva (2011) at www.itu.int/ITU-D/treg/Events/Seminars/GSR/.../Session_7_Wanjau.pdf (accessed on November 2, 2011).

⁸ Evanson Chege Kamau, "Pollution Control in Developing Countries with a Case Study on Kenya: A Need for Consistent and Stable Regimes," *Revista Internacional de Direito e Cidadania*, 9 (2011), p. 30.

the entitlement to clean and healthy environment by stating that “Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.” The main problem presented by this provision has been the question of whether this entitlement confers a real right to clean and healthy environment or not. The reason for this problem has been attributed to the human rights practice in Kenya that for an entitlement to be regarded as a human right, it has to be incorporated into the Bill of Rights which could only reside in the Constitution.

In addition to EMCA, other instruments touching on environmental management mainly include the sectoral statutes which incorporate aspects of environmental regulation. These include the Wildlife (Conservation and Management) Act,⁹ Forest Act,¹⁰ Mining Act,¹¹ Biosafety Act,¹² and Public Health Act.¹³ Until then, EMCA together with its shortcomings on prescription of environmental rights remained the organizing legislation in environmental regulation.

However, the rights problem in EMCA was settled in 2010 through the promulgation of the Constitution of Kenya, 2010. Article 42 of the Bill of Rights provides for environmental entitlements as human rights in the following terms:

“Every person has the right to a clean and healthy environment, which includes the right— (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.”

Article 69 referred to in the foregoing provision provides that:

“(1) The State shall—

⁹ Cap. 376, Laws of Kenya.

¹⁰ Act No. 7 of 2005

¹¹ Cap. 306, Laws of Kenya.

¹² Act No. 2 of 2009

¹³ Cap. 242, Laws of Kenya.

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
- (d) encourage public participation in the management, protection and conservation of the environment;
- (e) protect genetic resources and biological diversity;
- (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
- (g) eliminate processes and activities that are likely to endanger the environment; and
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”

Article 69 therefore incorporates the environmental obligations of the State which obligations must be fulfilled to ensure clean and healthy environment. The provision also incorporates obligations on the private persons requiring them to respect the constitutionally endowed rights. In this category, this thesis argues that the corporations must respect the right to a clean and healthy environment achievable through the fulfillment of the aforesaid obligations, and is bound to take some positive measures in cooperation with the state so as to fulfill the said obligations.

On the other hand, Article 70 also referred to in the provision on the substantive right to clean and healthy environmental states that:

“(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
- (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

In effect, Article 70 prescribes remedial measures that can be taken in relation to enforcing the right.

Even though corporations contribute to environmental degradation as already demonstrated, they nevertheless play a key role in the economy by participating vibrantly in shaping of the law in Kenya both directly and indirectly. The quotidian role of the corporation is manifested through corporate processes and activities¹⁴ such as innovation, raw material extraction, supply of goods and services, technological and skills transfer, employment creation, and by contributing quite significantly public revenue through taxation.

But the corporation is under threat from the potentially punitive legislative framework in Kenya. The reason for this argument is that in Kenya, environmental regulation in relation to corporations has traditionally been regarded from the approach of external regulation. The approach applies command-and-control through placing duties or responsibilities on corporations, individuals and other entities with penal consequences in the event a corporation fails to adhere to its responsibilities.¹⁵ Such an approach employs measures that restrain corporate conduct through the imposition of civil liability damages and criminal liability sanctions with limited scope of control. The limited scope of control is evidenced by the

¹⁴ David Ong, “The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives” 12 *European Journal of International Law* 4 (2001) pp. 685-726 at p. 686.

¹⁵ Neil Gunningham, “Reconfiguring Environmental Regulation,” in Pearl Eliadis, Margaret M Hill, Michael Howlett (eds), *Designing Government*, (McGill-Queen's University Press, Montreal, 2005) pp. 333-364.

continued corporate contribution to environmental damage.¹⁶ Besides the limited control, the approach has the potential effect of driving away corporations not only from certain businesses, but even out of the market entirely to the ultimate detriment of the economy and society.¹⁷ This kind of approach had been largely used in implementing the EMCA regime prior to the Constitution taking effect.

The foregoing positions on environmental degradation, the importance of corporations and the potential harm of purely external regulation on corporate business therefore raise the necessity for the conservation of the environment and the preservation of the corporations. The need presented by this position calls for innovative ways of constructing and maintaining a balance that would ensure that the corporations remain operational to serve the economy while also ensuring that they conform to the constitutional and legal requirements which prescribe their environmental rights and duties. This therefore justifies an alternative approach for the actualization of the constitutional environmental rights which preferably internalizes the implications of constitutional environmental rights within corporate governance. This study focuses on the modalities of using corporate governance to ensure corporate compliance with constitutional environmental rights as the alternative approach.

(b) Statement of the Problem

The specific problem which this study seeks to address is the failure, so far, to have the implications of the constitutional environmental rights in Kenya on corporate governance tested

¹⁶ *Ibid* note 14 at p. 686.

¹⁷ Neil Gunningham, "Reconfiguring Environmental Regulation," in Pearl Eliadis, Margaret M Hill, Michael Howlett (eds), *Designing Government*, (McGill-Queen's University Press, Montreal, 2005) pp. 333-364

in order to establish specific corporate responsibility and accountability under the constitutional environmental rights using corporate governance as a tool.

The basis of the problem is that despite environmental degradation which arises from corporate environmental impacts exemplified hereinbefore, corporate responsibility and accountability for environmental rights remained problematic in Kenya prior to the promulgation of the Constitution of Kenya 2010 and after.

The law applicable to environmental regulation prior to the constitutional enactment largely resided in EMCA which prescribed entitlements to clean and healthy environment. The problem with implementing such rights in relation to corporations can be attributed to four main challenges: firstly, questions regarding whether constitutional environmental rights were fundamental rights within the constitutional sense. The position prior to 27th August 2010 was that only the rights contained in the Bill of Rights were real fundamental rights and could be enforced as such. This problem was further manifested in the fact that the courts approached the question of environmental rights by interpreting the right to life to include the right to a clean and healthy environment instead of relying directly on the EMCA entitlement provision.¹⁸ Secondly, the law generally failed to clarify the place of corporations in environmental rights. This is caused by human rights character of environmental rights which concerns the traditional perspective that human rights apply to States, and not non-state actors. In fact EMCA, save for specific sections addressing liability of corporate persons, failed to provide the meaning of “person”. In this context as well, Kenya’s corporate law generally presented challenges of

¹⁸ See the cases of *Peter K. Waweru vs Republic*, Misc. Civil Application No. 118 of 2004 and *Charles Lekuyen Nabori & 9 Others vs Attorney General & 3 Others*, Petition 466 of 2006, [2007/8] eKLR as discussed at length in Chapter 2 of this thesis.

corporate legal personality *vis-à-vis* corporate groups and corporate mental element in environmental law breaches. Thirdly, EMCA largely consolidated and enhanced criminal and civil sanctions but failed to proffer a clear definition of corporate responsibility and accountability by defining how far the corporation ought to have taken proactive measures to ensure compliance with the law. This problem justifies the need to define the responsibility and accountability of the corporation in relation to environmental rights. The consequence of the foregoing has been the continued corporate environmental degradation.

The Constitution of Kenya 2010 has enshrined the environmental rights within the Bill of Rights by providing under Article 42 that “Every person has the right to clean and healthy environment”.¹⁹ The provision also outlines constitutional obligations by outlining the principles of environmental governance.²⁰ However, the problem with the provisions of the Constitution is that they do not clearly define specific corporate responsibilities for sustainability and instead leaves such responsibilities to be inferred from the largely principle-based obligations under the right. This means that the rights as structured under the Constitution do not explicitly solve the EMCA problem. Indeed, the considerably general terms of the obligations coupled with the right’s expanded rules of standing and consequential litigation outcomes opens the corporation more to liability based accountability system typical of EMCA. This is likely to be detrimental to corporations yet a balance ensuring that the expectations of the right and preservation of corporations is necessary. This lack of specific prescription of distinct responsibilities of corporations under the constitutional environmental rights in Kenya presents the problem for ensuring highly specific corporate compliance requirements.

¹⁹ See generally the provision on Article 42 quoted *in extenso* in page 3 hereof.

²⁰ See generally the provision on Article 69 quoted *in extenso* in page 3-4 hereof.

Furthermore, the constitutional environmental rights have eventual legal and related implications on corporate governance.²¹ The utility and validity of the implications in sustainable implementation of the constitutional environmental rights by corporations have largely not been tested yet they may hold strategic functions in corporate environmental responsibility and accountability.

(c) Objectives

In addressing the problem, the main objective of this study is to assess the efficacy as well as the legal and related implications of the constitutional environmental rights in Kenya as they relate to corporations. In pursuing this broad objective, the specific objectives of the study are to:

- (i) Assess the relationship between business, corporate governance and human rights;
- (ii) Critically examine the development and scope of constitutional environmental rights in Kenya;
- (iii) Evaluate the salient considerations necessary for effective implementation of the right to clean and healthy environment in relation to corporations in Kenya;
- (iv) Assess the legal and related implications of enforcement of the right to clean and healthy environment on corporate governance in Kenya;
- (v) Proffer proposals on addressing the legal and related challenges as well as the implications of constitutional environmental rights on the governance of the corporation in Kenya for corporate sustainability and fulfillment of the environmental obligations.

²¹ See David Ong, "The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives" *Ibid* note 14, at pp. 685-686.

(d) Research Questions

In pursuit of its objectives, this study attempts to answer the following questions:

- (i) What is the link between corporate governance, business and human rights?
- (ii) What is the scope of constitutional environmental rights?
- (iii) To what extent is the corporation liable for constitutional environmental rights? What are the possible problems with corporate responsibility in constitutional environmental rights?
- (iv) What are the implications of constitutional environmental rights on corporate governance?
- (v) Can the implications be applied to develop an optimal balance between the corporate business needs and its constitutional environmental obligations for corporate sustainability?

(e) Justification

Since the promulgation of the Constitution of Kenya 2010, studies in responsibility and accountability for constitutional environmental rights in Kenya have largely not interrogated corporate responsibility and accountability for the rights. Particularly, studies in fulfillment of constitutional environmental rights in Kenya have failed to focus on the utility of corporate governance in the fulfillment of those rights. Such studies have largely focused on the content and scope of the rights mainly owing to the fact that the rights are new in Kenya.²² This situation creates a knowledge gap on innovative sustainable solutions to the problem of corporate

²² For examples of recent studies in this area, see Collins Odote, "Country Report: Kenya - Constitutional Provisions on the Environment," 1 *IUCN Academy of Environmental Law* (e-Journal) (2012): 136-145. See also Kariuki Muigua and Kariuki Francis, "Safeguarding Environmental Rights in Kenya," (2012) <http://www.kmco.co.ke/attachments/article/100/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (last accessed on October 28, 2012)

environmental degradation. This study assesses the implications, challenges and prospects of constitutional environmental rights on the corporate governance and proposes mechanisms for innovative use of corporate governance in ensuring corporate compliance with constitutional environmental rights in Kenya. This in effect is a step to clarify the responsibility and accountability mechanisms of the corporations in constitutional environmental rights in Kenya. As a result, the outcome of this study shall therefore be useful to several persons or institutions, including corporations and the government.

For corporations, this study makes proposals for innovatively applying corporate governance to ensure the corporations adhere to or implement the demands of the constitutional environmental rights in Kenya. The innovativeness of the proposed approach shall be useful in ensuring corporations maintain viability while at the same time discharging their concomitant duties under the constitutional environmental rights.

For the government and its relevant agencies, especially the National Environmental Management Authority (NEMA), this study makes legislative and policy proposals which will be useful in ensuring sustainable environmental regulation in relation to corporations in Kenya. Particularly, the proposals proffered by this study present an opportunity for the government to reconsider its largely command-and-control approach to regulation and in its place promote a corporate-end strategy whereby corporations internalize the demands of the right to clean and healthy environment in order to ensure compliance therewith. In line with this benefit, the legislative proposals derived from this study shall be useful to the development of the framework law and other relevant legislation to clearly prescribe the responsibilities of the corporation.

(f) Hypothesis

This study proceeds from the organizing hypothesis that constitutional environmental rights have fundamental legal and related implications on corporate governance. In this regard, it is the hypothesis of this study that such legal and related implications must be strategically addressed for sustainable implementation of constitutional environmental rights in relation to the corporations in Kenya.

(g) Theoretical Framework

The stakeholder theory of corporate governance informs the author's approach to a feasible solution of the problem in this study. This has shaped the interrogation of the interaction between the corporation and constitutional environmental rights as a legitimate claim in the governance of the corporation.

To begin with, Sir Adrian Cadbury defines corporate governance as an arena of corporate law concerned with "...holding the balance between economic and social goals and between individual and communal goals...The aim [of holding the balance] is to align as nearly as possible the interests of individuals, of corporations, and of society."²³ This definition encompasses certain conceptions fundamental to the thesis of claims in corporate governance generally, and legitimate claims in particular. These conceptions include the matter of social goals and the interests of the society. They are important because they provide an indication of

²³ Adrian Cadbury, "Foreword," in Stijn Claessens, *Corporate Governance and Development*, (Washington DC: Global Corporate Governance Forum, 2003) v-vii at p. vii.

the relationship between the corporation and various (sub)systems in the society in the nature and form of economic, political and social (sub)systems therein.²⁴

The appropriateness of stakeholder theory is that its fundamental basis is both positive and normative, and involves acceptance that stakeholders are persons or groups with legitimate interests in procedural or substantive aspects of corporate activity.²⁵ This is so especially because stakeholders are identified by their interests in the corporation, regardless of whether the corporation has any corresponding functional interest in them.²⁶ Moreover, the interests of all stakeholders are considered to be of intrinsic value because each group of stakeholders warrants consideration for its own sake and not merely because of its ability to further the interests of some other group, such as the shareholders.²⁷

This study proceeds from the theoretical approach that the corporation is a social entity, not a private property of the shareholders. Aron A. Dhir neatly sums this perspective as interposed thus:

“...the corporation carries with it a public purpose. The corporation is born and operates as a legal construct only with the governmental approval. Government’s granting of the corporations juridical personality is seen as warranted by the state’s desire to promote social welfare (in other words, corporations are beneficial to society). Thus, as an extension, the proper purpose of the corporation can include advancing the general welfare through, for example, providing opportunities for meaningful employment, satisfying consumer desires, and contributing to community life [such as the community’s need for and right to clean and healthy environment]”²⁸

This position is echoed by William Bradford who argues thus:

²⁴ See Cary Coglianese, “Legitimacy and Corporate Governance,” Working Paper of the Corporate Social Responsibility Initiative, Harvard Kennedy School, Working Paper No. 11A (2005).

²⁵ Thomas Donaldson and Lee E. Preston, “The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications.” *20The Academy of Management Review* 1 (1995), p. 65.

²⁶ *Ibid* note 25 at pp. 66-67.

²⁷ *Ibid* note 27, at p. 68.

²⁸ Aron A. Dhir, “Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability,” *43 American Business Law Journal* 2 (2006), at p. 370.

“...the firm as not merely a legal fiction but rather as a moral organism with social and ethical responsibilities that extend far beyond the interests of shareholders to include other constituent groups such as employees, customers, suppliers, nongovernmental organizations, local communities, and even, in conjunction with issue-areas such as the environment, disease and corruption prevention, and human rights, the community of nations. Legitimate objects of the corporation include not merely profitability but sustainable growth, equitable employment practices, and long-term social and environmental accountability.”²⁹

Besides the foregoing arguments on stakeholder supremacy, relational elements challenge shareholder primacy in corporate governance. This thesis faults the shareholder primacy theories in the implementation of constitutional environmental rights. The problem with shareholder primacy approach to corporate governance is that its pillars emphasize corporate profit relationships at the expense of corporate social and political relationships and socio-economic effects thereof.³⁰ In summation, it has been argued that the profit-maximization objectives of the corporation influence domestic and international policy agendas.³¹ The results of this influence have had serious negative consequences for human rights, working conditions, and the environment.³² This problematique invites an alternative theory which recognizes holistic stakeholder approach to the governance of the corporation, and of which stakeholder theories are preferred as supported herein.

The foregoing perspectives found a context for the interrogation of the stakeholder in the governance of the corporation.

²⁹ William Bradford, 'Beyond Good and Evil: Toward a Solution of the Conflict between Corporate Profits and Human Rights,' (2007) at <http://ssrn.com/abstract=991241> (accessed on October 1, 2011).

³⁰ See generally Reinhard Steurer, Markus E. Langer, Astrid Konrad, André Martinuzzi. "Corporations, Stakeholders and Sustainable Development I: A Theoretical Exploration of Business-Society Relations," 61 *Journal of Business Ethics* 3 (2005) at pp. 263-281

³¹ *Ibid* note 30 at pp. 263-264.

³² Dennis P. McCann (2000) "Controversy: Do Corporations Have Any Responsibility Beyond Making a Profit? A Response to Norman P. Barry," 3 *Journal of Markets & Morality*, No. 1 (2000) at pp. 108-114.

(h) Literature Review

Several authors have researched and written on disciplines of corporate governance, and constitutional environmental rights respectively. Apart from Prof John Ruggie, the UN Special Representative of the Secretary General (SRSG) on Human Rights and Business who has examined corporate liability for human rights and attempted to develop guidelines on the same at the international level,³³ none of the authors whose literature are reviewed in this study has focused on the interdisciplinary connection between corporate governance and constitutional environmental rights in Kenya. Moreover, the legal and financial implications of constitutional environmental rights on corporate governance in Kenya have hitherto not been researched on comprehensively. The literature review is therefore confined to the works on different, relevant and necessary concepts of constitutional environmental rights as they impact on corporate governance in terms of legal and neighbouring implications.

The literature in this study is reviewed in three main categories.³⁴ There are those that contain background information on the contribution of the corporation to breach of environmental rights. These do not expressly address the question of corporate liability for environmental rights but found a basis for regulatory need at the constitutional level. Secondly, there are those that discuss the problem of constitutional environmental rights and the corporation. These literature mainly address the problem of corporate enforcement and legal effects within the national, transnational

³³ Prof Ruggie in conjunction with the Corporate Social Responsibility Initiative of the Harvard Kennedy School of Government has undertaken several studies under the auspices of the office of the SRSG on Human Rights and Business. These studies assisted in the developing the United Nations Guiding Principles on Business and Human Rights. Such studies include: John Ruggie, "Business and Human Rights: The Evolving International Agenda," A Working Paper of the Corporate Social Responsibility Initiative, Harvard Kennedy School of Government, Working Paper No. 38 of 2007 and John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, (2008) at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on September 24, 2011).

³⁴ This rudimentary categorization is based on the limited literature that discusses the research topic comprehensively. The literature basically addresses the study components of corporate governance and the right to clean and healthy environment.

and comparative context. Lastly, there are those literature that highlight the legal and related implications of environmental obligations of the corporation and some possible modalities of adjustment to sustainably accommodate the same. There is no literature that addresses the challenges and implication of enforcing the constitutional environmental rights on corporate governance yet. It is this lacuna that the thesis intends to fill. A review of some of the literature supports this claim.

It is from this dearth of interdisciplinary literature that this thesis draws its inspiration. Therefore, great reliance is placed on general writings on constitutional environmental rights. Due to the proximity of the subject to that of international environmental law, policy, and human rights, this thesis also reviews some of the existing literature on these areas of law and policy.

(i) Literature on the Contribution of the Corporation to Breach of Environmental Rights

To begin with David Hunter, James Salzman and Durwood Zaelke in their book *International Environmental Law and Policy*³⁵ argue that environmental degradation has an adverse impact on the quality of human life, and more specifically the full enjoyment of human rights. They also argue that environmental degradation too often leads to violation of human rights including the right to life, health, habitation, culture, equality before the law, the right to property and clean and healthy environment. On the nature of environmental law and policy, they argue that it is largely regulatory in its approach, often based on scientific standards, professional “management” of pollution, policy-based compromises, and a variety of technical considerations.³⁶ They further opine that while many national law systems have some rights that individuals can enforce, including constitutional provisions, citizen-suit statutes, and common

³⁵ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy*, (New York: Foundation Press, 2007), at pp. 1365-1377.

³⁶ *Ibid* note 35 at p. 1367.

law nuisance actions, many countries lack broad environmental rights that individuals can enforce.³⁷ They acknowledge the shortcoming of the existing environmental management frameworks which do not incorporate well defined environmental human rights. Consequently, this makes it an important area of this study because it provides a general basis for the need of environmental human rights.

In emphasizing the foregoing foundation on environmental degradation, **Jackton Boma Ojwang'** in his paper "**The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development**"³⁸ argues that many human activities that degrade the environment customarily occur at the level of the nation-state. He argues that it is within that unit that policies, politics, economics, cultures and practices exist which will allow or disallow environmental degeneration. According to him, whenever the Court has an opportunity to declare the law on an environmental question, the shape of that law should be conservatory of the environment and the natural resources. Thus, the Court should apply this principle to determine such rights or duties as may appear to be more immediately linked to economic, social, cultural, or political situations.³⁹ This article is important to the study in providing the context of environmental regulation by providing some core parameters in constructing the meaning and scope of environmental rights.

In addition, **Jackton Boma Ojwang'** has also attempted to bring environmental management into the constitutional process, in his other article entitled "**The Constitutional Basis for**

³⁷ *Ibid* note 35, at p. 1367.

³⁸ J.B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review*, (2007) pp. 19-29.

³⁹ *Ibid* note 38, at p. 21.

Environmental Management”.⁴⁰ In it, he argues that the gravity of the environmental challenges at once brings the question into the domain of political arrangements, and of constitutional order which exists to validate and regulate those arrangements. He further argues that the ultimate concerns of environmental law are two-fold: firstly, to provide a regulatory framework for those human activities which may undermine the vital natural assets that support normal economic and social life. Secondly, to provide appropriate legal theory to explain and guide the path of the law in environmental management.⁴¹ This study is of great import to the thesis as it generates the basis for bringing environmental regulation within the ambit of constitutional practice.

On generation of environmental effects of corporations on the society, **Suzanne Benn and Dexter Dunphy** in their article entitled **“Towards New Forms of Governance for Issues of Sustainability: Renewing Relationships between Corporates, Government and Community”**⁴² argue that much of the social and environmental risks associated with the environmental and social degradation stem out of economic development driven by corporations as externalized to communities. They further argue that governments have frequently been complicit in this externalization process.⁴³ This perspective is useful to this study as it sets out the link between the corporation and the society in terms of environmental impact which is in return applied to justify constitutional regulation of corporate environmental impacts.

⁴⁰ J.B. Ojwang', "The Constitutional Basis for Environmental Management," in Calestous Juma and J.B. Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change*, (Nairobi: Initiatives Publishers/London: Zed Books, 1996) pp. 39-60.

⁴¹ *Ibid* note 40, at p.47.

⁴² Suzanne Benn and Dexter Dunphy, "Towards New Forms of Governance for Issues of Sustainability: Renewing Relationships between Corporates, Government and Community" 9 *Electronic Journal of Radical Organization Theory* 1 (2005), pp.1-29.

⁴³ *Ibid* note 42, at p. 1.

Kiarie Mwaura in his paper “Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil”⁴⁴ has argued that the corporation is commonly acknowledged to bring a large number of stakeholders together. This is undertaken directly through creditors, employees or shareholders or indirectly as members of wider communities or those who suffer human rights effects of a firm’s activities. This article is important to this study in expounding on the corporate goals vis-à-vis stakeholders. This in turn justifies a higher level of regulation which can effectively be undertaken at the constitutional pedestal if comprehensively defined as argued for in this study.

The foregoing position on stakeholder primacy is echoed by Japheth Odhiambo in his paper entitled “The Nature of Claims in the Governance of the Corporation: Interrogating the Legal Organization of Stakeholders’ Legitimate Claims”⁴⁵ who argues that stakeholders, such as communities within which a corporation operates, have legitimate claims in the governance of the corporation. Such stakeholder claims, he argues, are as legitimate as those of shareholders despite not having injected start-up capital into the corporation. This article assists this study in developing the argument that corporate environmental impact on stakeholders justifies clear regulatory terms to define corporate responsibility and accountability vis-à-vis stakeholders.

Stephen Bottomley in his book entitled *The Constitutional Corporation: Rethinking Corporate Governance* has provided an account of corporate law that opens up a space in which it is

⁴⁴ Kiarie Mwaura, “Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil” *Harvard Law School’s Human Rights Program Working Paper Series*, (2008) http://www.law.harvard.edu/programs/hrp/Mwaura_Working_Paper.pdf (accessed on November 20, 2011). See also Kiarie Mwaura, “Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violations” 7 *Law Society of Kenya Journal* 1 (2011) at pp. 1-6.

⁴⁵ Japheth Odhiambo, “The Nature of Claims in the Governance of the Corporation: Interrogating the Legal Organization of Stakeholders’ Legitimate Claims,” 7 *University of Nairobi Law Journal (UNLJ), Commercial Law Journal* 1 (2012), pp. 57-69.

possible for stakeholders and governments to make corporations responsive to political, as well as socio-economic and cultural concerns. This constitutional account of corporate law is relevant for understanding the ways in which corporations can be made responsive to political and social concerns such as this study.⁴⁶ This book is important to this project in further supplying a justification modifying corporate governance in compliance with the Constitution of Kenya (including its Bill of Rights).

Lillian Manzella in her recommendations to the SRSG entitled “**The International Law Standard for Corporate Aiding and Abetting Liability**”⁴⁷ argues that both real and juridical persons are capable of aiding and abetting human rights violations [including environmental rights]. Manzella further argues that, international law imposes aiding and abetting liability upon those complicit in egregious human rights abuses, including corporations.⁴⁸ This argument expounds on corporate impacts on the society alluded to hereinbefore.

(ii) Literature on the Challenges of Implementing Constitutional Environmental Rights in Relation to Corporations

Prof John Ruggie in his paper “**Business and Human Rights: The Evolving International Agenda,**” highlights the challenge of enforcing the human rights in relation to a corporate group. He asserts that the transnational corporate networks pose a regulatory challenge to the international legal system.⁴⁹ He expounds that a parent company and its subsidiaries are distinct

⁴⁶ Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Surrey: Ashgate Publishers, 2007), pp. 1-10.

⁴⁷ Lillian Manzella, “The International Law Standard for Corporate Aiding and Abetting Liability,” (2006) Presented to the U.N. Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises, available at <http://www.earthrights.org/sites/default/files/publications/UNSRSG-aiding-and-abetting.pdf>. (last accessed on October 27, 2012).

⁴⁸ *Ibid* note 47, at p. 4.

⁴⁹ John Ruggie, “Business and Human Rights: The Evolving International Agenda,” (June 2007), KSG Working Paper No. RWP07-029, available at <http://dx.doi.org/10.2139/ssrn.976547> (last accessed on October 28, 2012).

legal entities, and even large scale projects may be incorporated separately. According to him, due to the doctrine of limited liability, a parent company generally is not legally liable for wrongs committed by a subsidiary even where it is the sole shareholder.

However, Prof Ruggie renders another instance where the subsidiary is under such close operational control by the parent that it can be seen as a mere agent. Each legally distinct entity is subject to the laws of the countries in which it operates, but the transnational corporate group or network as a whole is not governed directly by municipal law.⁵⁰ Prof Ruggie's paper is vital for this particular study as it expounds on the corporate responsibility for human rights and suggests proposals for sustainable management of such rights including environmental human rights.

Elisa Morgera in her book *Corporate Accountability in International Environmental Law*⁵¹ argues that national control over private companies, in particular multinational companies has proved ineffective. This is the case since such corporations may be present nowhere but their activities through their agents may be present everywhere and the location of these activities may change almost instantaneously.⁵² The book is important to the current study as it exposes the scheme of corporate responsibility and accountability under international law whose implications is assessed in this study as well as the environmental accountability of transnational corporations (TNCs) and the corporate group.

⁵⁰ *Ibid* note 49, at p. 7.

⁵¹ Elisa Morgera, *Corporate Accountability in International Environmental Law*, (New York: Oxford University Press, 2009).

⁵² *Ibid* note 51, at p. 25.

In expanding the foregoing problem which is of importance to this study, Natalya S. Pak and James P. Nussbaumer in a paper titled “Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses”⁵³ argue that TNCs are complex legal entities. This complexity derives from the fact that there are a number of factors which make it difficult to define a corporation’s responsibility for human rights. In furthering their argument, they observe that a corporation may be established in one country, have headquarters in a second country, shareholders from a third country, and operate in a fourth one, which make TNCs very difficult regulatory targets.⁵⁴ As a result, it is often difficult to define what element should be used in determining the legal accountability of a TNC.⁵⁵

Amanda Perry-Kessaris in her article “Corporate Liability for Environmental Harm,” has argued that there are significant theoretical and practical difficulties associated with imposing liability for environmental harm upon corporations.⁵⁶ She supports this assertion by stating that the complex, transnational structures ensure that corporations can be difficult to track. In her view, this is the case since corporations can locate their facilities where environmental regulation is weak or not enforced. Moreover, she points out that , when corporations are faced with the threat of litigation, they ‘shop’ for a forum in which their liability to victims is likely to be relatively low, or where court procedures are more likely to stall. She further argues that when corporations are cornered, they often use the principle of limited liability to keep their resources out of the reach of the injured party.

⁵³ Natalya S. Pak and James P. Nussbaumer, “Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses” (2009) Prepared for the European Centre for Constitutional and Human Rights, Berlin available at http://www.hertie-school.org/fileadmin/images/Downloads/working_papers/45.pdf (last accessed on October 26, 2012).

⁵⁴ *Ibid* note 53, at p. 3.

⁵⁵ *Ibid* note 53, at p. 3.

⁵⁶ Amanda Perry-Kessaris, “Corporate liability for environmental harm,” in Fitzmaurice, M, and Ong, D (eds) *Research Handbook on International Environmental Law*, (Cheltenham: Edward Elgar, 2010) pp. 361-377.

Kessarar concludes that many of these difficulties are legal constructs. She therefore suggests that the corporate form being a legal construct can be moulded, or even dismantled, by legal reform. Whether these difficulties are surmountable is to a large degree dependent upon the prevailing political and social environment.⁵⁷ This article is useful to this project as it attempts an assessment of the challenges of corporate liability for human rights (which include environmental human rights) as a core component of the problems hereunder.

Stephen J. Turner in his book *A Substantive Environmental Right: an Examination of the Legal Obligations of Decision-Makers towards the Environment* makes the following useful distinction between “substantive” and “procedural” environmental rights. He posits that substantive environmental rights “...would entitle the holder to a specific quality of environment”. Procedural environmental rights “...would entitle the holder to processes such as access to information concerning the environment, participation in decision-making processes and access to justice relating to environmental matters.”⁵⁸ This book is important to this research project as it renders some guidelines on how to implement the constitutional environmental rights in light of accessory or procedural and substantive rights related thereto.

Also connected to the relationship between environmental human rights and other rights, David Takacs, in his article “**The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,**”⁵⁹ where he argues that codified environmental human rights create obligations *erga omnes*, that is, duties that must be performed. He argues that

⁵⁷ *Ibid* note 56, at pp. 361-362.

⁵⁸ Stephen J. Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer Law International BV, The Netherlands 2009) at p. 27.

⁵⁹ David Takacs, “The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,” 16 *New York University Environmental Law Journal* 711 (2008) pp. 711-765.

environmental human rights give greater force to procedural rights, giving enhanced access to challenge official actions that impinge upon the fundamental rights. In his view, procedural rights may either be tools for vindicating other named rights, or they may be the environmental human right themselves. He concludes that environmental human rights leave more doors open for private parties to become defendants when they act to violate the public good.

Philippe Cullet in his article entitled “**Definition of an Environmental Right in a Human Rights Context**,”⁶⁰ sums up the procedural and substantive rights coordination conundrum by arguing that in human rights law, the procedural rights embodied in the Bill of Rights and informed by developments in international environmental instruments can be used on their own in some circumstances. He also argues that a full right to the environment allows environmental considerations to be looked at in their own right without reference to other human rights and to take into account the global dimension of the problem. He further argues that procedural rights should be viewed as complementary rather than incompatible as they all tend towards the same goal.

Tim Hayward in his book *Constitutional Environmental Rights*⁶¹ argues that the first potential obstacle to the implementation of enforceable constitutional environmental rights, would be that its general aim is so vague that it cannot be formulated sufficiently clearly and unambiguously to guide the choice of appropriate implementation strategies. He further argues that a constitutional right is directly justiciable when its definitive statement has the clarity and imperative force

⁶⁰ Philippe Cullet, “Definition of an Environmental Right in a Human Rights Context,” *Netherlands Quarterly of Human Rights*, (1995) pp. 25-40.

⁶¹ Tim Hayward, *Constitutional Environmental Rights*, (London: Oxford University Press, 2005).

equivalent to statutory or customary law that is capable of conferring actionable rights. For him therefore, the challenge of constitutional environmental protection can be summarized thus:

“[The purpose of constitutional environmental rights is]...not to show that constitutions should say something about the environment, as there is little controversy about this; rather, it is to show that the constitutional commitment should be to provide for its protection as a fundamental right. That is to say, the provision should not take the form of some less binding constitutional commitment such as a statement of social policy; it should not be classed merely among ‘social rights’ as such category is sometimes distinguished from fundamental rights proper; and it should not provide solely procedural rights (such as the right to information, access to justice, and to environmental decision-making).”⁶²

This perspective and the book generally are instrumental in this study in assessing the scope of constitutional environmental rights, and environmental rights expectations on corporations.

The ambivalent nature of constitutional environmental rights is also observed by **James Nickel** in his paper entitled “**The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification.**”⁶³ The author notes that the proposed standard of “*adequate* for health and well-being” [read clean and healthy for purposes of Kenya], “provides a general, imprecise description of the level of protections against environmental risks that States should guarantee. [Therefore] risk standards should be specified further at the national level through democratic legislative and regulatory processes, in light of current scientific knowledge and fiscal realities.”⁶⁴ This article is important in proffering guidelines on defining parameters such as “clean” and “healthy” for the right as constituted under the Constitution of Kenya 2010 which may be provided for through a statute.

⁶² *Ibid* note 61, at p. 5. Bracketed words are present author’s for contextualization and emphasis.

⁶³ James W Nickel, “The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification,” 18 *Yale Journal of International Law*, (1983) pp. 281–295.

⁶⁴ *Ibid* note 63, at p. 282.

Alan Boyle in his article entitled “The Role of International Human Rights Law in the Protection of the Environment” has argued that the broad aims of environmental rights may require embellishment. Such expansion should operate to identify definite environmental standards that are not directly specified at constitutional level. He argues that this broadness is not an insurmountable obstacle to justiciability. He then advances another angle to this issue by arguing that people should accept the impossibility of defining an ideal environment in abstract terms. He then proposes that the supervisory institutions and courts should be empowered to develop their own interpretations as they have done for other human rights.⁶⁵ This article is important to the present study as it attempts to clarify the expectations of the right to a clean and healthy environment hence guiding the present study on the scope of expectations on corporations in relation to constitutional environmental rights. In addition, the article informs the discussions on the application of international environmental human rights law to Kenya.

Joshua J. Bruckerhoff in his paper entitled “Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights”⁶⁶ argues that constitutional environmental rights remain largely untested in the courts. However, he argues that whenever they have been invoked, most courts have construed the right very narrowly. According to him, the courts hold that the right to a healthy environment only restricts state action that is likely to

⁶⁵ Alan Boyle, “The Role of International Human Rights Law in the Protection of the Environment”, in Alan E. Boyle and Michael R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, (Oxford: Clarendon Press, 1996) at pp. 43-65. See also arguments in Alan Boyle, “Human Rights or Environmental Rights? A Reassessment” XVIII *Fordham Environmental Law Review*, (2007) pp.471-511 and Alan Boyle, “Human Rights and the Environment: A Reassessment” Paper presented at the First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability, Kuala Lumpur, (2011), available at <http://www.unep.org/delc/Portals/24151/Towardsthedeclarationhumanrights.pdf> (last accessed on October 27, 2012).

⁶⁶ Bruckerhoff, Joshua J. “Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights,” 86 *Texas Law Review* 3 (2008): 615-630.

cause environmental harm that creates a significant threat to human health, such as pollution.⁶⁷ He argues that this current understanding and enforcement of environmental rights is flawed because it is too anthropocentric. He concludes that a right to a healthy environment should actually guarantee a healthy environment, not just an environment that satisfies minimal health standards for humans. The article is important to the thesis because it infuses sustainability in constitutional environmental rights which is integral under the role of sustainable development in the scope of the rights in Kenya.

Mariette X. Jones in her paper **“The Enforceability of Environmental Rights as Human Rights: A Tale of Two Countries,”**⁶⁸ argues that the enforceability of constitutionally protected environmental rights depend to a large extent on the way in which the right itself is constituted and classified. Such enforceability also depends on the support of the judicial and the executive branches of the *trias politica* which ensures that constitutionalization of the rights is practical. She further argues that the constitutional environmental rights [within the context of South Africa,] do not confer an absolute right to clean and unpolluted environment. Rather, the rights recognize that pollution and environmental degeneration is inevitable in industrial growth. The right refers to health which is a wider concept and is therefore open to wide environmental interpretation. In context, the main challenges facing the environmental right include instances where the right conflicts with other fundamental rights.⁶⁹ This article is important to this project

⁶⁷ See Alan Boyle, “The Role of International Human Rights Law in the Protection of the Environment,” *Ibid* note 65, at p. 44.

⁶⁸ Mariette X. Jones, “The Enforceability of Environmental Rights as Human Rights: A Tale of Two Countries,” (2009) at http://eprints.mdx.ac.uk/3606/1/The_Enforceability_of_Environmental_Rights_as_Human_Rights_South_Africa_and_the_Netherlands.pdf (last accessed on April 30, 2011).

⁶⁹ *Ibid* note 68, at pp. 12-13.

as it deals with interpretive problems likely to be associated with the right as worded constituted under the Constitution.

Rachel Nicolson and Emily Howie in their paper **“The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil - An Australian Law Perspective”** argue that corporations can be held liable for the breach of human rights [including constitutional environmental rights]. They assert that such liability can be established where a corporation “expressly, tacitly or impliedly authorized or permitted the commission of the offence.”⁷⁰ This includes cases where a corporation failed to create and maintain a corporate culture that required compliance with the particular law. Consequently, this paper is important to the study as it attempts to assess the challenges of corporate criminal liability which is assessed in this study as part of ensuring optimal realization of the rights *vis-à-vis* the corporation.

George O. Otieno Ochich in his paper entitled **“The Company as a Criminal: Comparative Examination of Some Trends and Challenges Relating to Criminal Liability of Corporate Persons,”**⁷¹ confirms Nicolson’s argument by arguing that corporate criminal liability (in Kenya) holds numerous challenges. Ochich argues that in the pursuit of their business objectives companies engage in criminal activities, some of which are purposeful while others are incidental to their objects. He also argues that while corporate criminal activities may be attributed to the individuals who comprise the company, others are assigned on the company as a

⁷⁰ Rachel Nicolson and Emily Howie, “The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective” (2007): Paper for ICJ Expert Legal Panel on Corporate Complicity in International Crimes.

⁷¹ George O. Otieno Ochich, “The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons,” *Kenya Law Review* Vol. II (2008-2010): pp. 1-35

legal person. Ochoy concludes that the number of corporations increases and their involvement in diverse spheres of life expands or reorients, hence there is the need to address corporate criminal liability seriously. The study shall benefit from this paper in assessing modalities of holding corporations responsible for environmental crimes envisaged by the Constitution and stipulated in EMCA.

James R. May and Erin Daly in their article “**Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutionally Entrenched Environmental Rights,**” argue that horizontal application of constitutional obligations is useful in enforcement of constitutional environmental rights. This arises because the court is likely to find liability against a private party than against the government. The main reason for this argument is that it is easy to show that the action of the private party caused or is likely to breach the right to clean and healthy environment. They argue that the court is likely to award damages against a private party than against the government.⁷² This is important in the interrogation of corporate liability for constitutional environmental rights since such private parties include companies, and the reasons why a proper implementation mechanism would ease corporate liability in environmental human rights has been guided by this paper.

Carl Bruch, Wole Coker, and Chris VanArsdale in their report entitled *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, argue that until the human health dimension is properly established, the right to a clean and healthy environment remains over-ambitious and counterproductive. In their view, once the right to an environment

⁷² James R. May and Erin Daly, “Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutionally Entrenched Environmental Rights,” 11 *Oregon Review of International Law* (2009) pp. 365-421 at 421.

adequate for health is established, courts appear more willing to protect the environment without requiring an explicit link to human life or health.⁷³ This argument is helpful but it leaves out the ecocentric aspirations of constitutional environmental rights envisaged under the right's sustainable development aspect. This study sets out to fill this gap by assessing the scope of the right to clean and healthy environment.

(iii) Literature on Implications of Environmental Obligations of the Corporation

Christina Simeone in her dissertation entitled *The Necessity and Possibilities of Constitutional Environmental Rights*⁷⁴ argues that the costs associated with shifting to more sustainable and environmentally friendly business practices cause many commercial and industrial actors to oppose environmental rights. This is based on the belief by the industry that the actualization of the environmental rights will occasion corporate costs without returns hence resulting into losses. She also argues that there are short-term cost increases and necessary capital investments required of many industrial and commercial entities with the adoption of an environmental right.⁷⁵ Increased costs are necessary to invest in new technology and processes to comply with stricter environmental regulations. These increased costs, will no doubt reduce profits in the short term but will improve business competitiveness. This study is crucial to the project in providing the overarching impact of environmental human rights on business and ultimately corporate governance. This perspective guides the specific legal implications that are arrived at in this thesis.

⁷³ Carl Bruch, Wole Coker, and Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, (Washington D.C.: Environmental Law Institute, 2000) at p. 67

⁷⁴ Christina Simeone, *The Necessity and Possibilities of Constitutional Environmental Rights* (Master of Environmental Studies Thesis: University of Pennsylvania, 2006).

⁷⁵ *Ibid* note 74, at pp. 25-29.

David M. Ong in his article entitled “The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives”⁷⁶ has argued that the enforcement of environmental rights bears certain implications on corporate compliance. These include the increasing need for a legally induced progressive change within the corporation’s management culture.⁷⁷ The aim is to provide for explicit incorporation of environmental concerns within their decision making processes. Ong argues that such implications may also include incorporating explicit reference to environmental considerations within the duties of the director. These are important to this study as they indicate the areas of legal and financial implications which guide this study. This article also emphasizes the emerging demands on corporations to incorporate environmental policy processes which form a core argument in the thesis.

Ong’s proposition is echoed by Daniel Esty and Andrew Winston in their book *Green to Gold: How Smart Companies use Environmental Strategy to Innovate, Create Value and Build Competitive Advantage* arguing that corporate sustainability should be reviewed more broadly as a business approach or paradigm that seeks to “enhance long-term shareholder value by addressing opportunities and managing the associated risks that derive from the economic, environmental and social developments facing the modern corporation.”⁷⁸ They posit that corporate sustainability leaders should be able to achieve superior financial performance by focusing their sustainability strategies to develop sustainability products and services. This book

⁷⁶ David M. Ong, “The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives” 12 *European Journal of International Law* 4 (2001) pp. 685-726.

⁷⁷ *Ibid* note 76, at p. 686.

⁷⁸ Daniel Esty and Andrew Winston, *Green to Gold: How Smart Companies use Environmental Strategy to Innovate, Create Value and Build Competitive Advantage*, (John Wiley Publishers: New York, 2008).

is important to the present study as it proposes the importance of incorporating sustainability into corporate policy processes.

In a bid to sum up the importance of environmental rights and its effects on corporate governance, **Kathryn Gordon** in her paper entitled “**Enabling Conditions for Environmental Sustainability: Private and Public Roles**”⁷⁹ argues that corporate policy statements are increasingly incorporating economic, social and environmental pillars of the sustainable development agenda. She argues that corporations increasingly address such issues as environmental management, human rights, labour standards, anti-corruption, consumer protection, information disclosure, competition and science and technology all of which impact on or are related to environment human rights. This paper is useful to the present study in emphasizing the need to incorporate sustainable development in corporate governance.

In congruence with Kathryn Gordon’s argument, **Francis Okomo-Okello** in his article entitled “**The Role of the Private Sector (Banks) in Promoting Compliance with Environmental Law (The Kenyan Experience)**”⁸⁰ has rightfully demonstrated that the private sector (read companies), as key players and stakeholders in the economic development process, play a pivotal role in the promotion of sustainable compliance with environmental law. Okello has further argued that the private sector has limited resources hence compensation schemes must be designed and administered sustainably. According to him, companies stand to gain a competitive advantage in marketing if they corporatize environmental evaluation by transcending legislative

⁷⁹ Kathryn Gordon, “Enabling Conditions for Environmental Sustainability: Private and Public Roles” Draft background paper for discussion at session V.1 of the OECD Global Forum on Sustainable Development: Conference on Financing Environmental Dimension of Sustainable Development OECD, Paris, 24-26 April 2002.

⁸⁰ Francis Okomo-Okello, “The Role of the Private Sector (Banks) in Promoting Compliance with Environmental Law (The Kenyan Experience)” 1 *Kenya Law Review* (2007) pp. 30-80.

requirements in addressing environmental challenges. In addition, he posits that given the transnational trend, private corporations must take up their role in ensuring compliance with environmental law and regulations.

(i) Research Methodology

This study is primarily library based. It heavily relies on secondary sources of information. It therefore utilizes information from textbooks, refereed journals, relevant municipal and foreign laws and relevant international legal instruments. The study also consults both published and unpublished reports which include official Government publications as well as other credible institutional reports related to government policy. This is important in examining the policy efforts of the various Governments to enable it make necessary reform proposals. Moreover, the study also relies on credible Newspapers and magazine articles for purposes of obtaining information on current affairs on the research problem. Such information includes analyses and opinion relevant to the topic generally. Due to the scarcity of relevant and up to date legal texts on this area of study in Kenya, this study has also resorted to Internet research in obtaining current and historical information on various aspects that are otherwise unavailable or limited in print.

(j) Limitations of the Study

Constitutional environmental responsibility including corporate environmental responsibility and accountability is influenced by numerous legal and non-legal factors. Apart from the corporate implications auxiliary to legal implications, most of these non-legal factors particularly are outside the scope of this study. In Kenya, for instance the role of ethnicity and poverty in constitutional implementation cannot be gainsaid. To the extent that this study does not have at

its core the exemplified non-legal factors which have a bearing on constitutional environmental responsibility by corporations, then it is limited in its scope.

CHAPTER ONE

BUSINESS, HUMAN RIGHTS AND CORPORATE GOVERNANCE

1.1 Introduction

The UDHR states that “every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms.”⁸¹ Whereas most human rights legal instruments concentrate on State obligations as opposed to businesses' and corporations', the Universal Declaration on Human Rights (UDHR) incorporates non-state actors in human rights. Consequently, it has been argued that corporations (and businesses) are not exempted from the expression “organs of society,” as they play a role in relation to these human rights.⁸²

Despite the foregoing declaration, there has been a growing body of evidence that the impact of corporate activities on communities in developing countries can result in violations of human rights in recent decades.⁸³ It is hence without any doubt that corporations affect and are affected by lives of people around the world.⁸⁴ These human rights effects of and claims on corporations is evidence of the interaction between business, human rights and corporate governance which this study assesses.

The link between corporations and human rights is founded on the capacity of the corporation to progress or regress human rights objectives. Business corporations play a fundamental role in advancing or offending human rights goals mainly by acting as a vehicle for economic, social,

⁸¹ See Preamble to Universal Declaration of Human Rights (1948) at <http://www.un.org/events/humanrights/2007/hrphotos/declaration%20eng.pdf> (accessed on January 29, 2012).

⁸² Louis Henkin, “The Universal Declaration at 50 and the Challenge of Global Markets,” 25 *Brooklyn Journal of International Law* 1, (1999) at p. 25.

⁸³ Emeka Duruigbo, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges,” 6 *Northwestern Journal of International Human Rights* 2, (2008) 222-261. See also, generally, Suzanne Benn and Dexter Dunphy, “Towards New Forms of Governance for Issues of Sustainability: Renewing Relationships between Corporates, Government and Community” 9 *Electronic Journal of Radical Organization Theory* 1, pp.1-29.

⁸⁴ Edward R. Freeman, *Strategic Planning: A Stakeholder Approach* (Pitman: London, 1984), at pp. 5-8.

and cultural reorganization.⁸⁵ Corporations undertake this through creation of employment and diffusion of technology, scientific advances, and investment. This function consequently affects a range of human rights including socio-economic and cultural rights as well as civil and political rights among other rights.⁸⁶

The main objective of this Chapter is to establish the link between human rights and corporations in order to provide a general context regarding the place of human rights in business and corporate governance. The Chapter also highlights to Kenyan situation in relation to business and human rights. Human rights include environmental human rights under Article 42 of Kenya's Constitution which states that "Every person has the right to clean and healthy environment..." The overall aim of this contextual and conceptual analysis is to assess whether constitutional environmental rights, as human rights, are legitimate claims in the governance of the corporation.

1.2 Conceptual Framework for Business and Human Rights

Business involves systems and processes that are a key source of investment, employment and other socio-economic impacts.⁸⁷ The systems are largely the markets which have been applied as a means for allocating resources through business transactions as business processes. In this regard, John Ruggie observes that business and markets "constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights."⁸⁸ Business and

⁸⁵ Paul Redmond, "Transnational Enterprise and Human Rights: Option for Standard Settings and Compliance," 37 *International Lawyer* (2003) pp. 69-102.

⁸⁶ *Ibid* note 85 at p. 71.

⁸⁷ UN Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on January 1, 2011) at p. 3.

⁸⁸ *Ibid* note 87 at p. 3.

markets work optimally only if they are entrenched within rules, customs and institutions.⁸⁹ Such rules, customs and institutions include the rules, customs and institutions of human rights.⁹⁰

Notably, Todd Landman broadly defines human rights thus:

“In their contemporary manifestation, human rights are a set of individual and collective rights that have been formally promoted and protected through international and domestic law since the 1948 Universal Declaration of Human Rights ... since the Universal Declaration, the evolution of their express legal protection has grown rapidly.”⁹¹

The foregoing facilitate the conceptualization of human rights as universal norms that aid the protection of all human beings from political, legal, economic and social abuses by states and non-state actors such as corporations as business vehicles.⁹² As a consequence, for companies, human rights are increasingly standards that companies are expected to explicitly address. In summation, human rights are increasingly applied by and in relation to companies and their stakeholders as the normative framework for social aspects of sustainability.⁹³ An expansive discussion on the interaction can best be assessed through the historical developments of the debate on business and human rights attempted hereinafter.

1.2.1. History of the Business and Human Rights Debate

The historical development of business and human rights and the struggle to control economic actors especially corporations has a long pedigree which is chequered with tensions, reversals

⁸⁹ *Ibid* note 87, at p. 3.

⁹⁰ Nicky Black, “Business Action on Human Rights: Doing No Harm, Good Works, and Good Business in the Developing World,” in *Corporate Citizenship in Developing Countries: New Partnership Perspectives*, E.R. Pedersen & M. Hunchie (eds) (Copenhagen: Copenhagen Business School Press, 2006) pp. 57-88. See also Christopher Jeffords, “Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions” Working Paper No. 16, The Human Rights Institute, University of Connecticut, Economic Rights Working Paper Series (2011).

⁹¹ See Todd Landman, “The Scope of Human Rights: From Background Concepts to Indicators,” Paper prepared for the AHRI-COST Action meeting 11-13 March 2005, Oslo at http://essex.academia.edu/ToddLandman/Papers/860631/The_Scope_of_Human_Rights_From_Background_Concepts_to_Indicators (accessed on December 30, 2011).

⁹² See Nickel, James, “Human Rights,” *The Stanford Encyclopedia of Philosophy (Fall 2010 Edition)* Edward N. Zalta (ed.) at <http://plato.stanford.edu/archives/fall2010/entries/rights-human/> (accessed on December 25, 2011).

⁹³ Paul Redmond, “Transnational Enterprise and Human Rights: Option for Standard Settings and Compliance,” *ibid* note 85, at p. 69.

and progress.⁹⁴ The trajectory of this development is examinable in three possible phases:⁹⁵ firstly, the early developments which trace the debate between 1970s and 1990s; secondly, the norms stage which captures the period between 2000 and 2005 and the Business and Human Rights stage marking the period after 2005 and which is in a continuum.

1.2.1.1 Initial Developments: 1970s - 1990s

In the early 1970s, large scale unethical and illegal activities by multinational companies triggered consideration for international regulation of corporations.⁹⁶ This resulted into activism in the 1970s and 1980s which targeted corporations in the form of boycotts.⁹⁷ For example, there were boycotts against British banks' particularly Standard Bank and Barclays National. These banks were deemed to have provided economic support to the apartheid regime in South Africa.⁹⁸

In response to the growing public unrest about the role of companies in relation to human rights, the UN commenced efforts to strengthen the accountability of business actors (mainly corporations) in the 1970s.⁹⁹ For instance, the UN Commission on Transnational Corporations was established in 1973, to investigate the effects of Transnational Corporations (TNCs) and

⁹⁴ See generally Patricia Feeney, "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda," 6 *SUR International Journal on Human Rights* 11 (2009) pp. 161-175.

⁹⁵ *Ibid* note 94 at p. 162.

⁹⁶ Two of the best known incidents were the involvement of ITT and other US companies in the 1973 Chilean coup and the bribes paid by Lockheed to Japanese officials to obtain military contracts. See James Salzman, "Decentralized Administrative Law in the Organization for Economic Cooperation and Development," 68 *Law and Contemporary Problems* 3 & 4 (2005), at p. 189.

⁹⁷ See generally Joseph Hanlon (Ed) *Independent Expert Study Group on the Evaluation of the Application and Impact of Sanctions against South Africa*, (London: Commonwealth Secretariat, 1990).

⁹⁸ John Nerys, "The Campaign against British Bank Involvement in South Africa," 99 *African Affairs*, (2000) 415-433.

⁹⁹ *Ibid* note 94 at p. 162.

strengthen the negotiating capacity of countries in which they operated.¹⁰⁰ The resulting draft UN Code of Conduct on TNCs¹⁰¹ was the first attempt to provide transnational social and environmental guidelines for transnational corporations. The Code provided guidance to enterprises on appropriate policies, activities and indicates ways in which their beneficial impact on the economy and development of host countries can be enhanced. The Code also stressed the areas and methods of possible cooperation with Governments but faced resistance from some governments and corporations in the global North, where many TNCs had their bases.¹⁰² Despite support from many governments in the global South, the UN Code of Conduct project was consequently scuttled.¹⁰³

Most developed countries, being apprehensive of the emergence of a transnational UN initiative regulating business, then turned to the Organization of Economic Cooperation and Development (OECD) for a solution. In 1975, the OECD Committee for International Investments and Multinational Enterprises was established to investigate the possibility of codes of conduct for TNCs.¹⁰⁴ The OECD aimed at protecting international investors from discrimination and expropriation by host country governments.¹⁰⁵ In 1976, the OECD Guidelines for Multinational Enterprises were promulgated as part of “The Declaration and Decisions on International

¹⁰⁰ Scott Jerbi, “Business and Human Rights at the UN: What Might Happen Next?” 31 *Human Rights Quarterly* 2, at 299-320.

¹⁰¹ United Nations Organization, Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations* Available at: <http://www.unctad.org/sections/dite/ia/docs/Compendium/en/13%20volume%201.pdf> (accessed on December 1, 2011).

¹⁰² *Ibid* note 94 at p. 162.

¹⁰³ *Ibid* note 94 at p. 162.

¹⁰⁴ See James Salzman, “Decentralized Administrative Law in the Organization for Economic Cooperation and Development,” *ibid* note 96, at p. 189.

¹⁰⁵ See Patricia Feeney, “Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda,” *Op. cit.*

Investment and Multinational Enterprises".¹⁰⁶ These guidelines incorporated some, they failed to incorporate other human rights save for labour rights and largely remained unused for about two decades.¹⁰⁷

In 1977, the International Labour Organisation (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.¹⁰⁸ This declaration required corporations to respect the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Although not legally binding, and concentrating specifically on workers' rights, ILO's Declaration established a mechanism through which CSOs and trade unions, could institute claims concerning business abuse on human rights of workers.¹⁰⁹

Throughout the 1980s, CSOs focused their campaigns on exposing the detrimental role played by the World Bank in supporting large-scale development projects in many developing countries and least developed countries (LDCs). This concern heightened because such projects generated environmental destruction and human rights harm.¹¹⁰ The Narmada Dam project in India where the Government, under World Bank funding, planned several dams to harness the waters of the Narmada River is an example. The construction of the dam was causing large scale abuse of human rights and displacement of indigenous communities. In addition, the campaigns against the Polonoroeste in Brazil where the government initiated the project financed by the World Bank with the principal objective of constructing a road in the Amazon. The project contributed

¹⁰⁶ *Ibid* note 94 at p. 163.

¹⁰⁷ *Ibid* note 94 at p. 165.

¹⁰⁸ International Labour Office, "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy," (1977) at <http://www.ilo.org/public/english/employment/multi/download/english.pdf> (accessed on December 2, 2011).

¹⁰⁹ *Ibid* note 94 at p. 163.

¹¹⁰ *Ibid* note 94 at p. 163.

to deforestation, invasion of biodiversity, resource conflicts and abuses on human rights. These projects exposed the failures of the World Bank to reduce poverty, to protect and promote the rights of indigenous peoples, the environment and human rights.¹¹¹ In response to the activist pressure during this period, the World Bank's Inspection Panel was created in 1993, offering a limited method of holding powerful international economic actors to account.¹¹² The Panel was established by the Executive Directors of the World Bank with the mandate to independently investigate complaints brought by private parties in borrowing countries.¹¹³ Such investigations would be in relation to allegations that the Bank has failed to observe its policies and procedures when designing, appraising and implementing the World Bank-financed projects.

The Panel was established to raise the Bank's accountability *vis-à-vis* non-state actors, and to improve compliance with *inter alia* its social and environmental policies.¹¹⁴ David Hunter and Lori Udall have argued that the method of the Panel was limited due to its lack of functional independence as it is regarded as an appendage of the Bank which lacks clear mechanisms of public participation throughout its process.¹¹⁵

Nevertheless, throughout the 1980s and 1990s, the size and power of TNCs increased significantly.¹¹⁶ In addition, suspicion grew that the interest of global business was being

¹¹¹ See generally, Bruce Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment and the Crisis of Development*, (Boston: Beacon Press, 1995).

¹¹² Stefanie Ricarda Roos, "The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with Special Reference to the China (Tibet) Case," in J.A. Frowein and R. Wolfrum (eds) *Max Planck Yearbook of the United Nations Law*, Volume 5 (Kluwer Law International: Alphen aan den Rijn, 2005) at 473-521 (a copy with the author hereof).

¹¹³ *Ibid* note 112 at p. 473-474.

¹¹⁴ *Ibid* note 112 at p. 474.

¹¹⁵ David Hunter & Lori Udall, *The World Bank's Inspection Panel*, CIEL Issue Brief No. 1 (April 1994) (reprinted in *Environment*, Nov. 1994) at <http://www.ciel.org/Publications/issue1.html> (accessed on July 19, 2012).

¹¹⁶ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: Transnational Corporations, Extractive Industries and Development* (Geneva: UNCTAD, 2007) at http://www.unctad.org/en/docs/wir2007_en.pdf (accessed on November 21, 2011).

promoted in various inter-governmental bodies over and above human rights resulting into renewed human rights struggles.¹¹⁷ The suspicion resulted in public awareness about sweatshop labour conditions in Indonesia, China and Vietnam. In 1995, human rights activist Ken Saro-Wiwa and eight other activists in Nigeria were executed following their protests against Shell Oil in Nigeria resulting into further international protests. The late 1990s witnessed widespread protests, epitomized in 1999 in Seattle by a march of 100,000 people demonstrating against the World Trade Organization (WTO), perceived by activists as a body set up to increase the mobility and power of business globally. The 1990s activism was accompanied by a series of UN meetings. For instance, Earth Summit in Rio de Janeiro in 1992, the World Conference on Human Rights in Vienna in 1993 which strengthened the place of second generation human rights.¹¹⁸

In particular, the Vienna Conference recognized that all human rights are universal, indivisible, interdependent and inter-related.¹¹⁹ It also challenged the negative human rights impact of several early free trade agreements (FTAs).¹²⁰ There were also agitations for reforms of the International Financial Institutions (IFIs) and the eradication of Structural Adjustment Programmes (SAPs) which had eroded the sovereign capacity of the States in much of the developing world.¹²¹

¹¹⁷ *Ibid* note 116 at p. 5.

¹¹⁸ Philip Alston, "Human Rights in 1993: How Far has the United Nations Come and Where Should it Go From Here?" In: Nowak, M. (ed), *World Conference on Human Rights* (Vienna: Ludwig Boltzmann Institute of Human Rights, 1994) pp. 13-22.

¹¹⁹ UN, "Vienna Declaration and Programme of Action: The World Conference Human Rights," Vienna, Austria 14-25 June 1993 Available at: <http://www2.ohchr.org/english/law/vienna.htm> (Last accessed on 26 October 2012).

¹²⁰ *Ibid* note 94 at p. 164.

¹²¹ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford: Oxford University Press, 2006).

While the UN summits and conferences throughout this period did not have a particular focus on corporate accountability for human rights, they helped promote a new focus on the role of non-state actors in development and human rights.¹²² It was against the background of increased mobilization and growing discontent, that initiatives for long-term solution emerged, each with their own standards and modalities.¹²³

In 1999, the UN Secretary-General Kofi Annan launched the UN Global Compact, aimed at aligning business operations with principles in the area of human rights, labour, environment and anti-corruption. The Compact required corporations to operate in line with the universally accepted principles in the areas of human rights, labour, environment and anti-corruption. It was aimed at helping ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies in line with the demands of sustainable development. However, the Compact lacked means of enforcing its principles. This rendered it insufficient on its own to address impunity utilized by and beneficial to TNCs.¹²⁴

By the end of the 1990s, campaigns exposing human rights-related problems in the garment and textile sector as well as the extractive industries generated a number of private company and industry-wide codes.¹²⁵ This led to renewed appeals for global standards to define a common benchmark for business conduct in relation to human rights. Consequent to this, CSOs and social activists aided the defeat of another plan of the of the OECD member governments for a Multilateral Agreement on Investment (MAI) in 1998. MAI was largely viewed as an attempt to

¹²² See Patricia Feeney, "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda," *Op. cit.*, note 94.

¹²³ The initiatives were the UN Global Compact and the OECD Guidelines for Multinational Enterprises and the Norms. *Ibid* note 94 at p. 164.

¹²⁴ Alejandro Teitelbaum, "United Nations and Transnational Corporations: A Deadly Association" (2007) http://thirdworldtraveler.com/United_Nations/UN_TNCs_DeadlyAssoc.html (accessed on December 2, 2011).

¹²⁵ See *op. cit.*

promote the interests of foreign investors over the development needs and priorities of developing countries and the LDCs.¹²⁶ Censured by the MAI fiasco and apprehensive of anti-globalization protests, the OECD governments embarked on a major revision of the OECD Guidelines for Multinational Enterprises in which CSOs were allowed to participate for the first time.¹²⁷ As a result, the new text, unveiled in June 2000, included an explicit reference to the UDHR. The implementation procedures were revamped to enable CSOs and others to bring complaints about corporate misconduct to the attention of home governments, including for actions that occurred outside of OECD territories.¹²⁸

The overall effect of this period was its contribution to the struggle for corporate accountability which seemed to be gaining ground and as discussed herein below, would inspire the subsequent developments.

1.2.1.2 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: 2000 -2005

The increasing demands for legal control of abusive practices of corporations also prompted efforts at the UN Sub-Commission on the Promotion and Protection of Human Rights¹²⁹ to develop a draft international instrument based on human rights law to strengthen corporate accountability. In 2003, the Sub-Commission approved the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.¹³⁰

¹²⁶ James Salzman, "Decentralized Administrative Law in the Organization for Economic Cooperation and Development," *Op. cit.*

¹²⁷ See generally Jernej Letnar Čerňič, "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises," 4 *Hanse Law Review* 1, (2008) 71-100.

¹²⁸ *Ibid* note 126, at pp. 89-90.

¹²⁹ The UN Commission on Human Rights is now known as the Human Rights Council (HRC). The Sub-Commission was an advisory expert body to the UN Commission on Human Rights.

¹³⁰ UN Commission on Human Rights, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard To Human Rights," U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 Aug. (2003) at

The Norms contained four general principles:¹³¹ firstly, that while States were the primary duty-holders, business actors also had responsibilities under international human rights law. Secondly, these responsibilities apply universally and cover a broad range of rights. Thirdly, governments need to take action to protect people from abuses by companies. Finally, the transnational nature of the problem requires that there be monitoring of company conduct and enforcement mechanisms beyond national boundaries to ensure compliance.

In general, the stakeholders to the process of developing the Norms intended that the core ideas therein would eventually form the basis for the development of binding international law.¹³² However, the several corporations and governments were unreceptive of the Norms which attracted several criticisms.¹³³ The Norms failed to distinguish clearly between the human rights obligations of States and the responsibilities of companies, which would invite strategic gaming between States and the corporations.¹³⁴ In addition, critics argued that international human rights law could only be directly applicable to States, thereby rejecting the notion that businesses have human rights duties due to the possibility of impeaching on the sovereignty of countries.¹³⁵ Besides, the Norms were criticized for lack of specific enforcement provisions.¹³⁶ Moreover, the UN Commission on Human Rights expressed the view that, while the Norms contained useful

[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En) (Accessed on December 2, 2011).

¹³¹ *Ibid* note 130, Paragraph A 1.

¹³² International Network For Economic, Social And Cultural Rights (ESCR-NET) "UN Human Rights Norms for Briefing Kit" (2005) at http://www.escr-net.org/usr_doc/Briefing_Kit.pdf (accessed on January 12, 2012).

¹³³ See for instance Karl-Heinz Moder "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights," Background paper to the FES side event at the 60th session of the UN-Commission on Human Rights on 25 March 2005, Palais des Nations, Geneva at http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf (accessed on February 5, 2012).

¹³⁴ *Ibid* note 94 at pp. 165-166.

¹³⁵ *Ibid* note 133 at p. 3-4.

¹³⁶ *Ibid* note 133 at p. 3-4.

elements and ideas, as a draft the Norms lacked legal standing.¹³⁷ To progress the process, the Office of the United Nations High Commissioner for Human Rights (OHCHR) was requested to consult in the expansion of a report examining the scope and legal status of existing initiatives and standards, including the Norms.¹³⁸

In 2005, the Commission failed to explicitly acknowledge the Norms and called on the Secretary General to appoint a Special Representative on the issue of business and human rights.¹³⁹ Consequently, the Norms were ultimately sidelined.¹⁴⁰ Nonetheless, the Norms play an important role in shaping the debate on corporate accountability for human rights as Clapham noted then that:

“Whether or not the Norms develop..., the stage has been set for the development of a normative framework that sets out the meaning of human rights obligations of corporations. Any such exercise will have to not only revisit the terrain covered by the Norms, but also consider how the international legal order has developed beyond an exclusive concern with state actors.”¹⁴¹

In summation, despite controversies over and shortcomings of the Norms, the initiative served a crucial role in the increasing recognition that companies have responsibilities in human rights. It also recognized that governments must act to protect people from human rights abuses by corporations, and that extraterritorial or global monitoring and enforcement mechanisms are needed.¹⁴² In this sense, the development and promotion of the UN Norms laid the foundation for prospective steps to prevent human rights violations involving business and hold those

¹³⁷ UN Commission on Human Rights, “Responsibilities of Transnational Corporations and Related Business Enterprises With Regard To Human Rights” (2004) U.N. Doc. E/CN.4/DEC/2004/116 at http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc (accessed on December 20, 2012).

¹³⁸ *Ibid* note 94 at p. 167.

¹³⁹ *Ibid* note 94 at p. 167.

¹⁴⁰ *Ibid* note 94 at p. 168. The North, as used in the emerging discourse in international law and politics mainly comprises the Americas, some Asian states, the European Union states, Australia and New Zealand (Oceania). This is as opposed to the Global South which mainly comprises Africa, Central and Latin America, and most of Asia.

¹⁴¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *Op. Cit.* at p. 237.

¹⁴² *Ibid* note 94 at p. 166.

responsible to account. One such step as discussed in this study is the development of the UN guidelines on business and human rights.

1.2.1.3 The Special Representative to the Secretary General on Business and Human Rights: Post 2005

Professor John Ruggie was appointed the SRSG on Business and Human Rights in 2005. Unlike the mandates of other UN Special Procedures, which often require country visits and engagement with directly-affected people, the work of the SRSG on Business and Human Rights was limited to a “desk-study”.¹⁴³ Thus, from the outset, the mandate of the SRSG was criticized for marginalizing individuals and communities directly affected by business abuse, effectively denying them a voice in the debate.¹⁴⁴ Furthermore, Ruggie commenced his mandate by rejecting the draft norms on conduct of TNCs.

The restrictive mandate given to the SRSG was viewed as essential in order to achieve support from the business community and overcome government reluctance.¹⁴⁵ It is noteworthy that the rejection of the Norms also resulted from perceived exclusion of corporations in the design process.¹⁴⁶ Consequent to the new mandate, the balance between the interests of business and the needs of affected people was slightly restored in SRSG’s 2007 report. This report was described as a mapping exercise to illustrate existing international standards, instruments and treaty body guidance in the field of corporate responsibility and accountability.¹⁴⁷ The report recognized that

¹⁴³ Emeka Duruigbo, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges,” 6 *Northwestern Journal of International Human Rights* 2, (2008) 222-261.

¹⁴⁴ *Ibid* note 143 at p. 222.

¹⁴⁵ Scott Jerbi, “Business and Human Rights at the UN: What Might Happen Next?” *Op. cit.* at p. 300-305.

¹⁴⁶ *Ibid* note 94 at p. 166-167.

¹⁴⁷ UN Human Rights Council, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts,” U.N. Doc. A/HRC/4/035 (2007) at <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf> (accessed on December 20, 2011).

the expansion of markets and the transnational reach of corporations had not been matched by an expansion in protection for individuals and communities suffering business related human rights abuse. It partly stated that:

“Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.”¹⁴⁸

The 2007 report also noted the inability or unwillingness of many States to offer protection against corporate abuse. The stakeholders further urged the SRSG to turn his focus to the victims and appropriately reflect the results of meetings with affected groups.¹⁴⁹ Various stakeholders also called on the SRSG to analyze the reasons why States often fail to discharge their duty to protect against corporate abuse.

In his 2008 report, “Protect, Respect and Remedy: A Framework for Business and Human Rights,” the SRSG outlined a three-part conceptual framework. The framework was designed and adopted by the Human Rights Council (HRC) on 16th June 2011 as UN Guiding Principles on Business and Human Rights contained in the Appendix of this thesis. The elements of the framework are discussed in depth in the section immediately below.

1.2.2. The Framework for Business and Human Rights

The framework for business and human rights firstly concluded that States have the duty to protect against human rights abuses by third parties, including businesses, through appropriate

¹⁴⁸ *Ibid* note 147 at Paragraph 3.

¹⁴⁹ *Ibid* note 94 at p. 166-167.

policies, regulation and adjudication.¹⁵⁰ The second pillar of the framework posited that corporations have the responsibility to respect human rights, which the SRSG defined as involving managing the risk of human rights harm with a view to avoiding it.¹⁵¹ The final pillar of the framework provides that victims of corporate human rights effects require greater access to effective remedies which include judicial and non-judicial grievance mechanisms.¹⁵²

1.2.2.1 The State's Duty to Protect

In order to fill the lacuna between the reach of economic activity and the potential negative consequences that may come with it, States have the obligation to make the difficult balancing decisions required to reconcile competing societal interests. In this regard, States have the duty to protect their citizens against harm that may be imposed by others within their jurisdiction, including by companies.¹⁵³ The SRSG recommends states to fulfill this duty by monitoring, prevention, investigation and punishment of abuse through regulation and adjudication.¹⁵⁴ The State duty to protect is enshrined under Article 21 (1) of the Constitution which provides that: "It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."

1.2.2.2 The Corporate Responsibility to Respect

The second organizing pillar of the business and human rights framework addresses the responsibilities of companies. The HRC adopted Ruggie's observation that companies have a

¹⁵⁰ Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on January 1, 2011)

¹⁵¹ *Ibid* note 150 at p. 13.

¹⁵² *Ibid* note 150 at p. 22.

¹⁵³ Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *Op. cit.* at pp. 6-7.

¹⁵⁴ *Ibid* note 150 at p. 6.

responsibility to respect human rights.¹⁵⁵ The concept of “respect” in the framework’s sense means not to infringe on rights of others. This standard implies that the activities undertaken by corporations must consider and address the potential negative effects on people, including activities arising out of a company’s social, economic and political relationships, and take adequate measures to avoid them.¹⁵⁶

In Kenya, the corporate responsibility to respect human rights is explicitly provided for under Article 20 (1) of the Constitution which provides that “The Bill of Rights applies to all law and binds all State organs and all persons.” The corporation, being a person in Kenya, is duty-bound to respect all human rights falling in the Bill of Rights. This is a case of express constitutionalisation of corporate responsibility in relation to human rights as envisaged under the UN Guidelines on Business and Human Rights.

One key mechanism for undertaking such responsibility is through human rights due diligence. Human rights due diligence is a process whereby companies gain awareness of and install mechanisms to address the human rights harm they cause or threaten to cause.¹⁵⁷ The process differs across sectors and sizes of companies, but according to Ruggie, it contains at least four elements: statement of policy, assessing human rights impacts, integration, and performance tracking or monitoring.¹⁵⁸ The statement of policy is based on a statement of commitment to

¹⁵⁵ See the Human Rights Council Resolution A/HRC/RES/17/4 of its Seventeenth Session, 33rd Meeting in Geneva Switzerland, 16th June 2011.

¹⁵⁶ *Ibid* note 150, p. 10.

¹⁵⁷ *Ibid* note 150, p. 16-20.

¹⁵⁸ Mark B. Taylor, Luc Zandvliet and Mitra Forouhar, “Due Diligence for Human Rights: A Risk-Based Approach.” Corporate Social Responsibility Initiative, John F. Kennedy School of Government, Harvard University Working Paper No. 53 (2009). See also, generally, Institute for Human Rights and Business (IHRB), *The “State of Play” of Human Rights Due Diligence: Anticipating the Next Five Years,*” (London: IHRB, 2011).

respecting rights and supporting policies embedded from the top of the business enterprise through all its functions.

On impact assessment, the corporation should gauge human rights risks through identifying and assessing any actual or potential adverse human rights impacts with which the corporation may be involved. This involvement can be through the corporations own operations and products or as a result of its business relationships. The element of integration involves incorporating respect for human rights into relevant internal functions and processes. The element of tracking involves tracking involves monitoring the processes of addressing the rights and communicating corporate performance in that regard.¹⁵⁹ However, the comprehensive utility and application of this mechanism is assessed in depth in Chapters Three and Four of this thesis. These chapters assess the elements of human rights considerations in environmental impact assessment, auditing, monitoring, management systems, accounting and responsible investment among other sub-elements thereof.

On the distinction of the State's duties and corporate responsibilities, it has been emphasized that the state duty to protect and the corporate responsibility to respect are differentiated yet complementary obligations.¹⁶⁰ They are differentiated because even in the instances where one party does not (adequately) discharge its duty or responsibility, the other party remains obligated to fulfill its own duties. They are deemed complementary because for optimal protection of human rights both states and companies need to fulfill their respective obligations as grounded

¹⁵⁹ *Ibid* note 150 at p. 19.

¹⁶⁰ John Ruggie, "Business and Human Rights: The Evolving International Agenda," A Working Paper of the Corporate Social Responsibility Initiative, Harvard Kennedy School of Government, Working Paper No. 38 of 2007.

under the framework.¹⁶¹ Perhaps this marks the rationale for including a mandatory cooperation provision in Article 69 (2) of Kenya's Constitution which provides that: "Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources." This provision is intended to ensure that corporations, being persons, perform their roles in fulfillment of the constitutional environmental right under Article 42 of the Constitution referred to herein. A detailed examination of the scope of this provision is undertaken in Chapter Two.

1.2.2.3 Access to Effective Remedies

Victims, whose rights have been infringed upon or threatened by breach, must have access to mechanisms that adequately and effectively remedy the situation and provide reparations where appropriate.¹⁶² Access to remedies includes both judicial and non-judicial remedies. The judicial and similar administrative remedies, which are obviously the domain of the state, are considered the most appropriate avenue. However, even where courts and similar administrative systems are fully operational, legal procedures may be slow and resource intensive hence the justification for non-judicial remedies such as alternative grievance mechanisms. Grievance mechanisms can be provided by governments and corporations. There can also be jointly administrated mechanisms, such as between companies and unions and multi-stakeholder initiatives.¹⁶³ The framework encourages institutionalization of corporate grievance mechanisms to which several merits have been proffered.

¹⁶¹ John Ruggie, "Business and Human Rights: The Evolving International Agenda," *op.cit.*

¹⁶² *Ibid* note 150 at p. 22.

¹⁶³ Business & Human Rights Initiative, *How to Do Business with Respect for Human Rights: A Guidance Tool for Companies*, (The Hague: Global Compact Network Netherlands, 2010).

Firstly, such mechanisms provide an avenue for redress when abuse has occurred hence promoting the broader corporations responsibility to respect human rights.¹⁶⁴ Second, grievance mechanisms should serve as an early warning system. By giving stakeholders an option to raise concerns at an early stage, a grievance mechanism helps avoid conflicts from escalating to costly litigious processes. As such, a grievance mechanism also helps companies with their immediate stakeholder engagement by providing an avenue to bring grievances to the attention of the company before the stakeholders take actions with negative consequences on corporations.¹⁶⁵ Finally, an effective grievance mechanism signals to employees and other stakeholders that the company considers about their interests. Thereby, it creates goodwill and a positive attitude on the part of the company stakeholders which is important for business operations.¹⁶⁶

In Kenya, the mandate of the State to address the issue of access to effective remedies is derivable from two main approaches; namely, through provisions on access to justice and the judicial authority. On the former, the Article 48 of the Constitution provides that: “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” This provision, read together with constitutional provisions on enforcement of the Bill of Rights, is essential for accessing judicial remedies. On the latter, Article 159 (2) (c) of the Constitution provides that: “In exercising judicial authority, the courts and tribunals shall be guided by the following principles...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms

¹⁶⁴ See generally John Sherman, “Embedding a Rights Compatible Grievance Processes for External Stakeholders with Business Culture.” (2009) *Corporate Social Responsibility Initiative Report No. 36*. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

¹⁶⁵ Business & Human Rights Initiative, *How to Do Business with Respect for Human Rights: A Guidance Tool for Companies*, (The Hague: Global Compact Network Netherlands, 2010) at p. 26.

¹⁶⁶ See generally Caroline Rees and David Vermijs, “Mapping Grievance Mechanisms in the Business and Human Rights Arena,” (2008) *Corporate Social Responsibility Initiative Report 28*, Cambridge, MA: John F. Kennedy School of Government, Harvard University.

shall be promoted....” This authority empowers the courts to direct or encourage the establishment of alternative dispute resolution (ADR) mechanisms including corporate grievance resolution mechanisms.

In summation, the business and human rights framework promises several benefits if comprehensively implemented with a human rights management framework of a corporation. The nature of such benefits transcends compliance and is founded on the business case for human rights.

1.2.3 The Business Case for Human Rights

The business case for human rights is an attempt to answer the question: why business should concern its objectives with human rights. The business case for human rights is grounded on three main arguments: firstly, that the respect for human rights promotes corporation’s values; secondly, that human rights due diligence is good for risk management and finally, that human rights create business opportunities.¹⁶⁷

1.2.3.1 Protecting Company Values

On this moral-ethical argument, companies increasingly recognize that they have a moral responsibility to respect human rights. Respecting the rights of individuals and communities with which the company interacts is simply the right thing to do.¹⁶⁸ The rationale for this value based case is the inherent characteristic of human rights. Since the human rights inhere in human beings including corporate managers and officers, the corporation respects the rights to preserve the rights of its managers and business. For instance, the corporation would respect an

¹⁶⁷ *Ibid* note 165, at p. 29.

¹⁶⁸ See generally John F. Sherman and Chip Pitts, “Human Rights Corporate Accountability Guide: From Law to Norms to Values,” Business Leaders Initiative on Human Rights (BLIHR) (2008) at http://www.hks.harvard.edu/m-rcbg/CSRI/pub_reports.html (accessed on December 30, 2011).

individual's right to life to retain a market share and labour ultimately comprising individuals, and because failure to respect the rights is bad for reputation and business.

Recognition of the responsibility to respect human rights can often be found in company value statements. These statements may state explicit respect for human rights or endorse values which are strikingly similar to the values embedded in the human rights framework. Similarly, respect for human rights may be expressed by a corporation's membership of a multi-stakeholder initiative with explicit reference to human rights standards.¹⁶⁹ Thus, even companies that have no explicit mention of human rights in their policies, recognize indirectly that acting with respect for human rights is the right thing to do. While much more is needed than a mere statement of intent, the recognition that business has a responsibility to respect human rights is an important component of the business and human rights framework.¹⁷⁰

1.2.3.2 Human Rights Due Diligence is Beneficial to Risk Management

This argument proceeds from the premise that there are financial, legal and other considerations affecting the company's objectives that provide incentives to take human rights seriously.¹⁷¹ From a cost perspective, abusing human rights can lead to real expenses for companies.¹⁷² Human rights due diligence is aimed at mitigating such risks and lowering associated costs. Moreover, shareholders and corporate regulators are becoming more and more concerned with such business risks.¹⁷³ Institutional investors, in particular, scrutinize companies on their risks

¹⁶⁹ *Ibid* note 165, at p. 29.

¹⁷⁰ *Ibid* note 165, at p. 29.

¹⁷¹ Mark B. Taylor, Luc Zandvliet and Mitra Forouhar, "Due Diligence for Human Rights: A Risk-Based Approach." *Op. cit.*

¹⁷² Linda S. Spedding, *Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning* (Amsterdam: CIMA Publishing, 2009).

¹⁷³ *Ibid* note 172, at p. 1-2.

related to environmental, social, and governance performance and demand that companies disclose information related to non-financial performance.¹⁷⁴

Moreover, a growing list of companies that cannot demonstrate that they take adequate measures to prevent human rights abuse, are excluded from the investment portfolio of important institutional investors.¹⁷⁵ Hence, adequately addressing human rights can shield companies against value erosion stemming from operational, legal, reputational, personnel and other costs.¹⁷⁶ Besides, considering human rights can protect directors and company management from mismanagement claims stemming from losses incurred through real and perceived corporate related human rights abuse.¹⁷⁷

1.2.3.3 Human Rights Creates Business Opportunity

Corporate accountability for human rights can help companies create value.¹⁷⁸ Environmentally and socially responsible business opportunities are examples of such value creation, for instance, carbon trading.¹⁷⁹ To expound on this discussion through the carbon trading example as a business opportunity, the process of climate change is a risk that requires long term planning from a corporate governance perspective.¹⁸⁰ A company that decides to be proactive reduces its GHG emissions by a percentage. If subsequent rules are established requiring all businesses to reduce their emissions by the same percentage, then such a company will have already placed

¹⁷⁴ *Ibid* note 158, at p. 2.

¹⁷⁵ See generally Luc Zandvliet, and Mary Anderson, *Getting it Right: Making Corporate-Community Relations Work*, (Sheffield: Greenleaf Publishing, 2009).

¹⁷⁶ *Ibid* note 165 at p. 30-31.

¹⁷⁷ *Ibid* note 165 at p. 30.

¹⁷⁸ *Ibid* note 165 at p. 31-32.

¹⁷⁹ *Ibid* note 165 at p. 32.

¹⁸⁰ Kate Miles "International Investment Law and Climate Change: Issues in the Transition to A Low Carbon World," Working Paper No. 27/08, Society for International Economic Law, Inaugural Conference, Geneva, July 15-17, 2008.

itself in a position of compliance and can sell emission credits to companies that need to reduce their emission level in order to comply with the regulatory requirements.¹⁸¹ Hence, such an opportunity presents competitive advantage for compliant companies.¹⁸²

Similarly, companies that have considered the issues of climate change and their implications are in a position to answer satisfactorily questions from shareholders and investors about the company's climate change policies.¹⁸³ If, for instance, such companies have already considered and formulated internal policies and procedures that: assess the financial consequences of climate change risks to the company; maximize shareholder and investor value in light of governmental regulation in relation to climate change, and measure the amount of GHG emissions the company emits and plans to reduce that level of emission, the reputation of those companies as environment-friendly and innovative entities would be bolstered.¹⁸⁴ This would in turn strengthen shareholders' and investors' confidence and minimize external stakeholder risks in the company.

Consequently, such innovative perspectives have led to the conclusion that human rights help companies make the connection between societal and business goals.¹⁸⁵ For instance, the human right to health may help pharmaceutical and health technology companies make policy adjustments relating to access to medicine.¹⁸⁶ Discussion around the right to water helps

¹⁸¹ See generally Radha Purswani, *Carbon Trading: Some Insights and Perspectives*, (ICFAI University Press, Hyderabad, 2008).

¹⁸² See Henning Madsen and John P. Ulhøi, "Have Trends in Corporate Environmental Management Influenced Companies' Competitiveness?" 44 *Green Management International* (2003), pp. 75-76.

¹⁸³ *Ibid* note 182, pp. 77.

¹⁸⁴ See Donald F. Larson, *et al* "Carbon Markets, Institutions, Policies, and Research," (2008) *Policy Research Working Paper 4761*, The World Bank, New York.

¹⁸⁵ *Ibid* note 165 at p. 32.

¹⁸⁶ John Ruggie, "Business and Human Rights: The Evolving International Agenda," *op. cit.*

companies in the utilities and beverages sectors balance competing demands and interact with stakeholders about how to make innovative yet sustainable use of the available water supplies.¹⁸⁷

1.2.4 The Kenyan Situation in Relation to Business and Human Rights

In Kenya, the engagement in the human rights and business agenda is nascent.¹⁸⁸ However, the link between business and human rights has been acknowledged and some efforts have been made to actualize the rights as prescribed by the Constitution. For instance, the Kenya National Commission on Human Rights (KNCHR) has adopted and is involved in disseminating the UN Guiding Principles on Business and Human Rights as part of its mandate under Article 59 (2) (c) of the Constitution. This Article provides that “The functions of the Commission are...to promote the protection and observance of human rights in public and private institutions.” The Commission has generally applied “private institutions” to include institutional non-state actors such as corporations. Towards this function, the Commission in collaboration with the Kenya Bureau of Standards (KEBS) developed the ISO 26000 which is an international voluntary standard for social responsibility.¹⁸⁹ ISO 26000 incorporates human rights as part of the standardization measurement parameters. It is the argument of this thesis that the recognition of all the elements of the business and human rights framework as demonstrated hereinbefore in the Constitution of Kenya 2012 and the business case for human rights shall be instrumental in further developing the framework in Kenya.

¹⁸⁷ *Ibid* note 165 at p. 32.

¹⁸⁸ See for instance, Kenya National Commission on Human Rights (KNCHR), *Annual Report for the 2010/2011 Financial Year*, (Nairobi, KNCHR, 2011) at p. 39-40.

¹⁸⁹ *Ibid* note 188 at p. 39.

The conceptual framework for business and human rights raises certain questions with substantive impact on and from corporate governance. These questions are key to establishing the link between business, human rights and corporate governance.

1.3 The Conceptual Link between Business, Human Rights and Corporate Governance

Corporate governance deals with corporate organization and decision making structures.¹⁹⁰ One of its main purposes is to ensure the efficient confluence of otherwise competing interests that are affected by companies' activities.¹⁹¹ The relationship between shareholders' interests and other stakeholders' interests remain at the centre of contention in corporate governance. This thesis argues that the concern of corporate governance and the conceptual relationship thereof with business and human rights is founded on human rights as legitimate claims in corporate governance. Therefore, this thesis examines the nature and scope of legitimate claims in corporate governance with a bias on whether human rights-holders are stakeholders with a legitimate claim in corporate governance.

1.3.1 The Nature and Scope of Legitimate Claims in Corporate Governance

First and foremost, it is important to assess whether human rights holders are stakeholders in corporate governance. Generally, a stakeholder has been defined as a person who holds the stake that others are wagering or staking on some event.¹⁹² The synthesis of this definition is that

¹⁹⁰ See for example (UK) Company Law Review Steering Group, *Modern Company for a Competitive Economy*, (UK Department of Trade and Industry Consultation Document) (1998). See also other definitions and theoretical arguments in the Introduction to this thesis especially the theoretical framework.

¹⁹¹ See Elena F Pérez Carrillo, "Corporate Governance: Shareholders' Interests' and Other Stakeholders' Interests," *4 Corporate Ownership & Control* 4 (2007) pp. 96-102.

¹⁹² Thomas Donaldson & LE Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications," *The Academy of Management Review* 20, No. 1 (1995), at p. 65.

something is at stake if one is materially concerned in its outcome which need not be financial in nature.¹⁹³

In effect, stakeholding mainly serves as recognition that several factors must be considered when pursuing even ostensibly simple corporate outcomes.¹⁹⁴ For instance, though the corporation's main objective is to maximize shareholder value, the interests of all groups that affect and which might be affected by that value must be taken into account.¹⁹⁵

Consequently, a stakeholder can mainly be defined as any group or individual who can affect or be affected by the systems and processes designed for the achievement of a firm's objectives.¹⁹⁶

This implies two main classes of stakeholders: first, primary stakeholders who have interests that are directly associated with the activities of a company, which class includes shareholders and investors, creditors, employees, customers, suppliers, residents of the communities affected by the company's operations and the government. Increasingly, the individuals and groups that advocate for the natural environment, and future generations are being included in this category.¹⁹⁷ Secondly, secondary stakeholders who have indirect influences on an organization or are indirectly affected by the activities of the corporation. These include the media and

¹⁹³ *Ibid* note 192 at p. 66-67.

¹⁹⁴ Organization for Economic Co-operation and Development (OECD) *OECD Principles of Corporate Governance*, (OECD: Paris, 2004).

¹⁹⁵ See Dennis P. McCann "Controversy: Do Corporations Have Any Responsibility Beyond Making a Profit? A Response to Norman P. Barry," 3 *Journal of Markets & Morality*, No. 1 (2000), pp. 108-114. Elisabet Garriga & D Melé (2004) "Corporate Social Responsibility Theories: Mapping the Territory," *Journal of Business Ethics* 53, No. 1-2, at p. 51.

¹⁹⁶ Edward R. Freeman, *Strategic Planning: A Stakeholder Approach* (Pitman: London, 1984), at pp. 5-8.

¹⁹⁷ D. Wheeler & M. Sillanpää (1997) *The Stakeholder Corporation: A Blueprint for Maximizing Stakeholder Value*, London: Pitman Publishing, at p. 1.

pressure groups taking the form of CSOs, and others that inhabit the business and social networks of the corporation.¹⁹⁸

Arising from this interrogation of the basis, nature and scope of a stakeholder, the claims of the stakeholders can therefore be defined generally. For instance, the stakes or claims of investors are based on equity (shares).¹⁹⁹ Other direct stakeholders, including customers, employees, competitors, suppliers, and debt holders, have economic stakes or interests in a company and they can directly affect or be affected by a corporation's financial success.²⁰⁰ The trade or labour unions, community pressure groups, environmental organizations, human rights organizations and consumer advocacy groups have a socio-political stake in the company's impact on people and the environment, as well as their economic impact, and are legitimately expected to fulfill advocacy on behalf of certain primary stakeholders and account for the same.²⁰¹

Having noted the claims generally, it is crucial to interrogate whether these claims constitute legitimate claims in the governance of the corporation.

1.3.1.1 What Constitutes Legitimate Claims?

Generally characterized, if an act or result thereof is 'legitimate', then that act or result thereof is compliant with the law or is in accordance with established or accepted patterns and standards of human behavior and expectations.²⁰² On the other hand, 'a claim' is something that one party

¹⁹⁸ See generally F. Hond, and F.G.A. de Bakker, "Ideologically Motivated Activism: How Activist Groups Influence Corporate Social Change Activities" (2007), pp. 901-902.

¹⁹⁹ *Ibid* note 191 at p. 92-95.

²⁰⁰ *Ibid* note 191, at p. 98.

²⁰¹ *Ibid* note 191, at p. 98.

²⁰² See for example Japheth Odhiambo, "The Nature of Claims in the Governance of the Corporation: Interrogating the Legal Organization of Stakeholders' Legitimate Claims," 7 *University of Nairobi Law Journal* 1,(Commercial Law Edition) (2012): pp. 57-69.

owes another whereas 'to claim' is to demand or assert as a right.²⁰³ Within basic legal reasoning, claims are facts that combine to give rise to a legally enforceable right or judicial action or demand for relief.²⁰⁴ A deductive combination of the foregoing definitions would result into simplistically defining a legitimate claim as a set of facts that give rise to a legally enforceable right or judicial action or remedy which set of facts are compliant with the law and generally accepted normative standards. This definition is narrow and basic hence worth expounding against the background of legitimate claims and legitimacy in general governance.

Corporate governance displays much closer semblance to institutional mechanisms typically found in politico-constitutional governance hence an appropriate premise to proceed from in undertaking the above-mentioned comparison.²⁰⁵ This is the case since corporations exert significant power through business systems and processes affecting the people's lives in substantial respects.²⁰⁶ This is important for assessing legitimate claims in corporate governance as such systems, processes and outcomes thereof have major ramifications for investors, customers, the communities where the corporation does business, the government and the economy.²⁰⁷

The foregoing is an indication that shareholders are not the only victims of corporate failures. There are other stakeholders who are fundamentally affected by the corporate systems and processes. For example, in Kenya, due to corporate failure to comply with environmental obligations, the environment has been damaged and consequently the communities have suffered

²⁰³ *Ibid* note 202 at p. 60.

²⁰⁴ *Ibid* note 202 at p. 60.

²⁰⁵ See Angus Corbett & P Spender, "Corporate Constitutionalism," 31 *Sydney Law Review* 147 (2009), at pp. 146-148.

²⁰⁶ *Ibid* note 192, at p. 73.

²⁰⁷ *Ibid* note 192, at p. 76.

due to downwind or downstream effects of the polluting corporation and other corporate actions hindering sustainable development in Kenya. Examples of this latter implication, include environmental degradation of the Lake Naivasha ecosystem by (inter)national flower corporations which discharge chemicals into the lake, destabilizing the ecosystem and leading to the reduction of water levels in the lake.²⁰⁸ Another key incident of harmful corporate environmental impact is the Dominion Farms Ltd's agricultural activity in disregard on EMCA and regulations thereof. Such effects include pollution of the wetlands from agricultural chemicals, water diversion hence tampering with downstream ecosystems and clearing of the sensitive wetlands ecosystem for agriculture.²⁰⁹

The effects of salt mining by corporations in Malindi is also noteworthy since it has led to salinisation of fresh water sources, pollution from discharge of hypersaline water into the environment, deforestation of the coastal forests and woodland grasslands, loss of biodiversity with ultimate health risks.²¹⁰ In addition, gold mining in Migori by corporations has had harmful environmental effects. These include deforestation and soil erosion, acid drainage and water pollution, air pollution and health effects of metals and chemicals applied in mining.²¹¹

In addition, environmental impact of failure by corporations lies in solid waste management (SWM) in urban areas where corporations have failed at two levels, firstly, by failing to arrest

²⁰⁸ See for example, Food & Water Watch and the Council of Canadians, "Lake Naivasha Withering under the Assault of International Flower Vendors," (Washington DC: Food & Watch/Ottawa: The Council of Canadians, 2008).

²⁰⁹ See Collins Odote, Benson Ochieng and Odhiambo Makoloo, "The Implications of Property Rights for Wetlands Management in Kenya" at http://iasc2008.glos.ac.uk/conference%20papers/papers/O/Odote_122601.pdf (last accessed on September 30, 2011) at pp. 18-19.

²¹⁰ See generally Kenya National Commission on Human Rights (KNCHR), *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi*, (Nairobi: KNCHR, 2006).

²¹¹ Jason Ogola, Winnie Mitullah and Monica Omulo, "Impact of Gold mining on the Environment and Human Health: A Case Study in the Migori Gold Belt, Kenya," *Environmental Geochemistry and Health*, (2002) 24 at 141-158.

solid waste at the level of use, corporations eventually release these waste the poor management system. Secondly, corporations contracted to control, collect, transport, process and dispose solid waste in accordance with the best principles of public health, economics, engineering, conservation, aesthetics and other environmental considerations have often failed to put in these considerations hence contributing to systemic failure in SWM.²¹² In the ICT sector, poor e-waste management has led to numerous environmental impacts including toxicity resulting from radioactive nature of e-waste to the environment.²¹³

The foregoing builds a foundation for assessing legitimacy in governance. The objective of undertaking such an assessment is to assist in defining legitimate claims so as to evaluate whether there are other stakeholders with legitimate claims in the governance of the corporation. Within the broader governance context, legitimacy has been defined as 'a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed systems of norms, values, beliefs and definitions or prescriptions.'²¹⁴ This definition affirms the elements of legitimacy as assessed hereinbefore.

Legitimacy gives the governance of the corporation legal authority to act or not to act in a particular way based on generally accepted standards of law enacted through legitimate representation.²¹⁵ In this regard, Coglianesse has argued that the notion of corporate legitimacy operates from the premise that stakeholders within the community deliberate on those corporate

²¹² See UNEP, *Selection, Design and Implementation of Economic Instruments in the Kenyan Solid Waste Management Sector* (Nairobi: UNEP, 2005) at pp. 24-39.

²¹³ Timothy Waema and Muriuki Mureithi, "E-waste Management in Kenya," (Nairobi: Kenya ICT Action Network (KICTANET), 2008).

²¹⁴ Scott Hargreaves, "Conceptualising Legitimacy for New Venture Research," A paper for the Small Enterprise Association of Australia and New Zealand 16th Annual Conference, Ballarat, 28 Sept-1 Oct, 2003.

²¹⁵ *Ibid* note 24, at pp 1-12.

activities which are acceptable through defined legal systems and processes.²¹⁶ At the same time, corporate legitimacy provides that corporations, as members of that community, are expected to carry out their activities within the boundaries of what is deemed acceptable by that community and the appropriate legal framework, the community being referred to herein being the community of stakeholders.²¹⁷ Legitimacy is achieved when organizations adopt proper organizational structures and practices that comply with social norms or values.²¹⁸

Stakeholders have made social, political and economic claims on the governance of the corporation which are generally accepted within the legal and normative frameworks.²¹⁹ Consequently, the corporations have regarded these claims as legitimate, altered their decision-making and allowed stakeholder preferences to constrain the exercise of corporate power to accommodate these claims.²²⁰ The foregoing arguments indicate that the notion of corporate legitimacy provides legitimate duties on the part of the corporation. These duties entitle the stakeholders to certain legitimate rights which translate into claims in the governance of the corporation.

1.3.2 Do Human Rights-Holders in Kenya Have Legitimate Claims on Corporate Governance?

From the arguments in this Chapter, it is observable that shareholders are not the only stakeholders with legitimate claims in the governance of the corporation. There are other stakeholders with legitimate claims, arising from the law. Consequently, these stakeholders can

²¹⁶ *Ibid* note 24, at pp 1-12.

²¹⁷ T.D. Wilmshurt & G.R. Frost, "Corporate Environmental Reporting: A Test of Legitimacy Theory," 13 *Accounting, Auditing & Accountability Journal*, No. 1 (2000), pp. 10-26.

²¹⁸ JW Meyer & B Rowan, "Institutionalised Organization: Formal Structure as Myth and Ceremony", in PJ DiMaggio & WW Powell (eds) (1991) *The New Institutionalism in Organizational Analysis*, (University of Chicago Press: Chicago, 1991), at pp. 1-38.

²¹⁹ *Ibid* note 192 at p. 82.

²²⁰ *Ibid* note 192 at p. 79.

invoke the foundation of their claims in the law. These form the convergence of corporate governance and corporate responsibility to the society which is indeed the nexus between business, human rights and corporate governance. Human rights, by virtue of Article 20 (1) of the Bill of Rights, form part of these claims and the human rights holders are the stakeholders to the governance of the corporation. The provision states that: “The Bill of Rights applies to all law, and binds all State organs and all persons.” This translates into the corporation having certain human rights duties towards the stakeholders. In support of the fact that human rights derive legitimacy from the law hence bind corporations, Irene Khan states thus:

“Human rights are rooted in law. Respecting and protecting them was never meant to be an optional extra, a matter of choice. It is expected and required. It should be part of the mainstream of any company’s strategy, not only seen as part of its corporate social responsibility strategy.”²²¹

The legitimate claims of the human rights stakeholder in the governance of the corporation can be, according to the circumstances, for example, the circumstances of employment, those of being a consumer, those of being the government and the circumstances of belonging to an environment or a community within which a corporation operates. These are the instances on how stakeholders such as human rights holders bear legitimate claims in relation to the corporation. Human rights in Kenya include the right to a clean and healthy environment making the latter a legitimate claim in corporate governance.

1.4 Chapter Conclusion

In this Chapter, the thesis has interrogated the context of the human rights in business and corporate governance. In this regard, this Chapter has conceptualized business and human rights

²²¹ Irene Khan, “Should Human Rights Be Your Business?” Speech delivered to Japan Association of Corporate Executives, Keizai Doyukai, Tokyo, 2 June 2005, http://asiapacific.amnesty.org/apro/APROweb.nsf/pages/IreneKhan_KeizaiDoyukai (accessed on January 10, 2012).

founded within a conceptual framework of such a relationship in the Ruggie Framework. This Chapter has also examined whether human rights are legitimate claims in corporate governance or not, and has argued that human rights form a legitimate claim in corporate governance. This argument is buttressed by the finding that the scheme of corporate governance concerns balancing all stakeholders' legitimate claims, corporate business having certain human rights impacts which impacts include those environmental in nature. Ultimately, legitimacy of claims is assessed to justify the framework of business and human rights. Therefore, this Chapter establishes the link between business and human rights, and the place of human rights in corporate governance. The human rights discussed in this Chapter include constitutional environmental rights whose holders are largely the community, future generations and (by extension) the environment *qua* environment. The link between human rights and the environment is made in Chapter Three of this thesis which addresses the scope of the constitutional environmental rights in Kenya.

CHAPTER TWO

THE SCOPE OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN KENYA

2.1 Introduction

Human rights and environmental protection present overlapping legal and social standards with substantively common objectives.²²² Both pursue the attainment of the highest quality of life for people. Hence, human rights depend on environmental protection and environmental protection depends on human rights in this sense.²²³ The necessity to link both provinces stems from the different but complementary approaches each has attempted to adopt. Whereas environmental law seeks to protect both nature for nature's and peoples' benefit, human rights have centered on fundamental aspirations of human beings with much more developed compliance mechanisms for justiciability of individual and group rights.²²⁴

Consequently, a clean and healthy environment is *sine qua non* for existence of life and for maintenance of the ecological balance in terms of securing *inter alia*, the rights to health, to food and to life including a decent quality of life. Several judicial authorities has stated and confirmed this position. For instance, The Supreme Court of India, in the case of *M.C. Mehta Vs Union of India*,²²⁵ held that it is the inalienable right of every citizen to live in a clean, healthy and pollution-free environment and this notion has also been adopted in the Indian Constitution. In this connection, the Supreme Court of Nepal, in *Suray Prasad Sharma Dhungel v. Godavari*

²²² Philippe Cullet, "Definition of an Environmental Right in a Human Rights Context," *Netherlands Quarterly of Human Rights*, (1995) at p. 25.

²²³ See arguments in Alan Boyle, "Human Rights or Environmental Rights? A Reassessment" XVIII *Fordham Environmental Law Review*, (2007) p. 471. See also Susan Glazebrook, "Human Rights and the Environment," 40 *Victoria University of Wellington Law Review* (2009) at p. 293

²²⁴ Dinah Shelton, "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?" 35 *Denver Journal of International Law and Policy* 1 (2005) at p. 130.

²²⁵ A.I.R (1987) 4 S.C.C. 463

*Marble Industries and Others*²²⁶ held that existence of bio-diversity, including that of man, is possible only in an unspoiled ecosystem characterized by clean and healthy environment; stating the right to life is encompassed in the right to clean and healthy environment. The Kenyan case of *Peter K. Waweru v Republic*,²²⁷ discussed in part 2.3.1 of this Chapter also confirmed this position. The *Waweru Case* echoed the jurisprudence in the Tanzanian case of *Festo Balegele and 749 others v. Dar es Salaam City Council* which confirmed the dependence of life on a clean and healthy environment.²²⁸ This argument is buttressed by the notion that the existence of the entire human race is largely dependent on clean, healthy and sustainable environment.²²⁹ Thus, it is important that the ecosystem, biodiversity, and other components of the environment are clean and healthy for the continuity of life and environmental stability. However, clean and healthy environment has been subject to challenges of concerted degradation.²³⁰

Environmental degradation has an adverse effect on the quality of life, the enjoyment of life, the guaranteed fundamental human rights and ultimately the achievement of sustainable development.²³¹ The inclusion of an environmental dimension in the human rights debate is necessary in view of the recognition of the pervasive influence of local and global environmental conditions upon the realization of human rights.²³²

²²⁶ WP 35/1992

²²⁷ Miscellaneous Civil Application No 118 of 2004

²²⁸ Civil Case No. 90 of 1991, High Court of Tanzania

²²⁹ *Ibid* note 224, at p. 131.

²³⁰ See discussions in Introduction and Chapter One of this Thesis for corporate contribution to environmental degradation.

²³¹ See Carl Bruch, Wole Coker & Chris Van Arsdale, "Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa," *Environmental Governance in Africa Working Paper Series* (Washington DC: World Resources Institute, Institutions & Governance Programme, 2001) at pp. 5-6.

²³² See Christopher Jeffords, "Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions" Working Paper No. 16, The Human Rights Institute, University of Connecticut, Economic Rights Working Paper Series (2011) at p. 1.

Some principal and complementary approaches have emerged to characterize the relationship between human rights and the environment. Firstly, instances where international environmental laws incorporate and utilize human rights guarantees deemed necessary or important to ensuring effective environmental protection.²³³ In this perspective, environmental protection is seen as part of the protection of human rights. Hence, it has been argued that linking human rights to environmental harm allows individuals to use global and regional human rights complaint procedures when states violate human rights by allowing substantial environmental degradation.²³⁴ Within this framework, a person can allege that environmental degradation has affected certain rights guaranteed under international human rights instruments. Human rights protection is strengthened with the incorporation of environmental protection because it extends human rights protection to an area hitherto neglected.²³⁵

Secondly, those cases wherein human rights law re-casts or interprets internationally-guaranteed human rights to include an environmental dimension when environmental degradation prevents full enjoyment of the guaranteed rights.²³⁶ Under this perspective, human rights can only be realized if the environment is protected. According to Dinah Shelton, this perspective risks creating an opportunity for states to invoke the precondition as an excuse not to protect human rights.²³⁷ Furthermore, it fails to account for the complexity of the interrelation between human rights and the environment.²³⁸

²³³ Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?* *op. cit.* at p. 131.

²³⁴ See Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?* *op. cit.* at p. 131.

²³⁵ *Ibid* note 224, at pp. 131-132.

²³⁶ See Philippe Cullet, "Definition of an Environmental Right in a Human Rights Context," *op. cit.* at p. 25.

²³⁷ *Ibid* note 224, at p. 132.

²³⁸ *Ibid* note 224, at p. 130.

Thirdly, there are those linkages where international environmental law and international human rights law elaborate a new substantive right to a clean and healthy environment.²³⁹ Under this approach, environmental protection is regarded and operationalised as a human right in itself. Article 42 of the Constitution of Kenya is a manifestation of this relationship.

Owing to the importance of the environment and other pressures, numerous Constitutions of the world formulated or reformed after 1992 have enshrined the right to clean and healthy environment.²⁴⁰ In this regard, May and Daly observe that:

“Since the Stockholm Convention, nearly 60 countries have constitutionally entrenched environmental rights, according their citizens basic rights to environmental quality in one form or another. The list is diverse politically, including countries with civil, common law, Islamic, and other traditions. Some of the more recent of these include Kenya in 2010....”²⁴¹

The shift towards recognizing environmental human rights has been considered as a wave in the human rights development beginning with international environmental human rights which have been constitutionalised in several states since the 1990s.²⁴²

What then is a constitutional environmental right? A constitutional environmental right declares that citizens have a specific right to live in some form of a healthy or clean environment.²⁴³ An

²³⁹ This linkage is generally a product of the Stockholm Conference of 1972 and resultant process and activities, as well as the Rio Conference of 1992 and the resultant processes and instruments. These processes are discussed elsewhere in this Chapter especially regarding their utility in influencing the development of the constitutional environmental rights in Kenya.

²⁴⁰ See James R. May and Erin Daly, “New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide,” *IUCN Academy of Environmental Law e-Journal Issue* (2011) p. 1. For similar observations, see also, generally, Carl Bruch, Wole Coker & Chris Van Arsdale, “Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa,” *op. cit*; Christopher Jeffords, “Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions” *op. cit* and Dinah Shelton, “Human Rights, Health & Environmental Protection: Linkages in Law & Practice” http://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf (accessed on January 10, 2012)..

²⁴¹ See James R. May and Erin Daly; *ibid* note 240, at p. 1.

²⁴² See generally Christopher Jeffords, “Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions” *Op. Cit*.

²⁴³ Joshua J. Bruckerhoff, “Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights,” (2008) 86 *Texas Law Review* 3, at p. 615.

environmental right transcends a public policy statement or a general charge to the government to consider environmental measures.²⁴⁴ For instance, the Constitutions of the Netherlands and Greece contain provisions on environmental policy, but these provisions do not specifically grant any right to live in a healthy, clean, or even adequate environment. The vast majority of courts have declined to infer environmental rights from constitutional provisions on environmental policy. Constitutional environmental rights are ensured when the rights of the present and future generations to clean, healthy and sustainable environment are incorporated under the fundamental rights.²⁴⁵ Ideally, these rights are designed for incorporation in the wider definition of environmental health which recognized holistic environmental protection of bio-diversity is also recognized.²⁴⁶ Therefore, the pressing need of incorporating these vital rights to clean and healthy environment in the Constitution in the context of Kenya is derived from the above importance.

This Chapter assesses the scope of constitutional environmental rights in Kenya. This is undertaken through assessing the linkage between environmental protection and human rights and interrogating the arguments for constitutionalising the right interrogated in depth. The Chapter also evaluates the scope of Article 42 of the Constitution of Kenya and the role of international environmental law in relation to constitutional environmental rights.

2.2 Arguments Justifying Constitutionalization of Environmental Rights

Numerous constitutional and environmental law scholars and commentators have advocated for constitutional environmental rights. To begin with, the advocates for environmental rights argue

²⁴⁴ See generally Tim Hayward, *Constitutional Environmental Rights*, (London: Oxford University Press, 2005) at 1-5.

²⁴⁵ *Ibid* note 231, at p. 5.

²⁴⁶ See generally *ibid* note 243, pp. 615-630.

that human rights discourse should include environmental rights.²⁴⁷ As such, they argue that environmental rights, like other human rights, should be constitutionalized.²⁴⁸ By encouraging environmental protection, environmental rights “may be cast as a means to the end of fulfilling human rights standards.”²⁴⁹

In addition, the proponents of constitutional environmental rights argue that it provides stimulus for stronger environmental laws. In this regard, they argue that constitutional protection of a right offers the strongest possible form of legal protection because a Constitution is the supreme law of the land.²⁵⁰ A basic principle of constitutional law is that all legislation, regulation, and government policy must be consistent with the constitution or risk being void for inconsistency. In this regard, Article 2 (4) of the Constitution states that: “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission of this Constitution is invalid.” Therefore, Parliament and government decision-makers must consider the implications of their actions on constitutionally protected rights.²⁵¹ Thus, constitutional recognition of the right to a healthy environment could have an integrating effect, putting environmental concerns on the agenda throughout government rather than in one or two isolated and often weak departments.²⁵²

²⁴⁷ See Roger Schlickeisen, “Protecting Biodiversity for Future Generations: Emerging Recognition of Local Community Rights in Ecosystems under International Environmental Law,” *59 Tennessee Law Review* 735 (1992): pp. 181-182.

²⁴⁸ *Ibid* note 247, at p. 190.

²⁴⁹ *Ibid* note 247, at p. 190.

²⁵⁰ See Carl Bruch, *op. cit.* See also Charles Odidi Okidi, “Concept, Function and Structure of Environmental Law,” in C. O. Okidi, P. Kamari-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEP: Nairobi, 2008) at p. 11.

²⁵¹ See generally, Ronald. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978).

²⁵² *Ibid* note 231, at p. 5.

In many nations, entrenchment of a constitutional right to a healthy environment would require the enactment of stronger environmental laws in order to protect and fulfill the right. Stevenson predicts that constitutional recognition of the right to a healthy environment would cause environmental laws to improve to a state in which they justify the high expectations of the draftsmen and legislators.²⁵³ In Kenya, constitutionalization of environmental rights calls for strengthening of the framework law and other environmental laws.²⁵⁴ In fact, a Taskforce for Drafting Legislation Implementing Land Use, Environment and Natural Resource Provisions of the Kenya Constitution was appointed by the Minister for Environment and Natural Resources in 2010 to align environmental laws with the constitutional expectations.

Furthermore, the proponents have argued that the right is useful in shielding environmental principles from political interference. Tim Hayward, for instance, has argued that constitutionalization of environmental principles “secures [such principles] against the vicissitudes of routine politics.”²⁵⁵ In other words, it ensures that environmental protection does not depend solely on narrow majorities in legislative bodies. Instead, constitutionalisation ensures provides for measures that protect the rights from manipulation through simple amendment processes. In Kenya, for instance, the amendment of the Bill of Rights, which incorporates the environmental rights, can only be amended through a referendum which is more cumbersome than amendment parliamentary initiative. Article 255 (1) (e) of the Constitution provides that: “A proposed amendment to this Constitution shall be enacted in accordance with

²⁵³ C.P. Stevenson, “A New Perspective on Environmental Rights after the Charter,” 21 *Osgoode Hall L. J.* 3 (1983) 390 at 391.

²⁵⁴ In fact, a Taskforce for Drafting Legislation Implementing Land Use, Environment and Natural Resource Provisions of the Kenya Constitution was appointed by the Minister for Environment and Natural Resources in 2012 three months after the promulgation of the Constitution to align environmental laws with the Constitution. See Gazette Notice No. 13880 of 2010.

²⁵⁵ Tim Hayward, *Constitutional Environmental Rights*, (Oxford: Oxford University Press, 2005) p. 129

Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters...(e) the Bill of Rights;....” Articles 256 and 257 provide for amendments by parliamentary initiative and popular initiative respectively.

Besides, the proponents of constitutional environmental rights have posited that the right provides a safety net for realizing comprehensive environmental governance and improved enforcement of environmental laws. This argument arises from the rationale that the right to a healthy environment could help address implementation gaps and the discrepancy between constitutional obligations and existing laws, regulations, and policies.²⁵⁶ Gaps in environmental law and policy may occur because of delays in addressing particular issues or because new threats arise. Delays may be caused by a lack of legal and technical resources, or by a lack of priority being assigned to particular environmental problems by the State.²⁵⁷ The existence of a constitutional right to a healthy environment provides a flexible tool through which aspects of environmental regulation not covered or anticipated by a statute can be dealt with through liberal construction of the right.²⁵⁸ In Kenya, Article 20 (3) of the Constitution provides that: “In applying a provision of the Bill of Rights, a court shall...(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.” The Constitution therefore provides wide authority to the courts to provide interpretations which aim at enforcing the Bill of Rights (which includes the environmental rights). This provision remedies any unanticipated aspect of environmental regulation.

²⁵⁶ Carl Bruch, W. Coker, and C. VanArsdale, “Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa,” *Op. Cit* at p. 131.

²⁵⁷ *Ibid* note 231, at p. 5.

²⁵⁸ *Ibid* note 231, at p. 5-6.

Moreover, the proponents for the right view the rights as promoting accountability. According to this argument, in the absence of a constitutional right to a healthy environment, it can be difficult to hold government accountable for failing to protect human health and the environment.²⁵⁹ There may be a lack of publicly available information, an absence of opportunities to participate in decisions that have major environmental consequences, and lack of access to tribunals or courts when a person suffers harm because of environmental degradation.²⁶⁰ Both the substantive and procedural aspects of the constitutional right to a healthy environment can contribute to overcoming these problems. This will in return ensure that processes and forums are available that enable citizens and groups to hold governments accountable.²⁶¹ In Kenya, several constitutional principles and values underpin constitutional environmental rights. For instance, Article 10 (2) (c) of the Constitution provides that: "The national values and principles of governance include...good governance, integrity, transparency and accountability." These provisions bind all persons whenever they apply or interpret the Constitution, any law or public policy. These principles shall enhance accountability. Besides, procedural rights such as the right to information underpin the constitutional environmental rights in Kenya.

Additionally, the school of thought supporting constitutional environmental rights state that the right provides a leveraged opportunity for environmental justice. This is so because at the heart of constitutional law is the idea of protecting minorities from majoritarian actions, or protecting

²⁵⁹ Neil Popovic, "Pursuing Environmental Justice With International Human Rights and State Constitutions," 15 *Stanford Journal of Environmental Law*, (1996) 338.

²⁶⁰ *Ibid* note 61, at pp. 19-21.

²⁶¹ Philippe Cullet, "Definition of an Environmental Right in a Human Rights Context," *Netherlands Quarterly of Human Rights*, (1995): 25-40.

the weak from the strong.²⁶² Both nationally and internationally, there is a growing body of evidence that a disproportionate burden of harm from environmental degradation such as toxic pollution, over-fishing, habitat destruction, is borne by people who are poor, belong to ethnic minorities, or are otherwise disadvantaged.²⁶³ Constitutional recognition of the right to a healthy environment could: increase the probability of effective protection, provide vulnerable individuals, affected communities, and civil society with a potentially powerful tool for holding governments accountable and offer remedies to people whose rights are being violated.²⁶⁴ In addition, lawsuits asserting the right to a healthy environment can be used as mobilizing tools to gather community support and momentum on issues of environmental justice.²⁶⁵ In Kenya, environmental justice shall largely be aided by the expansive rules of standing under the constitutional environmental rights, and other procedural such as the right of access to justice under Article 48 of the Constitution. This provision states that: “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

Also is support of the constitutional environmental rights is the perspective that it provides a more prominent role for the judiciary in environmental protection. In this regard, environmental human rights could increase the role of courts by facilitating citizen access to judicial remedies.

²⁶² P. Kameri-Mbote, “Law, Gender and Environmental Resources: Women’s Access to Environmental Justice in East Africa,” in J. Ebbesson and P. Okowa, eds. *Environmental Law and Justice in Context*. (Cambridge: Cambridge University Press, 2009) 390–408.

²⁶³ *Ibid* note 262, at p. 391.

²⁶⁴ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd Ed. (Princeton: Princeton University Press, 1996).

²⁶⁵ *Ibid* note 264, at p. 1.

Since the nature and scope of human rights are often defined and refined through litigation,²⁶⁶

Stephens argues that courts are ideally suited for this role in the following terms:

“The institution of adjudication in its independence, the process of argumentation according to criteria of rationality, and the decision-making process according to law means that courts, international and national, are uniquely placed to speak beyond the confines of the dispute at hand and confront the major environmental challenges of our time.”²⁶⁷

Citizens could use the constitutional right to a healthy environment both in seeking remedies for violations of the right and also in a preventive perspective by seeking precautionary measures to avoid prospective environmental damage.²⁶⁸ The impartiality of courts should enable them to balance competing economic and environmental interests, individual and collective interests, and public and private interests.²⁶⁹ The judicature can make a unique contribution by insulating environmental protection measures typically accompanied by high short-term costs and resultant political disfavor from political horse-trading.²⁷⁰ Constitutional protection of the right to a healthy environment could result in the evolution of jurisprudence that currently undermines the efficacy of environmental law such as issues regarding causation, the burden of proof, liability, and other problems.²⁷¹ Prerequisites for the achievement of these promises include adherence to

²⁶⁶ David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy*, (Vancouver: University of British Columbia Press, 2003).

²⁶⁷ T. Stephens. *International Courts and Environmental Protection*, (Cambridge: Cambridge University Press), 2009.p. 116.

²⁶⁸ See Science and Environmental Health Network (SEHN) *An Environmental Right for Future Generations: Model State Constitutional Provisions and Model Statute*, (North Dakota: SEHN, 2008).

²⁶⁹ Louis J. Kotzé, and Anél du Plessis. “Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa,” 3 *Journal of Court Innovation* (2010) at p. 158.

²⁷⁰ F. Dubois, “Social Justice and the Judicial Enforcement of Environmental Rights and Duties,” in A.E. Boyle and M.R. Anderson, eds. *Human Rights Approaches to Environmental Protection*. Oxford: Clarendon Press, pp. 153-175 at 157.

²⁷¹ D. Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, ON: Canada Law Book, 1990) p. 11.

the rule of law, the absence of corruption, and an independent judiciary all of which are the hallmarks of sound and legitimate constitutional governance.²⁷²

The central role of the courts in making environmental law is amplified by J.B. Ojwang who argues that Court's role is to shape the law should in a manner conservatory of the environment and the natural resources if that opportunity arises. Certainly, the right to clean and healthy environment provides that opportunity.²⁷³ Hence, the Court should holistically consider such rights to determine the duties as may appear to be more immediately linked to economic, social, cultural, or political situations. Within the Kenyan legal framework, the Article 22 (1) of the Constitution provides that "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." This provision invites the courts as the adjudicators in such contentions. The authority of the court to interpret the rights fortifies this role.

As well, the proponents of constitutional environmental rights have also argued that the right levels the environmental playing field. In this regard, it has been argued that when government and industry make decisions, economic and social considerations often trump environmental concerns.²⁷⁴ Therefore, the purpose of a constitutional right to a healthy environment is to seek a better balancing of competing interests, not to unilaterally trump economic and social priorities by challenging the environmentally harmful economic freedoms.²⁷⁵ Consequently, constitutional protection of the right to a healthy environment could tip the balance in many different

²⁷² Tim Hayward, *ibid* note 61, at p. 94-95.

²⁷³ Jackton Boma Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review*, (2007) pp. 19-29.

²⁷⁴ E. Brandl and H. Bungert.. "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad," 16 *Harvard Environmental Law Review* 1 (1992) at p. 87.

²⁷⁵ *ibid* note 61, at p. 112.

regulatory, administrative, corporate, and judicial decisions by acting as a guiding criterion in discretionary decision-making and as a standard for interpretation.²⁷⁶ On fairness in administration in Kenya, Article 47 (1) of the Constitution provides that “Every person has the right to administrative action that is expeditious efficient, lawful, reasonable and procedurally fair.” This provision provides for a mechanism of restraining abuse of discretion where most of the unfair decisions arise from.

The supporters of the rights also argue that such rights are tool for bolstering democracy. This would be the case especially if it resulted in the strengthening of procedural rights such as access to information, participation in decision-making, standing in environmental cases, and the ability to enforce environmental laws.²⁷⁷ Improved enforcement of environmental law, which demonstrates that the law applies to everyone, could enhance respect for the rule of law, which is otherwise hindered by weak or selective enforcement.²⁷⁸ In Kenya, the Constitution provides for the abovementioned procedural rights and the judicially enforceable principles of democracy and participation of the people. In this regard, Article 10 (2) (a) of the Constitution provides that: “The national values and principles of governance include...patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.”

Finally, a prominent view on the role of constitutional environmental rights in promoting environmental education and public values has been proposed. In this view, a country’s

²⁷⁶ Nicolas de Sadeleer, “Environmental Principles, Modern and Post-modern Law,” in R. Macrory, ed. *Principles of European Environmental Law: Proceedings of the Avosetta Group of European Environmental Lawyers*, (Amsterdam: Europa Haw Publishing, 2004).pp. 223-36.

²⁷⁷ J.A. Chappinelli. 1992. “The Right to a Clean and Safe Environment: A Case for a Constitutional Amendment Recognizing Public Rights in Common Resources,” 40 *Buffalo Law Review* 597, at pp. 599-601.

²⁷⁸ R. Eckersley, “Greening Liberal Democracy: The Rights Discourse Revisited,in B. Doherty and M. deGeus, eds. *Democracy and Green Political Thought: Sustainability, Rights, and Citizenship*. (London: Routledge, 1996.) pp. 212-236, at 213.

Constitution is intended to express, enshrine, and protect the most cherished and fundamental values of people. It has long been recognized that Constitutions both reflect and shape these values. Human rights have an expressive and educational role, signaling the values a society stands for, regardless of the method of their enforcement.²⁷⁹ Brandl and Bungert argue that constitutional provisions provide a model character for the citizenry to follow, and they influence and guide public discourse and behaviour.²⁸⁰

As Alexandre Kiss writes, every Constitution has an educational value. Constitutionalization of fundamental rights and freedoms has undoubtedly contributed to securing for them general acceptance and observance.²⁸¹ The public tends to be more familiar with constitutional principles than the details of laws and regulations.²⁸² Constitutional recognition of the right to a healthy environment would reflect and reinforce the public's growing concerns about the severity of today's environmental problems, underscoring the fact that a healthy environment is a fundamental element of human well-being, and a prerequisite to the full enjoyment of other human rights.²⁸³

2.3 The Scope of Constitutional Environmental Rights in Kenya

The scope of constitutional environmental rights can be best understood against the backdrop of their historical development in Kenya. The history of constitutional environmental rights in Kenya can be traced to the influence of the transnational history of the right. At this level, it is

²⁷⁹ S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008). pp. 32-33.

²⁸⁰ *Ibid* note 274, at p. 87.

²⁸¹ A. Kiss. 1993. "Concept and Possible Implications of the Right to Environment," in K.E. Mahoney and P. Mahoney, eds. *Human Rights in the Twenty-first Century: A Global Challenge*. Dordrecht: Martinus Nijhoff, pp. 551-559 at 559.

²⁸² J.R. May. 2006. "Constituting Fundamental Environmental Rights Worldwide," *23 Pace Environmental Law Review* 113-182 at 118.

²⁸³ *Ibid* note 283, at p. 113-114.

noteworthy that the UN Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992 inaugurated the recognition of the right to a clean and healthy environment at international law.²⁸⁴ The Rio Conference was preceded by the Stockholm Conference 1972 which is considered an important starting point in developing environmental law at the global as well as national level. The conference adopted the Stockholm Declaration, consisting of three non-binding instruments: a resolution on institutional and financial arrangements; a declaration containing 26 principles; and an action plan containing 109 recommendations.

Several principles in the Rio Declaration on Environment and Development (RDED) are in the nature of guidelines or policy directives which necessarily give rise to specific environmental legal rights and obligations.²⁸⁵ Due to varying national legal systems, the techniques of implementation differ from State to State.²⁸⁶ However, numerous States have incorporated principles as embodied in the RDED into national legislation by means of constitutional provisions and provisions in statutes. For instance, Principle 22 provides that:

“Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

This provision has been implemented in Article 69 (1) (c) of the Constitution which provides that: “The State shall... protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities”. The recognition of the need for

²⁸⁴ Donald Worster, “The Vulnerable Earth: Towards a Planetary History,” in Donald Worster (ed) *The Ends of the Earth*, (New York: Cambridge University Press, 1988). See also Dinah Shelton, “The Links between International Human Rights Guarantees and Environmental Protection,” 22 (University of Chicago, Centre for International Studies, 2004) at <http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf> (accessed on January 10, 2012); Prudence E. Taylor, “From Environmental to Ecological Human Right: A New Dynamic in International Law?” 10 *Georgetown International Environmental Law Review* (1990) at p. 309.

²⁸⁵ United Nations, *Rio Declaration on Environment and Development: Application and Implementation Report of the Secretary-General*, E/CN.17/1997/8 (UN: New York, 1997).

²⁸⁶ *Ibid* note 285, at Paragraph 14.

sustainable coexistence between human beings and the environment under Principle 1 of the RDED which states that “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” is legislated as the right to clean and healthy environment under Article 42 of the Constitution which states that: “Every person has a right to clean and healthy environment...” and section 3 of the EMCA which provides that: “Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment”.

2.3.1 The Situation in Kenya Prior to the Promulgation of the Constitution of Kenya 2010

Prior to 2010, Kenya’s Constitution lacked explicit provisions on the right to clean and healthy environment. However, certain attempts were made to apply other fundamental rights and freedoms to protect the environment. Such rights included the right to life which was argued to encompass the right to clean and healthy environment in the expansive jurisprudence and interpretation of other jurisdictions particularly Indian.²⁸⁷ For instance, in the celebrated case of *Peter K. Waweru v. Republic*,²⁸⁸ the applicants had been charged with the offence of discharging raw sewage into a public water source contrary to provisions of the Public Health Act.²⁸⁹ The applicants filed a constitutional reference against the charge on the ground that the charge was discriminatory against them. This contention arose from the fact that other land owners in Kiserian where they owned land had not been charged despite them carrying out the same acts with which they were charged. The Court in concurring with them discussed the implications of the applicants’ action for environmental management. The Court held that the constitutional right

²⁸⁷ See Patricia Kameri-Mbote and Collins Odote, “Courts as Champions of Sustainable Development: Lessons from East Africa,” *Journal of Sustainable Development Law & Policy* (2009), at pp. 34-35.

²⁸⁸ Miscellaneous Civil Application No 118 of 2004, 1 Kenya Law Reports (Environment and Land) 677-696.

²⁸⁹ Cap 242, section 118 (e).

to life as enshrined in section 71 (1) of the former Kenyan Constitution which provided that: “No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of criminal offence under the law of Kenya of which he has been convicted” includes the right to a clean and health environment.²⁹⁰

In another case, *Charles Lekuyen Nabori & 9 Others v. Attorney General & 3 Others*,²⁹¹ the Kenyan government and the Food Agricultural Organization (FAO) undertook a joint project in 1982 that introduced *prosopis juliflora* weed in Baringo District. The weed had caused extensive damage to the Lake Baringo basin ecosystem. The government had made no efforts to solve the problem hence the petitioners claimed that the right to a clean and healthy environment was being breached by the unabated spread of the weed. The petitioners sought the declarations, *inter alia*, that their rights to life as set out in section 71²⁹² of the former Constitution had been compromised by the introduction of the weed. This prayer was supported by the argument that the introduction of the weed had had adverse effects on the environment and socio-economic well being of the petitioners and other occupants of the affected areas. The court was thus tasked with the question of whether the right to life included a clean and healthy environment which guaranteed the full enjoyment of natural resources. The court was also tasked to determine whether there was an infringement of the petitioners right to life as envisaged by the Constitution as read with the Stockholm Declaration on Human Environment 1972, Rio Declaration on Environment and Development, 1992, and the Convention on Biological Diversity (CBD) of 1992.

²⁹⁰ See *ibid* note 288 at p. 692.

²⁹¹ Petition 466 of 2006, [2007/8] eKLR.

²⁹² See reference to section 71 (1) of the former Constitution quoting the provision *in extenso* on this page.

Justice Ang'awa in that case held that "...“Right to life” using a broad meaning in this case that includes the right to be free from any kind of detrimental harm to human health, wealth and or socio economic well being.”²⁹³ Justice Rawal concurred with this position holding “That a right to a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth and/or socio-economic well being and ultimately the human life is a fundamental right to life as enshrined in Section 71 of the Constitution of Kenya.”²⁹⁴

Other fundamental rights included in the protection of the environment prior to 2010 were those that were generally deemed relevant to access to justice in environmental protection disputes. These included the freedom of speech, assembly and association as well as the right to equal protection of the law as well as the right of access to the High Court for redress regarding enforcement of fundamental rights and freedoms.²⁹⁵

Besides the application of other fundamental rights and freedoms, the development and application of the framework law on environmental governance in EMCA has played a role in the development of the right to clean and healthy environment.²⁹⁶ Specifically derivable from its preambular provision which states that EMCA is “An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto....” The law under EMCA provides for the framework for sustainable environmental management and creates the

²⁹³ *Ibid* note 291 at p.38.

²⁹⁴ *Ibid* note 291 at p.65.

²⁹⁵ P. Kameri-Mbote, “Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention,” International Environmental Law Research Centre (IELRC) Working Paper No. 2005-1 at <http://www.ielrc.org/content/w0501.pdf> (last accessed on July 3, 2012).

²⁹⁶ Anne N. Angwenyi, “An Overview of Environmental Management and Co-ordination Act,” in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEP: Nairobi, 2008) at p. 163-165.

institutional mechanisms for environmental management. It contains legal provisions reiterating the right to a clean and healthy environment, establishing a central environmental authority, and has detailed provisions requiring Environmental Impact Assessments (EIAs). To complement the framework law, Kenya has additional legislation governing specific sectors of the environment including fisheries, forestry, wildlife, water, land²⁹⁷ and physical planning.

Kenya had no major constitutional reform to align its Bill of Rights with the international Bill of Rights until the commencement of the Constitution of Kenya Review process. Following the National Constitutional Conference (NCC) in 2004, the Constitution of Kenya Review Commission (CKRC) produced a draft Constitution which included explicit guarantees of the right to a clean and healthy environment as a constitutional right. However the post 2004 constitutional review processes consistently incorporated the right. This was partly due to the international wave to incorporate environmental human rights and the shortcomings of the EMCA which was evident through deteriorating environmental state. Ultimately, the right was incorporated in the Constitution of Kenya, 2010. The resulting constitutional and legal framework does not displace EMCA in environmental governance, but relegates EMCA into a statute implementing the right to clean and healthy as enshrined in the Constitution.

²⁹⁷ Kenya has an array of land laws dealing with ownership and transactions related therewith on land. The significance in environmental protection context is the placement of conditions in land at transfer. As at the time of writing this thesis, the law had just undergone reforms to accommodate such provisions explicitly, for instance, under the Land Act, No. 6 of 2012, National Land Commission Act, No. 5 of 2012 and the Land Registration Act, No. 3 of 2012. These legislation bear numerous provisions on environmental protection especially in land use.

2.3.2 The Right to Clean and Healthy Environment in Kenya

The Constitution of Kenya 2010 was promulgated on 27th August 2010 after a lengthy constitutional reform process with its historical basis in 1992.²⁹⁸ Among the main contributions of the Constitution is the establishment of an expansive Bill of Rights contained in Chapter Four thereof. Article 42 (a) provides that: “Every person has the right to a clean and healthy environment, which includes the right...to have the environment protected for the benefit of the present and future generations through legislative and other measures....” This Article embeds intergenerational equity which is core to environmental law and governance as well as constitutional human rights in relation to the environment in Kenya. It also contains an expansive language on the minimum substance of what possibly constitutes a clean and healthy environment under Article 69 which has been quoted *in extenso* in the introductory Chapter of this thesis.²⁹⁹ The environmental rights language includes intergenerational equity by providing that the right belongs not only to current citizens but also to future generations.³⁰⁰

The provision contains an expansive language on environmental protection which incorporates sustainable utilization of natural resources, protection of intellectual property rights (IPRs) in and indigenous knowledge (IK) of biodiversity and genetic resources. It also provides for elimination of all activities and process that may endanger the environment as well as protection of biodiversity and genetic resources. This expansiveness may bring considerable juridical challenges especially in defining what would be within the ambit of a “clean and healthy environment.” However, the inclusion of negative and positive duties of the State under Article

²⁹⁸ See generally Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Sareat/Mwengo: Nairobi, 1999) and Alicia L. Bannon, “Designing a Constitution-Drafting Process: Lessons from Kenya,” 116 *Yale Law Journal* (2007): 1824-1872, at pp. 1830-1840.

²⁹⁹ See pp. 3-4 of this thesis for the content of the provision.

³⁰⁰ *Ibid* note 66, at p. 615-616.

69 (1) and the non-State actors per Article 69 (2) is noteworthy in guiding the jurisprudence of the scope of the right under Article 42. This means that Article 42 must be read together with Article 69 and 70³⁰¹ of the Constitution as well as with authoritative judicial decisions. For instance, the Article may be construed restrictively or expansively. On the latter, the celebrated case of *Oposa v. Factorian*³⁰² is one of the landmark cases on environmental rights, the Philippine Supreme Court held that the plaintiffs could challenge the constitutionality of a governmental permit that allowed the destruction of vast areas of rainforest. The court held that the plaintiffs demonstrated a cognizable constitutional claim because their cause of action was to “prevent the misappropriation or impairment” of Philippine rainforests. The *Oposa* court did not narrow its interpretation of the environmental right only to issues of human health. The Ugandan case of *Uganda Electricity Transmission Co. Ltd v. De Samaline Incorporation Ltd*³⁰³ reflects the *Oposa* position in the following terms:

“... the right to a clean and healthy environment must not only be regarded as a purely medical matter... it should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings...a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem. And poor access to health services. That right is not restricted to a clinical model.”

Article 42 of the Constitution³⁰⁴ must also be read together with constitutional provisions on procedural rights.

³⁰¹ See reference to Article 42, 69 and 70 quoting the provisions of these Articles *in extenso* at pp. 3-5 of this thesis.

³⁰² See *Juan Antonio Oposa & Others v. The Honorable Fulgencio S. Factoran, Jr & Others* at http://www.escrib.net.org/usr_doc/minors_oposa_judgment.doc (accessed on January 29, 2012).

³⁰³ High Court Miscellaneous Cause No. 181 of 2004; See discussion in Ben K. Twinomugisha, “Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda” 3/3 *Law, Environment and Development Journal* (2007): 244-258 at p. 249 available at <http://www.lead-journal.org/content/07244.pdf> (accessed on July 21, 2012).

³⁰⁴ See reference to Article 42, 69 and 70 quoting the provisions of these Articles *in extenso* at pp. 3-5 of this thesis.

2.3.3 The Role of Procedural Rights

The right to a clean and healthy environment will further be enhanced by procedural rights generally provided for under Principle 10 of the RDED. The RDED procedural rights outlined in the Constitution include public participation,³⁰⁵ access to information,³⁰⁶ and access to justice.³⁰⁷ The Constitution also provides for fair administrative action³⁰⁸ which buttresses access to justice. These rights recognize that substantive right to a clean and healthy environment requires supportive infrastructure for implementation.³⁰⁹ The interdependence between the environmental rights and procedural rights can thus be regarded as organic since the procedural rights form a fundamental reinforcing component of right to clean and healthy environment.

The justification of procedural rights as a supportive infrastructure for environmental rights is that they enhance accountability, transparency and participatory equity in decision-making by the public policy makers and non-state actors by extension.³¹⁰ Consequently, an individual may thus hold the State accountable for failing to protect, and corporations for failing to respect, their right to a clean and healthy environment in instances where either contribute to failure in observing procedural rights. The fundamental role of procedural rights cannot be gainsaid in the environmental context.

In the case of *Musa Mohammed Dagane and 25 Others v. Attorney General and Another*,³¹¹ the court, on assessing the centrality of procedural rights, observed that the petitioners had not been

³⁰⁵ *Constitution of Kenya*, Article 35 read together with Article 69(1) (d). See also extensive discussion in Collins Odote, "Country Report: Kenya - Constitutional Provisions on the Environment," 1 *IUCN Academy of Environmental Law* (e-Journal) (2012): 136-145 at p. 138.

³⁰⁶ *Constitution of Kenya*, Article 69 (1) (d).

³⁰⁷ *Constitution of Kenya*, Article 48.

³⁰⁸ *Constitution of Kenya*, Article 47.

³⁰⁹ Philippe Cullet, "Definition of an Environmental Right in a Human Rights Context," *op. cit.*

³¹⁰ *Ibid* note 309, at p. 36-37.

³¹¹ Constitutional Petition No. 56 of 2009 [2011] eKLR.

granted an opportunity for genuine consultation. The court also observed that there was no adequate and reasonable notice prior to the scheduled date of eviction and no alternative land or housing was made available in reasonable time to all those affected. Besides, the court observed that there was no representation from an independent organization or the applicants during their forcible eviction to avoid casualties and claims of illegality or provision of legal remedies made available to the applicants. The court also observed that the applicants were also not granted legal aid in order for them to seek legal redress from the court, and there was no evidence that their consent was sought before the action. Therefore, the state action was declared illegal. These capture the main elements of procedural rights which extend to corporations with focus on the corporate responsibility to respect human rights.

2.3.4 *Locus Standi* in Constitutional Environmental Right in Kenya

Prior to the Constitution coming into effect, Kenyan application of common law, notably the law of tort, dictated that only persons whose rights were directly affected or who were actually or potentially harmed by an action, could bring a suit for environmental damage.³¹² The language of section 3 (3) of EMCA, although permissive, did not substantively open the rule of standing. The provision states that: “If a person alleges that the entitlement conferred under subsection (1) [to a clean and healthy environment] has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate....” The court

³¹² See for example *Wangari Maathai v. Kenya Times Media Trust Ltd*, (1989) H.C.K. 5403 (Kenya).

has had an occasion to interpret this provision as it is in the case of *Mwaniki and 2 Others v. Gicheha & 3 Others*,³¹³ the court observing *sua ponte* stated that:

“The plaintiffs, though not the owners of the land in dispute, nevertheless had the authority to sue, such authority being derived from section 3 (3) of the Environmental Management and Co-ordination Act, 1999, which states if a person alleges that the entitlement under subsection (1) to a (clean and healthy environment) has been, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give directions as it may deem appropriate, to prevent, stop, or discontinue any act or omission deleterious to the environment.”

However, this position has now been reversed as the Constitution provides a form of open or expansive standing to vindicate environmental harms on behalf of oneself and the public interest. Article 70 enforcement of environmental rights provides thus on standing: “For the purposes of this Article [70], an applicant does not have to demonstrate that any person has incurred loss or suffered injury.” This standing is even broadened by incorporating public interest litigation, which characterizes a significant portion of environmental claims as Articles 22 and 258 of the Constitution. Article 22 of the Constitution which is particular on the enforcement of the Bill of Rights provides that:

“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.”

³¹³ (2006) 1 KLR (E&L) 739-748 at p. 740.

While Article 258 which is general to the enforcement of the provisions of the Constitution applies similar expansive language on *locus standi* by stating that:

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.”

These provisions on legal standing means that a person under the categories outlined in the provisions can institute judicial proceedings concerning contravention of any provision of the Constitution. Provisions on environmental rights are provisions under the Bill of Rights in particular and under the Constitution in general hence persons listed under Article 258 have the standing in environmental rights disputes which largely involve contravention of the law.

Corporations also have a *locus standi* by virtue of being a person under Article 20 (1) which states that “The Bill of Rights applies to all law and binds all State organs and all persons” as read with Article 260 which states that “In this Constitution, unless the context requires otherwise— “person” includes a company, association or other body of persons whether incorporated or unincorporated;...” hence can institute court proceedings under any of the categories of persons under Articles 70, 22 and 258 of the Constitution has been contravened or is threatened by contravention. This expansiveness supported by the horizontality of the Bill of Rights cures the problem of standing in the case of *Wangari Maathai v. Kenya Times Media Trust Ltd.*³¹⁴

³¹⁴ *Ibid* note 312, at pp. 164-171.

2.3.5 Remedies

The remedies to which an applicant is entitled under the Article 70 (2) of the Constitution of Kenya incorporate the polluter pays principle as well as the prevention and precautionary principles. It specifically includes the court giving orders or directions that ultimately operate to achieve any of the following:

- “(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
- (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
- (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.”

The remedies issuing under Article 70 (2) of the Constitution quoted above are broad enough to enable the courts issue orders or directives be they injunctive, compelling and compensatory in nature and operation depending on case requirement. In fact, the remedies flowing from the court’s powers “to compel any officer to take measures to prevent or discontinue any Act or omission that is harmful to the environment” has practical implications. One such practical implication is the provision’s potential to compel NEMA to invoke its authority to issue environmental restoration and conservation orders.

EMCA empowers NEMA to issue and serve environmental restoration or conservation orders upon any person who has been responsible for environmental degradation, damage or injury. Restoration orders require persons or entities served therewith not to undertake an activity that would or is likely to harm to the environment. Consequently, such orders may require the served persons or entities to restore such environment to its previous status or pay the cost of restoring the environment incurred by authorized persons or organizations. This would apply if such action has already been taken hence there is the need to award compensation to the persons whose

environment or livelihood has been harmed by the activity.³¹⁵ The court may also grant environmental conservation orders or environmental easements which are granted to facilitate the conservation and enhancement of the environment by imposing obligations with respect to the use of land in the vicinity of the burdened land.³¹⁶

The restoration order specifies what the orders require from the person it is served upon.³¹⁷ The person to who is the orders are served has a right to appeal to the courts. Before going to the courts, the person can apply for reconsideration of the order to NEMA.³¹⁸ NEMA has the power to enter any premises to ascertain or inspect the effects of the activity prior to or after grant of restoration orders. Refusal or neglect to take action as required by a restoration order will result into NEMA taking the measures for the enforcement of the order. NEMA can claim in civil suit the cost incurred in such an event. This mechanism will be useful in actualizing remedies specified by the intendment of Article 70 (2) of the Constitution of Kenya.³¹⁹

2.3.6 Applicability of the Right to Corporations

The application of the constitutional environmental rights expressly extends to corporations. Specifically, the Bill of Rights binds all persons as per Article 20 of the Constitution. Article 20 (1) provides that “The Bill of Rights applies to all law and binds all State organs and all *persons*.” In line with the Hohfeldian right-duty perspective of human rights, Article 20 (2) binds further and entitles all persons to the enjoyment of the right by providing that: “Every *person* shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.” The entry point of corporations

³¹⁵ EMCA, Section 108. See also *ibid* note 296, at pp. 143-168.

³¹⁶ EMCA, Section 112.

³¹⁷ EMCA, Section 109.

³¹⁸ EMCA, Section 110.

³¹⁹ See reference to Article 70 *in extenso* at pp. 4-5 of this thesis.

as persons is founded on Article 260 which provides that: “In this Constitution, unless the context requires otherwise – ...“person” includes a company, association or other body of persons whether incorporated or unincorporated.” Consequently, the corporation is bound by the Bill of Rights.

The nature of a corporation’s duty is generally the duty to respect the rights envisaged under the Bill of Rights.³²⁰ This duty, under the Kenya’s constitutional environmental rights includes the duty to cooperate with the State in realizing the environmental rights. Article 69 (2) provides that: “Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.” This, impliedly, extends the State duty to protect to the corporations in environmental protection.

The question on who will be held accountable in case of breach remains a subject of debate and to the interpretation by the courts. Strictly, the corporation as a legal personality should be held accountable for breach and remedies applied appropriately. However, some courts have lifted the corporate veil and held directors of corporations accountable for breach of environmental rights. Such was the case in South Africa, which applies similar environmental rights as Kenya, in the case of *Minister of Water Affairs and Forestry Vs Stilfontein Gold Mining Company Limited & 11 Others*,³²¹ where the veil of incorporation was lifted and the directors were held liable in corporate environmental breaches. Although decision in the *Stilfontein case* was reversed by the Supreme Court for being an activist judgment, it is an indication of the appreciation of the liability of the corporation for breach of environmental rights. Due to the demands of

³²⁰ See John Ruggie, “Business and Human Rights: The Evolving International Agenda,” A Working Paper of the Corporate Social Responsibility Initiative, Harvard Kennedy School of Government, Working Paper No. 38 of 2007.

³²¹ Case No. 2005/7655 (South Africa) (Unreported).

environmental rights, Kenya may be compelled to provide for the Bill of Rights being an exception on lifting the veil under Kenya's company law.

2.4 Applying International Environmental Law under the Constitution

International environmental law has played a pivotal role in the development and operation of national environmental law framework in Kenya. This role is bound to prevail due to the effect of Article 2 (6) of the Constitution of Kenya 2010 which provides that "any treaty or convention ratified by Kenya shall form part of the laws of Kenya." This provision implies the conversion of Kenya from a dualist state where a national legislation is required to be domesticated and applied in legislation to a monist state where treaties and conventions come into force automatically on ratification without the need for enabling legislation.³²²

However, whether the treaties and general rules as envisaged under the Constitution are directly applicable in Kenya is problematic. This is the case as international environmental law (IEL) is largely regarded as calling upon States to regulate the conduct of non-State actors that are the source of harm to the environment.³²³ The implementation of international environmental provisions does not envisage a special role for private companies, but rather provides for States to enact the necessary legislation to direct and control the conduct of these actors in their territory and under their jurisdiction.

Furthermore, it is established practice in IEL that state parties to multilateral environmental agreements (MEAs) have three main obligations, namely: implementing MEAs through national

³²² Adronico Adede, "Domestication of International Obligations," (2001) Constitution of Kenya Review Commission, available at <http://www.commonlii.org/ke/other/KECKRC/2001/14.html> (last accessed on July 8, 2012). In order to streamline the applicability of treaties, the Ratification of Treaties Bill, 2011 has been tabled in Parliament. This Bill would be useful in prescribing legal effect of various forms of treaties.

³²³ David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, Third Edition (New York: Foundation Press, 2007) at 370-371.

legislation,³²⁴ ensuring compliance with the implementing national law by both state actors' and non-state actors' within the jurisdiction and control of that State, and reporting to the MEAs secretariat or other designated organization on specific dimensions of performance.³²⁵ Consequently, this thesis argues that Kenya will require implementing legislation to ensure compliance with the obligations contained in the international environmental law for effective implementation and administration. Such legislation can take to form of the framework law domesticating the treaties through regulations.

The international instruments to which Kenya is party largely reinforce the weakly anthropocentric character of Article 42 and reflect most of the obligations under Article 69. These include; African Convention on the Conservation of Natural Resources;³²⁶ Ramsar Convention on Wetlands of International Importance Especially as Water Fowl Habitat;³²⁷ Convention for the Protection of the World Cultural and Natural Heritage;³²⁸ Convention of the Prevention of Marine Pollution by Dumping of Wastes and other Matter;³²⁹ International Convention for the Prevention of Pollution from Ships;³³⁰ Convention on International Trade in

³²⁴ This practice is supported by for example Chapter 8 of Agenda 21 which states that: "Laws and regulations suited to country-specific conditions are among the most important instruments for transforming environment and development policies into action."

³²⁵ *Ibid* note 323, at pp. 370-371.

³²⁶ The Convention is aimed at the conservation, utilization and development of natural resources in Africa in accordance with scientific principles and with due regard to the best interests of the people.

³²⁷ The convention is an initiative to conserve the wetlands and their flora and fauna especially waterfowl by combining far sighted national policies with co-ordinate international action.

³²⁸ This Convention aims at ensuring the identification, protection, conservation, presentation and transmission to future generations the cultural and natural heritage situated in its territory.

³²⁹ The main objective of this convention is to protect and preserve marine environment from all sources of pollution and take effective measures, according to the scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter.

³³⁰ This Convention aims at eliminating international pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances from ships

Species of Wild Fauna and Flora;³³¹ Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention);³³² United Nations Convention on the Law of the Sea,³³³ Convention for the Protection Management and Development of the Marine and Coastal Environment of the Eastern African Regions;³³⁴ Vienna Convention for the Protection of the Ozone Layer;³³⁵ Protocol Concerning Cooperation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region;³³⁶ Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region;³³⁷ Montreal Protocol on Substances that Deplete the Ozone Layer;³³⁸ CBD;³³⁹ United Nations Framework on Climate Change,³⁴⁰ Convention for

³³¹ This Convention recognizes that States are best placed to protect of certain species of against over exploitation through international trade.

³³² The objective of this agreement is to restore the migratory species of wild animals concerned to a favorable conservation status or to maintain it in such a status.

³³³ This Convention sets up a comprehensive new legal regime for the sea and oceans and, as far as environmental provisions are concerned establishes material rules concerning environmental standards as well as enforcement provision dealing with pollution in the marine environment.

³³⁴ The convention is the umbrella agreement for the protection, management and development of the marine coastal environment of the East African Region. It indicates the sources of pollution which require control. The convention has two additional protocols namely; the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern Africa Region and the Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region. Under the Convention, no State can become a contracting party without also becoming a party to at least one of the two protocols.

³³⁵ This Convention was aimed at binding State parties to take appropriate measures in accordance to the convention and protocols that may arise as a result, to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.

³³⁶ This Protocol is aimed at the protection of the marine and coastal environment from pollution incidents and the establishment of means of responding to marine pollution incidents and reducing the risk of marine pollution through enactment of relevant legislation. It is also intended to develop of machinery to respond to marine pollution and designation of a national authority responsible for the implementation of the treaty.

³³⁷ Under this Protocol, States are bound to take appropriate measures to maintain essential ecological processes and life support systems, to preserve genetic diversity and to ensure the sustainable utilization of harvested natural resources under their jurisdiction.

³³⁸ The parties to the Montreal Protocol committed to facilitate access to environmentally safe alternative substances and technology to State parties that are developing and assist them to make expeditious use of such alternative.

³³⁹ The objective of the convention are; the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources including the access to the genetic resources and by appropriate transfer of the relevant technologies, taking into account all rights over those resources and to technologies

³⁴⁰ The aim of UNFCCC is to achieve the stabilization of green house gases concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate systems.

the Establishment of Lake Victoria Organization,³⁴¹ Lusaka Agreement on Co-operative Enforcement operations Directed at Illegal Trade in Wild Fauna And Flora;³⁴² United Nations Convention To Combat Desertification Particularly In Africa;³⁴³ Cartagena Protocol to the CBD (CPB);³⁴⁴

In addition to the foregoing, the UN Guiding Principles on Business and Human Rights plays the crucial role of “soft” law in addressing corporate liability for violation of (international) environmental human rights. As such, it constitutes part of the international law making whose applicability to Kenya will depend on whether Kenya contextualizes them into municipal legislation. Hunter, Salzman and Zaelke state thus regarding the importance of soft law in IEL:

“Soft law is an important innovation in international law-making that describes a flexible process for States to develop and test new legal norms before they become binding upon international community....”³⁴⁵

However the efficacy and utility of the hard and soft law in fulfillment of constitutional environmental rights in Kenya will be highly dependent on the implementation processes and mechanisms. Perhaps, the beginning point would be the domestication of the UN Guiding

³⁴¹ The material aim of this instrument was to initiate and implement a programme to strengthen regional coordination in the management of Lake Victoria resources, including fisheries, water and other resources.

³⁴² The objectives of this agreement are to reduce and ultimately eliminate illegal trade in wild fauna and flora and to establish a permanent task force for this purpose.

³⁴³ The Convention has immediate and long terms objectives. Whereas the former is to combat desertification and mitigate the effects of drought and to achieve sustainable development in affected areas through international cooperation and partnership arrangements, in the framework of an integrated approach, the latter is intended to improve productivity of land, the rehabilitation and the conservation and sustainable management of land and water resources.

³⁴⁴ Cartagena Protocol on Biosafety is an international agreement which aims to ensure the safe handling, transport and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on biological diversity, taking also into account risks to human health. It was adopted on 29 January 2000 and entered into force on 11 September 2003.

³⁴⁵ David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, Op. Cit at p. 353. See also Pierre-Marie Dupuy, “Soft Law and the International Law of the Environment,” 12 *Michigan Journal of International Law*, (1991) 420-435.

Principles on Business and Human Rights to establish legal standards for corporate responsibility in relation to human rights.

2.7 Chapter Conclusion

This Chapter has examined the link between human rights and environmental protection, arguing that environmental protection is a prerequisite for the attainment of core human rights such as life. The Chapter has also assessed the scope of constitutional environmental rights under Article 42 of the Constitution of Kenya 2010. The Chapter has argued that the design of the right makes standing thereunder expansive while it accommodates support from procedural rights under the Constitution. The Chapter has also assessed the role international environmental law and has concluded that such law can be actualized through implementation provisions under EMCA. The Chapter has further concluded that the structure of the right makes it explicitly applicable to corporations, and presents far reaching implications for the corporation in terms of compliance and exposure to liabilities. The scope of the right is assessed to aid the study in determining the implications of the right on corporate governance discussed in Chapter Three of this thesis.

CHAPTER THREE

IMPLICATIONS OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS ON CORPORATE GOVERNANCE

3.1 Introduction

The legal and regulatory environment within which a company operates determines in large measure the limits and quality of corporate governance.³⁴⁶ This remains the case as the concern of corporate governance relates to the ways in which all parties affected by the operations of the corporation interact.³⁴⁷ Corporate governance consequently provides the stakeholders with legitimate claims in corporation with means to ensure that the corporation adopts mechanisms that safeguard the interests of the stakeholders. The law is an essential tool in this process and relationship since it is generally concerned with regulating conduct, of natural and legal persons. In fact, corporate governance mechanisms are lego-economic institutions and an outcome of legal decisions.³⁴⁸ The foregoing demonstrates that the law has an effect on corporate governance.

This Chapter generally sets out to ascertain whether, and if so how far, environmental protection as envisaged under the Constitution transcends its position in the external legal framework governing corporate behaviour. This is then applied in evaluating the role of such an overall effect within the internal regulation of the way companies operate. In order to comprehensively attend to the foregoing task, this Chapter takes stock of the imminent challenges of enforcing the

³⁴⁶ See generally Elena F. Pérez Carrillo, "Corporate Governance: Shareholders' Interests' and Other Stakeholders' Interests," 4 *Corporate Ownership & Control* 4 (2007) pp. 96-102. See also Robert Kagan, Dorothy Thornton & Neil Gunningham, "Explaining Corporate Environmental Performance: How Does Regulation Matter?" 37 *Law & Society Review* 1, (2003): 51-90.

³⁴⁷ Ahmadu Sanda, Aminu S. Mikailu and Tukur Garba, "Corporate Governance Mechanisms and Firm Financial Performance in Nigeria, AERC Research Paper 149, (African Economic Research Consortium: Nairobi, March 2005).

³⁴⁸ See Aron A. Dhir, "Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability," 43 *American Business Law Journal* 2 (2006), at p. 370.

constitutional environmental rights in relation to the corporation and possible solutions therefor, before assessing the implications in the Kenyan context.

3.2 The Challenges of Enforcement in relation to Corporations

The development of a binding and enforceable legal duty on the corporation to observe constitutional environmental rights faces a number of legal obstacles. Under municipal law, these obstacles include: the limitations on liability arising out of corporate legal personality, establishing the mental element of liability for the corporate actor and the impact of jurisdictional limits on process and liability.³⁴⁹

3.2.1 The Challenge of Corporate Legal Personality

Victims of constitutional environmental rights violations by corporations may be characterized as involuntary creditors whose main claim against the company will largely lie in tort.³⁵⁰ Involuntary creditors have no chance to bargain with the corporation over the allocation of risks, unlike voluntary creditors, who enter into contracts with the company.³⁵¹ Yet they bear the risk of loss if the corporation does not possess sufficient assets to compensate them for their damages.³⁵² This presents the problem of separate legal personality in corporate law and logic, which is manifested, for example, in parent-subsidary and company-shareholder relationships. Consequently, mechanisms should be installed to effectively bring the corporations and their directors, officers or generally shareholders to account with the ultimate aim being accounting for liability.

³⁴⁹ Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation," 22 *Business Ethics Quarterly* 1 (2012) at pp. 145-177.

³⁵⁰ See generally, Reinier H. Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls," 93 *Yale Law Journal*, (1984) 857-898.

³⁵¹ *Ibid* note 349, at p. 151.

³⁵² *Ibid* note 349, at p. 149.

For the claims by the involuntary creditors to a corporate group (parent-subsidary arrangements) to succeed, such a claim depends on proof that the parent company was directly involved in causing the alleged harm.³⁵³ This is challenging given the logic of corporate separation and limited liability. This may lead to significant under-compensation or non-compensation of victims, if the parent applies the separation between itself and its subsidiary to insulate itself from liability.³⁵⁴ This position is reinforced by the highly restrictive conditions under which a court would lift or pierce the corporate veil and find the parent directly responsible for the acts of the subsidiary.³⁵⁵ In Kenya, the courts lift the veil of incorporation under common law or under statute. Under the latter, company law does not accommodate environmental rights and offences attendant thereto an instance inviting veil piercing. In common law, though, there is a provision for lifting the veil when a company is incorporated to commit improper objective. While this seems applicable to companies, it may face challenges since companies are often generally incorporated for a legal purpose, but environmental impact may incidentally arise out of the corporation pursuing its purpose. This forms the uniqueness of environmental rights *vis-à-vis* corporate legal personality and veil piercing under company law.

This status of company law in Kenya, therefore, externalizes a risk that ought properly to be borne by the company as against the involuntary creditor.³⁵⁶ Consequently, the environmental rights holder (the poorer risk taker) assumes the burden of the risk. This is contrary to conventional notions of efficient risk allocation in law which emphasizes that the person who has

³⁵³ *Ibid* note 349, at p. 152.

³⁵⁴ Rachel Nicolson and Emily Howie, "The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective" *op. cit.*

³⁵⁵ Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation," *op. cit.*

³⁵⁶ *Ibid* note 349, at p. 152.

the best knowledge of the risk should bear it.³⁵⁷ In the case of environmentally hazardous corporate actions the person with best knowledge would be the corporation itself.³⁵⁸ The logic of company law externalizes the risk of liability away from the corporate controlling interest by insulating the interest from liability. The general exception to this is establishing that it has a direct involvement in the events leading to the violation or rights. This is an obstacle to the realization of access to effective remedies which is a key element of constitutional environmental rights.³⁵⁹ It is also a constraint on the realization of the corporate duty to respect environmental rights as this legal situation encourages irresponsibility by way of increasing companies' moral hazard.³⁶⁰ Therefore, one important change in national company laws would be to extend the cases in which the corporate veil ought to be disregarded to include cases of constitutional environmental rights violations by the company.

To strengthen the extension of veil piercing to environmental rights, a presumption in law could be introduced of parent corporation's responsibility for the acts of the subsidiary based on the actual or potential control exercised by the former over the latter.³⁶¹ This could be achieved by way of a statutory exception to the doctrine of corporate separate legal personality. The approach is shown in the UK Corporate Responsibility Bill of 2002 where such liability may be introduced

³⁵⁷ Reinier H. Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls," *op. cit.*

³⁵⁸ Rachel Nicolson and Emily Howie, "The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective" *op. cit.* See also Nina Mendelson, "A Control-Based Approach to Shareholder Liability for Corporate Torts," *Columbia Law Review* (2002): 1203–1303.

³⁵⁹ See Nina Mendelson, "A Control-Based Approach to Shareholder Liability for Corporate Torts," *Ibid* note 358, at pp. 1203 and 1303 respectively.

³⁶⁰ *Ibid* note 349, at p. 152.

³⁶¹ Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation," *op. cit.* See also Peter B. Oh, "Veil-Piercing," *Legal Studies Research Paper Series*, University of Colorado Working Paper No. 2010-06 February 2010; see also Beate Sjøfjell, "Environmental Piercing of the Corporate Veil The Norwegian Supreme Court Decision in the *Hempel* Case" at <http://ssrn.com/abstract=1616820> (last accessed on March 20, 2012).

by law.³⁶² One important issue is whether parental liability should be based on a duty of care, requiring proof of negligence on the part of the parent, or whether, as in India's "enterprise liability" doctrine,³⁶³ it should be strict, arising out of the fact that the parent is the controlling entity in the enterprise.³⁶⁴ The incentive or deterrent factor to internalize risk on the part of the parent corporation would be greater if liability was strict.³⁶⁵ In such cases, the major issue would be to establish the boundaries of the business for the purposes of liability in environmental human rights. Such a consideration should also be given to other affiliates that may be relevant parties in certain circumstances.

Section 145 (1) of EMCA offers a progressive beginning point for the liability of corporations by providing that:

"When an offence against this Act, is committed by a body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence."

Significantly, this provision makes room for piercing the veil at the level of the corporation as comprising of directors and officers. However, it requires proof of knowledge which is often difficult to prove. The operationalization of this provision shall be bolstered by the implementation safety nets in the constitutional environmental rights.

³⁶² *Ibid* note 349, at p. 152.

³⁶³ See Kiarie Mwaura, "Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil" *Harvard Law School's Human Rights Program Working Paper Series*, 2008) http://www.law.harvard.edu/programs/hrp/Mwaura_Working_Paper.pdf (accessed on February 20, 2011).

³⁶⁴ *Ibid* note 349, at p. 152-153.

³⁶⁵ Mark J. Loewenstein, "Veil Piercing To Non-Owners: A Practical And Theoretical Inquiry," *Legal Studies Research Paper Series Working Paper Number 10-23* (2010) University Of Colorado Law School.

3.2.2 Establishing the Mental Element of Corporate Liability

Constitutional environmental rights violations in Kenya involve the elements of criminal acts as well as civil wrongs. Proof of criminal intent will be required to establish criminal liability while an element of foresight will be required to prove negligence.³⁶⁶ In both cases, the main difficulty is the attribution of the human actions and intentions of corporate officers to the corporate organism itself.

As regards criminal responsibility one approach is shown in the English law on corporate manslaughter. Under the Corporate Manslaughter and Corporate Homicide Act 2007 a new offence of “corporate manslaughter” has been created. This does not require proof that the “directing will” of the company carried the requisite intent and that one natural person acting as an agent of the company, and who was part of the “directing will,” committed the act.³⁶⁷ Instead, the offence is committed by an organization if “the way in which its activities are managed or organized by its senior management is a substantial element in the breach.”³⁶⁸

The relevant organization in the abovementioned definition includes a corporation among other bodies. Senior management is defined as the persons who play significant roles in the making of decisions about how the whole or a substantial part of the organizations activities are to be managed or organized or the actual managing or organizing of the whole or a substantial part of those activities.³⁶⁹ A gross breach arises where “conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organization in the

³⁶⁶ See generally Steven Shavell, “The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize Their Employees,” 17 *International Review of Law and Economics*, (1997) pp. 203-213.

³⁶⁷ Ellen S. Podgor, “Criminalization of Corporate Law the Impact of Criminal Sanctions on Corporate Misconduct,” 2 *Journal of Business & Technology Law* 1 (2007), at pp. 119-121.

³⁶⁸ See section 1(1) and (3) of the English Corporate Manslaughter and Corporate Homicide Act 2007

³⁶⁹ Peter Muchlinski, “Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation,” *op. cit.*

circumstances.”³⁷⁰ Thus while the threshold for liability still remains high it is now possible to find the organization to be liable where no one member of senior management has committed a gross breach of duty, but where the aggregate effects of the actions of different senior managers reach that threshold. Consequently, a larger range of managers’ conduct can now be taken into account as the definition no longer limits itself to the very top of the management hierarchy but extends to senior divisional managers as well.³⁷¹

In relation to civil liability, the usual rule of liability attribution is that of vicarious liability. Thus the company is liable for acts of its officers, agents and employees acting within the scope of their authority or in the course of their employment.³⁷² The question that has been mooted concerning this approach is whether the company can be liable only if an officer, agent or employee commits a tort or whether the company can be liable regardless of the legal effects of the actions of its personnel. The recommended view is that the actions of the personnel can be attributed to the company hence it can be liable regardless of whether the individual concerned is also liable.³⁷³ Accordingly, it is possible to make the company itself liable for actions of its officers in a manner not dissimilar to criminal liability. Section 145 (3) and (4) of EMCA is useful in imputing liability on the agent or servant and that of the corporate employer by providing that:

“A person shall be personally liable for an offence against this Act, whether committed by him on his own account or as an agent or servant of another person....An employer or principal shall be liable for an offence committed by an employee or agent against this Act, unless the employer or principal proves that the offence was committed against his express or standing directions.”

³⁷⁰ See also George O. Otieno Ochich, “The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons” *Kenya Law Review*, Vol. II (2008-2010) 1-35.

³⁷¹ *Ibid* note 370, at p. 1.

³⁷² See generally Steven Shavell, “The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize Their Employees,” *op. cit.*

³⁷³ *Ibid* note 366, at p. 203.

EMCA therefore imputes strict liability through these provisions, and provides for substantive and administrative offences which apply to corporations in which the strict liability applies.³⁷⁴ Substantive offences include: release of any polluting or hazardous substances into the coastal zone;³⁷⁵ and discharge of poison, toxic, noxious or obstructing matter, radioactive waste or other pollutants or permitting any person to dump or discharge such matter into the aquatic environment in contravention of water pollution control standards.³⁷⁶ Emission of any substances which cause air pollution in contravention of emission standards is also included in substantive offences.³⁷⁷ EMCA also criminalizes operation of a motor-vehicle, train, ship, aircraft or other similar conveyance in such a manner as to cause air pollution in contravention of the established emission standards, and the importation of any machinery, equipment, device or similar thing that will cause emissions into the ambient air in contravention of prescribed emission standards.³⁷⁸ In addition, importing into Kenya of any hazardous waste is outlawed under

³⁷⁴ Patricia Kameri-Mbote, "The Use of Criminal Law in Enforcing Environmental Law," in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (ILEG, CASELAP, EAEP: Nairobi, 2008): 110-125 at pp. 120-121.

³⁷⁵ Section 55 (5) of EMCA states that: "Any person who releases or causes to be released into the coastal zone any polluting or hazardous substances contrary to the provisions of this Act shall be guilty of an offence and liable upon conviction to a fine of not less than one million shillings or to imprisonment for a period not exceeding two years or to both such fine and imprisonment".

³⁷⁶ EMCA Section 72 (1) provides that "Any person who upon the coming into force of this Act, discharge or applies any poison, toxic, noxious or obstructing matter, radioactive waste or other pollutants or permits any person to dump or discharge such matter into the aquatic environment in contravention of water pollution control standards established under this Part shall be guilty of an offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding one million shillings or to both such imprisonment and fine."

³⁷⁷ EMCA Section 78 (2) stipulates that "Any person who emits any substances which cause air pollution in contravention of emission standards established under this Part shall be guilty of an offence and liable to imprisonment for a term of not more than two years or to a fine of not more than five hundred thousand shillings or to both such fine and imprisonment."

³⁷⁸ EMCA Section 82 provides for this by stating that "No owner or operator of a motor-vehicle, train, ship, aircraft or other similar conveyance shall – (a) operate it in such a manner as to cause air pollution in contravention of the established emission standards; or (b) import any machinery, equipment, device or similar thing that will cause emissions into the ambient air in contravention of prescribed emission standards."

EMCA.³⁷⁹ The Act also prohibits discharge of any hazardous substance, chemical, oil or mixture containing oil into any waters or any other segments of the environment.³⁸⁰ As a substantive offence, the Act also prescribes as criminal, the use or disposal of a pesticide or toxic substance into the environment.³⁸¹

The administrative offences proscribed in EMCA include the operation of a waste disposal site without a licence,³⁸² and exportation from and transportation within Kenya of any hazardous waste without a permit.³⁸³ The Act also sets out other offences relating to inspection,³⁸⁴ EIAs,³⁸⁵ records,³⁸⁶ standards,³⁸⁷ and restoration orders, easements and conservation orders.³⁸⁸

³⁷⁹ EMCA Section 91 (3) provides for this offence by stating that “No person shall import into Kenya any hazardous waste falling under any category determined under subsection (1).” Subsection 1 categorises hazardous waste in specific categories.

³⁸⁰ In this regard, EMCA Section 93 (1) states that “No person shall discharge any hazardous substance, chemical, oil or mixture containing oil into any waters or any other segments of the environment contrary to the provisions of this Act or any regulations thereunder.”

³⁸¹ EMCA Section 98 (1) (c) provides that “No person shall – (c) use or dispose into the environment a pesticide or toxic substance in contravention of the provisions of this Act.”

³⁸² EMCA Section 87 (1) provides for this offence by stating that: “No person shall discharge or dispose of any wastes, whether generated within or outside Kenya, in such manner as to cause pollution to the environment or ill health to any person.”

³⁸³ EMCA Section 91 (4) provides that “No hazardous waste shall be exported to any country from Kenya without a valid permit granted by the Authority and written consent given by a competent authority of the receiving country.”

³⁸⁴ EMCA Section 137 “Any person who – (a) hinders or obstructs an environmental inspector in the exercise of his duties under this Act or regulations made thereunder; (b) fails to comply with a lawful order or requirement made by an environmental inspector in accordance with this Act or regulations made thereunder; (c) refuses an environmental inspector entry upon any land or into any premises, vessel or motor vehicle which he is empowered to enter under this Act or regulations made thereunder; (d) impersonates an environmental inspector; (e) refuses an environmental inspector access to records or documents kept pursuant to the provisions of this Act or regulations made thereunder; (f) fails to state or wrongly states his name or address to an environmental inspector in the cause of his duties under this Act or regulations made thereunder; (g) misleads or gives wrongful information to an environmental inspector under this Act or regulations made thereunder; (h) fails, neglects or refuses to carry out an improvement order issued under this Act by an environmental inspector; commits an offence and shall, on conviction be liable to imprisonment for a term not exceeding twenty four months, or to a fine of not more than five hundred thousand shillings, or both.”

³⁸⁵ EMCA Section 138 states that “Any person who – (a) fails to submit a project report contrary to the requirements of section 58 of this Act; (b) fails to prepare an environmental impact assessment report in accordance with the requirements of this Act or regulations made thereunder; (c) fraudulently makes false statements in an environmental impact assessment report submitted under this Act or regulations made thereunder; commits an offence and is liable on conviction to imprisonment for a term not exceeding twenty four months or to a fine of not more than two million shillings or to both such imprisonment and fine.”

³⁸⁶ EMCA Section 139 provides that “Any person who – (a) fails to keep records required to be kept under this Act; (b) fraudulently alters any records required to be kept under this Act; (c) fraudulently makes false statements in any records required to be kept under this Act; commits an offence and is liable upon conviction to a fine of not more

3.2.3 Jurisdictional Obstacles to Liability

In addition to substantive and doctrinal obstacles to constitutional environmental rights liability for corporate actors, procedural obstacles have arisen out of the mismatch between the state legal systems and the multinational enterprise activities.³⁸⁹ Thus claims against the parent company of the TNC have often been subjected to lengthy and costly litigation over jurisdiction. This is generally problematic in common law systems espousing the *forum non conveniens* doctrine. Under this doctrine, the court presiding over a case can exercise determining discretion to remove the case and refer it to another, more appropriate, forum in another State. This can be undertaken on the basis of a balancing of private party interests in the conduct of the case and the public interests of the forum and the alternative forum in the jurisdictions involved.³⁹⁰ The private party interests include the location of evidence and witnesses, the cost of presenting the case, the balance of procedural advantages between the parties. This has proved to be an impediment to the conduct of constitutional environmental rights based litigation against parent companies within TNCs.³⁹¹

than five hundred thousand shillings or to imprisonment for a term of not more than eighteen months or to both such fine and imprisonment.”

³⁸⁷ EMCA Section 140 “Any person who – (a) contravenes any environmental standard prescribed under this Act; (b) contravenes any measure prescribed under this Act; (c) uses the environment or natural resources in a wasteful and destructive manner contrary to measures prescribed under this Act; commits an offence and shall be liable upon conviction, to a fine of not more than five hundred thousand shillings or to imprisonment for a term of not more than twenty four months or to both such fine and imprisonment.”

³⁸⁸ EMCA Section 143 “Any person who – (a) Fails, neglects or refuses to comply with an environmental restoration order made under this Act; (b) fails, neglects or refuses to comply with an environmental easement, issued under this Act; (c) fails, neglects or refuses to comply with an environmental conservation order made under this Act; commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding twelve months, or to a fine not exceeding five hundred thousand shillings, or to both.”

³⁸⁹ UN Special Representative of the Secretary General (SRSG), “Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops,” UN Doc. A/HRC/4/35/Add.2 15 February 2007.

³⁹⁰ The public interest may include the extent of regulatory interest in the outcome of the case. See Peter Muchlinski, “Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation,” *op. cit.*

³⁹¹ *Ibid* note 349, at p. 150.

A possible solution to this problem is to develop further the notion of universal jurisdiction for constitutional environmental rights claims against corporate actors. Universal jurisdiction is defined as, “the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state’s own national interests.”³⁹² Crimes under international law, such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances, and crimes under national law of international concern, such as terrorist crimes, are largely subject to universal jurisdiction.³⁹³ Where a corporate actor is implicated in such crimes, universal jurisdiction may be available in principle.³⁹⁴

The principle of universal jurisdiction may also acquire effectiveness in civil as well as criminal cases, if the practice of subjecting TNCs to actions for violations of constitutional environmental rights, arising outside the forum jurisdiction is embraced more at the transnational plane. If universal civil jurisdiction for constitutional environmental rights claims in relation to corporate actors emerges in Kenya, “this would represent an act of legal harmonization and convergence that would further strengthen the emergence of a new transnational order of responsibility.”³⁹⁵

3.3 Primary Legal Implications

Environmental human rights generally envisage corporate environmental accountability standards based on sustainable development, disclosure of environmental information. The right also envisages environmental rights due diligence, prevention and precaution which are international derivatives. Consequently, these initiatives have provided a direct translation of

³⁹² Amnesty International, *Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction* (Amnesty International: London, 2009) at p. 13.

³⁹³ *Ibid* note 392, at p. 13.

³⁹⁴ *Ibid* note 392, at p. 14.

³⁹⁵ *Ibid* note 349, at p. 154.

international environmental law principles, objectives and basic obligations conceived for States' duty to protect into normative standards directly applicable to private corporations as a duty to respect. This inclination marks the implications of the constitutional environmental rights, which may take the following forms: environmental integration; prevention of environmental damage and degradation; precaution in interaction with the environment; disclosure of environmental information; public participation; and sustainable use of natural resources.³⁹⁶ These form the legal implications of the constitutional environmental rights.

3.3.1 Environmental Integration

Environmental integration implies that the State commits to integrate environmental considerations into economic development. It also entails the State considering the needs of socio-economic development in designing, interpreting and implementing environmental obligations.³⁹⁷ Environmental integration translates directly into the general expectation that business enterprises take into account environmental concerns within their corporate decision-making processes and systems. As translated for companies, the integrative implication denotes the consideration of environmental impacts of corporate activities at the Board of Directors' level. This would be instrumental in identifying, rectifying and preventing any negative environmental.³⁹⁸

³⁹⁶ See Elisa Morgera, *Corporate Accountability in International Environmental Law*, (New York: Oxford University Press, 2009), at p. 178.

³⁹⁷ *Ibid* note 396, at p. 179.

³⁹⁸ David M. Ong, "The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives" 12 *European Journal of International Law* 4 (2001) at p. 685 and 695 respectively.

The Constitution also expects companies to pursue at the minimum environmental integration as a precondition for all their operations on a continuous basis.³⁹⁹ Consequently, if a company plans to undertake or already undertakes activities in complete disregard of possible environmental consequences, it would definitely be against minimum environmental standards. Tools for implementing the integration standard by companies have been identified as environmental impacts assessment (EIAs) and the adoption of an Environmental Management Systems (EMS).⁴⁰⁰ This essentially means that the Constitution requires corporations to appropriately install these tools in their interaction with the environment.

3.3.1.1 Environmental Impact Assessments

EIA implies the requirement of: scientific evidence, effective consideration of possible impacts of an entity on the environment, and communication to authorities of the findings of such consideration.⁴⁰¹ In Kenya, EIAs have been principally governed by EMCA until 2010 when the enactment of the Constitution constitutionalized EIAs. Article 69 (1) (f) provides that: “The State shall...establish systems of environmental impact assessment, environmental audit and monitoring the environment.” The implementation framework for this requirement, however, remains under EMCA.

In summary, the EIA process under EMCA commences by the submission of proposed project report to NEMA by a project proponent.⁴⁰² The report is then screened to determine EIA requirement. Screening is undertaken by appointed lead agency in consultation with the

³⁹⁹ *Ibid* note 396, at p. 180.

⁴⁰⁰ *Ibid* note 396, at p. 179.

⁴⁰¹ *Ibid* note 471 at p. 180.

⁴⁰² The process of EIAs is provided for under Part III of the Environmental (Impact Assessment and Audit) Regulations, 2003.

Provincial and District Environmental Committees.⁴⁰³ Where EIA is not required, then NEMA grants an EIA license. However, where EIA is required, scoping is undertaken to identify impact that requires further assessment.⁴⁰⁴ Important aspects of this stage are public participation and issuance of the terms of reference (TORs). The scoping report is supposed to demonstrate how the affected community will be involved in the project formulation stages. Scoping is followed by an EIA study involving the identification, analysis and evaluation of the significance of impacts identified in the TORs.⁴⁰⁵

The study ultimately culminates into an environmental impact statement (EIS) which is submitted to NEMA by the project proponent. The EIS is prepared on behalf of the proponent by a legally registered EIA expert. The EIS is then reviewed by NEMA review experts in conjunction with relevant lead agency, Provincial and District Environmental Committees as well as the public. The review results into a decision to grant licence or to reject a proposal. It includes the review of all the possible alternative actions related to the project.⁴⁰⁶ Such a decision is based on the validity of the EIS. Where a licence is granted, the project is implemented with an environmental management plan (EMP), monitoring and auditing as conditions of approval.

As to the broader implication of integration, companies are required to continuously and regularly assess the possible impacts on the environment of all its activities, on the basis of scientific evidence and communication with likely affected stakeholders. The standard as envisaged under Article 69 (1) (f) of the Constitution requires companies to consider such an assessment in deciding whether to undertake, or continue to carry out, such activities and with

⁴⁰³ Regulation 10, Environmental (Impact Assessment and Audit) Regulations, 2003.

⁴⁰⁴ Regulation 11, Environmental (Impact Assessment and Audit) Regulations, 2003.

⁴⁰⁵ Regulation 12, Environmental (Impact Assessment and Audit) Regulations, 2003.

⁴⁰⁶ Regulation 20, Environmental (Impact Assessment and Audit) Regulations, 2003.

which necessary precautions. The requirement for EIA for companies compels companies' management to consider environmental performance and play a role in the transfer of valuable information on environmental control technology and costs.⁴⁰⁷

The specific implication of the EIA on corporation is its consideration of compliance with environmental law as part of performance.⁴⁰⁸ It provides a(n) (dis)incentive for companies in Kenya to adopt operational policies that are environmentally sensitive hence adding to the corporation's triple bottom line (TBL). TBL is a framework applied in measuring holistic business performance. According to Francis Okomo-Okello, the chairperson of the Barclays Bank of Kenya Board of Directors, TBL "captures the spectrum of values that modern organizations must embrace namely; economic, environmental and social impacts of the business."⁴⁰⁹ TBL, thus, takes into account environmental and social performance not just financial outcomes but also.

Owing to its human rights adaptation, a human rights-based approach to EIA would be useful for integrating EIA into corporate systems and processes. Such an approach can be found in the UN Guidelines on Business and Human Rights.⁴¹⁰ The Guidelines imply that business enterprises should assess the environmental impacts of their activities on environmental human rights

⁴⁰⁷ See basis of this argument, for instance in, C. Pearson, 'Environmental Standards, Industrial Relocation and Pollution Havens', in C. Pearson (ed), *Multinational Corporations, Environment, and the Third World* (Durham: Duke University Press, 1987) at pp. 113 and 128 respectively.

⁴⁰⁸ See Patricia Kameri-Mbote, "The Use of Criminal Law in Enforcing Environmental Law," in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (ILEG, CASELAP, EAEP: Nairobi, 2008) 110-125 at p. 120.

⁴⁰⁹ Francis Okomo-Okello, "The Role of the Private Sector (Banks) in Promoting Compliance with Environmental Law (The Kenyan Experience)," 1 *Kenya Law Review* (2007) pp. 30-80, at p. 43.

⁴¹⁰ See Elisa Morgera, *Final Expert Report: Corporate Responsibility to Respect Human Rights in the Environmental Sphere* (2010) a study commissioned by the EU to "identify cross-learning opportunities between existing environmental protection initiatives in the EU and initiatives to operationalise the State duty to protect under the UN Framework for Business and Human Rights.

periodically. This should be aimed at ensuring that the burden of the negative environmental consequences does not fall on the environmental rights stakeholders.⁴¹¹ The integration of environmental and human rights impacts is considered desirable in light of the links between environmental degradation and the violations of human rights.⁴¹²

These provisions are crucial for realizing environmental protection envisaged under Article 69. Consequently, it is noteworthy that environmental integration incorporates an assessment of environmental impacts by companies prior to commencing a new project. In addition, it incorporates an ongoing process to allow the integration of environmental concerns in its decision-making processes throughout the life of the project by means of auditing and monitoring envisaged under Article 69 (1) (f). Besides, the requirement is vital for strengthening EIAs, environmental audits and monitoring which have had shortcomings under the framework law in Kenya. Some of the generally documented EIA weaknesses applicable to Kenya include: lack of meaningful partnership with the concerned public, poor quality of EISs and inadequate follow up mechanisms of the proposed mitigation measures among others.⁴¹³ The Constitution does not specifically address these shortcomings. However, to the extent that the EIAs have been raised to the constitutional-political bar opens EIAs to an opportunity for reform and expects internalization of thereof by corporations to meet high constitutional expectations.

⁴¹¹ *Ibid* note 410, at p. 5.

⁴¹² See Introduction for Chapter Two of this study under section 2.0

⁴¹³ John Chebii and Irene Maithya, "Environmental Impact Assessment: Enhancing Its Role as a Mechanism for the Protection of the Environment," 6 *Law Society of Kenya Journal* 1 (2010) at pp 159-175. See also Lareef Zubair, "Challenges for Environmental Impact Assessment in Sri Lanka," 21 *Environmental Impact Assessment Review* (2001) 469-479.

3.3.1.2 Environmental Management Systems

Environmental Management Systems (EMSs) have been defined as the organizational structure, practices, processes, resources and responsibilities applied in determining and implementing environmental policy.⁴¹⁴ EMSs operationalise EIA, auditing and monitoring systems to practically internalize corporate environmental impacts for environmental performance. EMSs serve to control both direct and indirect environmental impacts of enterprise⁴¹⁵ EMS involves the installation of systems and process to practically address environmental impacts identified at the EIAs.

The application of EMSs requires companies to engage in a process of continuous improvement of their environmental performance.⁴¹⁶ This is contemplated though the collection and evaluation of information and monitoring of measurable environmental objectives and targets.⁴¹⁷ EMSs have been considered as a core component of corporate environmental accountability since EMSs require mitigation of environmental impacts and proactive environmental performance enhancement by companies.⁴¹⁸ These systems, as relevant to constitutional requirement in Kenya, establish a practical way for companies to assess whether they are employing the best practical compliance means with regard to their environmental performance.⁴¹⁹

⁴¹⁴ Juergen Freimann and Michael Walther, "The Impacts of Corporate Environmental Management Systems: A Comparison between EMAS and ISO 14001," Paper presented at the EASY-ECO Evaluation of Sustainability Euro Conference, May 23 – 25, 2002, Vienna / Austria (on file with the author)

⁴¹⁵ *Ibid* note 414, at p. 1-2.

⁴¹⁶ *Ibid* note 414, at p. 1.

⁴¹⁷ See also Elisa Morgera, *Final Expert Report: Corporate Responsibility to Respect Human Rights in the Environmental Sphere*, *op. cit.*

⁴¹⁸ For instance, International Finance Corporation considers EMSs as such. *Ibid.*

⁴¹⁹ *Ibid* note 414, Stephanie Maier/ Kelly Vanstone, "Do good environmental management systems lead to good environmental performance?"(2005) Ethical Investment Research Services, London, Research Briefing, October 2005. pp. 1-12.

Another important characteristic of the EMS concerns disclosure of information and public participation. Disclosure of public information and public participation are enshrined in the Constitution as procedural rights capable of buttressing constitutional environmental rights in Kenya.⁴²⁰ This requirement is enforced by the requirement for companies to establish a grievance mechanism and a system of external reporting on the management system implementation.⁴²¹ In conclusion, the standard on self assessment of environmental impacts and environmental management is interconnected with that on disclosure of information and public participation under the EMS. Therefore, EMS as an implication of the right shall be instrumental to actualizing procedural rights at the corporate level

3.3.2 Prevention

Prevention means that necessary action should be taken at an environmental damage occurs to prevent such damages. The preventive implication of environmental human rights calls for corporate due diligence to avoid conducts harmful to the environment by controlling activities that may constitute the risk of environmental damage.⁴²² Such measures generally include prohibiting activities that cause or may cause damage to the environment in violation of environmental standards established under Article 69 (1) (g) of the Constitution which states that “The State shall... eliminate processes and activities that are likely to endanger the environment”.

⁴²⁰ See section 2.3.3 in Chapter Two of this thesis discussing these elements as procedural rights.

⁴²¹ See generally W.R. Anton, G. Deltas, and M. Khanna, “Incentives for Environmental Self-Regulation and Implications for Environmental Performance,” 48 *Journal of Environmental Economic Management* 1 (2004) at pp. 632–654.

⁴²² See David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, *op. cit.*

Applied to corporations, a standard based on prevention reinforces the need for companies to consider possible environmental impacts of their activities on the environment. Most importantly, it expects companies to take active steps, including the suspension of certain activities, when this is necessary to prevent damage to constitutionally protected environmental resources.⁴²³ The prevention standard therefore provides another underlying key concept to evaluate companies' assessment of environmental impacts and EMSs. This is based on the prospect that companies not only integrate environmental concerns but actually take positive acts to manage the identified environmental risks.⁴²⁴

Whenever it is established that avoidance of environmental damage is not possible, the Constitution envisages damage control and minimization to be undertaken by the company to limit adverse impacts on the environment.⁴²⁵ This implication means that "companies should put in place contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies, as well as mechanisms for immediate reporting to competent authorities."⁴²⁶

Generally summarized, the preventive implication of constitutional environmental rights in Kenya shall compel corporations to establish and institutionalize corporate environmental rights due diligence. Prevention forms the action limb of precaution and the precautionary principle discussed elsewhere in this Chapter.

⁴²³ See *op. cit* note 422, at p. 189.

⁴²⁴ *Ibid* note 422 at p. 189-190.

⁴²⁵ See Charles O. Okidi, "Concept, Function and Structure of Environmental Law," in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (ILEG, CASELAP, EAEP: Nairobi, 2008) at p. 28

⁴²⁶ See Elisa Morgera, *Corporate Accountability in International Environmental Law*, *ibid* note 51, at p. 183.

3.3.2.1 Corporate Environmental Rights Due Diligence

The due diligence process fuses two conceptually distinct processes; one is an investigation of facts, and the other is an evaluation of the facts in light of the relevant standard of care.⁴²⁷

Conduct of due diligence is not a mechanical process and requires exercise of informed and seasoned judgment by the investigator. Article 69 (1) (f) of the Constitution provides that “The State shall... establish systems of environmental impact assessment, environmental audit and monitoring of the environment.” Section 145 (2) of EMCA provides that:

“Where an offence is committed under this Act by a partnership, every partner or officer of the partnership who had knowledge or who should have had knowledge of the commission of the offence and who did not exercise *due diligence*, efficiency and economy to ensure compliance with this Act, commits an offence.” [Italicization mine for emphasis]

The Constitution and EMCA make the conduct of due diligence a legal requirement, hence the investigator’s failure to exercise reasonable judgment may lead to legal liability for the investigation.⁴²⁸ To sum up the concept in simple terms, due diligence is application of a method by a person who possesses competence in the underlying subject matter.⁴²⁹ Therefore, in order to fulfill the responsibility to respect constitutional environmental rights, corporations must conduct due diligence to assess the environmental human rights risks that may be associated with their activities, operations and business relationships.⁴³⁰

On the standard of care applicable, respecting the letter and the purpose of constitutional environmental rights as well as international human rights is the appropriate standard of care to

⁴²⁷ See UN Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on February 2, 2011).

⁴²⁸ See Linda S. Spedding, *Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning* (Amsterdam: CIMA Publishing, 2009).

⁴²⁹ See Mark B. Taylor, Luc Zandvliet and Mitra Forouhar, “Due Diligence for Human Rights: A Risk-Based Approach.” Corporate Social Responsibility Initiative, John F. Kennedy School of Government, Harvard University Working Paper No. 53.

⁴³⁰ *Ibid* note 427, at Paragraph 25.

apply in environmental human rights due diligence.⁴³¹ The foregoing does not exclude the inclusion of a company's own values and ethical standards as part of that standard of care that due diligence should cover unless such values and standards conflict with the Constitution.⁴³² It should be noted that conducting due diligence as presently designed in Kenya, is not in itself compliance, but a preventive measure against the potential for violating a standard of care. Corporate environmental human rights due diligence processes complement the EIAs, audits and monitoring and supply a safety net for considering issues which the scope of EIAs may not cover.

3.3.3 Precaution

Precaution generally denotes alertness to possible future dangers and exercising an appropriate level of prudence to safeguard against possible danger. Precaution is conceived as a reaction to the challenges faced by decision-makers confronted with uncertainty about potential outcomes.⁴³³ Precaution applies to the definition of precautionary principle. In the case of *Ms Shehla Zia and Others v. WAPDA*,⁴³⁴ the court captured the link between precaution and precautionary principle by defining the precautionary principle thus:

“...there is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and caution. The rule of prudence is to adopt such measures which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the welfare and safety of human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. ...if there are threats of serious danger, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not inconclusive.”

⁴³¹ *Ibid* note 429, at p. 3.

⁴³² *Ibid* note 429, at p. 3.

⁴³³ Arie Trouwborst, “Prevention, Precaution, Logic and Law: The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions,” 2 *Erasmus Law Review* 2 (2009): 105-127.

⁴³⁴ PLD 1994 Supreme Court 693 (Pakistan).

The precautionary principle appreciates the limitations of scientific evaluation, as it is not always able to determine with scientific certainty the likely environmental impacts of a phenomenon, product or process.⁴³⁵

The Constitution envisages precautionary approaches in the fulfillment of constitutional environmental rights under Article 69 (1) (g) which states that “The State shall- eliminate processes and activities that are likely to endanger the environment.” This implies the authority of the State and therefore corporations to take any measures to arrest an environmental risk. The precautionary principle in the context of environmental protection is essentially about the management of scientific risk.⁴³⁶ Section 2 of EMCA defines the principles as “the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” This provision reflects the provision of Principle 15 of the 1992 Rio Declaration states that:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

The provision implies that the State should not rely on the lack of scientific certainty as a reason for not applying cost-effective measures to prevent environmental degradation, where there are threats of serious or irreversible damage to the environment. Although the term “measures” is not entirely clear in the Principle, it has generally been accepted to include actions by regulators

⁴³⁵ David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, Third Edition (New York: Foundation Press, 2007) at p. 405.

⁴³⁶ David Cole, “The Precautionary Principle: Its Origins and Role in Environmental Law,” (2005) <http://edo.org.au/edosa/research/david%20Cole%20onprecautionary%20principle.doc> (last accessed on 27 October 2012)

such as the use of statutory powers to refuse environmental approvals to proposed developments or activities.⁴³⁷ The resultant implication of this principle can be translated into constitutional standards for corporate environmental accountability.

The precautionary implications of Article 42 of the Constitution of Kenya shall significantly alter the processes by which new products and technologies are developed and exploited by corporations *vis-à-vis* the environment. It shall also limit the admissibility of activities recognized as being potentially hazardous, as opposed to leaving such activities unrestricted until actual harm has occurred or is impending.

In general terms, a precautionary standard requires companies to act with care and foresight when making and implementing decisions concerning activities that may have adverse impacts on the environment.⁴³⁸ More specifically, the implication may prevent companies from invoking insufficient scientific certainty about the impacts of the project on the environment as a reason for carrying out activities potentially dangerous for the environment. In addition, this standard implies a shift of the burden of proof, thus requiring that a company proposing an activity will have to prove that such activity will not cause harm to the environment.⁴³⁹

3.3.4 Disclosure of Environmental Information

Improving the availability of information on the state of the environment (SoE) and activities with adverse effects is a requirement of the constitutional environmental rights in Kenya. This is

⁴³⁷ *Ibid* note 433, at p. 110.

⁴³⁸ See Elisa Morgera, "From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?" (2004) 13 *Review of European Community and International Environmental Law*, at p. 214.

⁴³⁹ See Maurice O. Makoolo, Benson O. Ochieng' and Collins Odote, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*, (Ecogovernance Series No. 4) (Institute of Law and Environmental Governance: Nairobi, 2007) at p. 26.

a prerequisite for effective environmental management, protection and cooperation as well as for allowing preventive and mitigation measures and enhancing public participation.⁴⁴⁰ The legal justification for disclosure of environmental information under the Constitution is founded on the right of access to information which is provided for under Article 35 (1) that:

“Every citizen has the right of access to—
(a) information held by the State; and
(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”

This provision, especially paragraph (b) thereof, shall be instrumental in compelling corporations to disclose any information if that information is to be used to protect the right to clean and healthy environment. Until this enactment, EMCA largely provided for disclosure of information though the publication of EIA reports and invitation of the public to comment on the same.⁴⁴¹ Although restricted to information on environmental impact, the application of EMCA in this regard will remain instrumental in disclosure. In this regard, the constitutional environmental rights therefore provide a safety net on the nature and scope of information where EMCA is restrictive.

Disclosure of environmental information is also the basis of the private sector cooperation with local and other authorities, particularly for compliance with the prevention standard.⁴⁴² Against this background, information held by companies should be disclosed when a key stakeholder interest such as the environment is at risk.⁴⁴³ This is rationalized by the argument that companies are well capable of providing timely response information, are likely to possess the most updated

⁴⁴⁰ Philippe Sands, *Principles of International Environmental Law*, 2nd ed (Cambridge: CUP, 2003) at p. 826.

⁴⁴¹ See Regulation 21 of Environmental (Impact Assessment and Audit) Regulations, 2003.

⁴⁴² See Catá Backer, Larry, “From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations,” 39 *Georgetown Journal of International Law* (2008), at p. 591.

⁴⁴³ *Ibid* note 442, at p. 591.

information on specific technologies and are best placed to transmit such information intranationally.⁴⁴⁴

Other specific obligations of the corporation in this regard imply a duty for private companies to disclose environmental information and cooperate with public authorities as captured under Article 69 (2) of the Constitution of Kenya. The standard for disclosure of environmental information applies to companies not only before a certain project or activity is commenced, during the life of such project where the impact has to be audited and monitored.

3.3.5 Public Participation

Article 69 (1) (d) stipulates that “The State shall... encourage public participation in the management, protection and conservation of the environment.” This provision read together with Article 69 (2) which incorporates the obligation of all persons to cooperate with the State in fulfilling the objectives of the constitutional environmental rights imply that companies shall facilitate public participation of affected communities. The UN Guidelines on Business and Human Rights have identified a role for the companies in ensuring participation of affected individuals, which has also been highlighted in several instances by human rights monitoring bodies considering cases of corporate environmentally irresponsible conduct.⁴⁴⁵ Public participation shall only meet the constitutional standards if it is prior informed thus translating into investment in effective communication mechanisms.⁴⁴⁶

⁴⁴⁴ *Ibid* note 442, at p. 591. See also Elisa Morgera, *op. cit.*

⁴⁴⁵ See generally P.W. Scroth, “Public Participation in Environmental Decision-Making: A Comparative Perspective” 14 *Forum* (1979), at pp. 352-368

⁴⁴⁶ See *Ibid* note 445, at p. 367.

According to these recurring international recommendations, it seems that communities' involvement should be ensured by the private sector particularly in cases where expected or likely environmental impacts may also hinder the enjoyment of local and indigenous communities' rights.⁴⁴⁷ In addition, involvement of these communities in the EIA and management of corporations' projects can contribute to the quality of the assessments, information for better decision-making, solutions to mitigation and contingency planning.⁴⁴⁸

The requirement for public participation reflects the demands of Principle 10 of RDED which provides that: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level." Moreover, the Constitution of Kenya strengthens public participation in governmental processes in a manner applicable to corporations in environmental governance. For instance, Article 10 (2) (a) of the Constitution provides public participation as a national value and principle in governance. The provision provides that national values and principles bind all persons whenever they apply the Constitution. The definition of persons incorporates companies. In addition, EIAs also make public participation in the EIA process mandatory hence applying to corporations that plan to undertake EIA-dependent projects.⁴⁴⁹

The courts in Kenya have had the occasion to invoke the primacy of public participation in environmental governance. The case of *Musa Mohammed Dagane & 25 others v. Attorney General & Another*⁴⁵⁰ underpins the importance of public participation in environmental decision-making processes, lack of which renders such processes irregular. Also reflecting the

⁴⁴⁷ Article 69 (1) (c) of the Constitution of Kenya (quoted in *extenso* at p. 3-4 of this thesis).

⁴⁴⁸ See Annel Du Plessis "Public participation: A pillar for the fulfillment of environmental rights" 2 *Potchefstroom Electronic Law Journal* (2008), pp. 1-34.

⁴⁴⁹ See for instance, Regulation 17 of the Environmental (Impact Assessments and Audit) Regulations, 2003.

⁴⁵⁰ Constitutional Petition No.56 of 2009 (2011) eKLR.

foregoing perspective, the court in the case of *Bogonko v. National Environment Management Authority*,⁴⁵¹ held that the public had been denied the right to participate in the EIA process by a proponents failure to advertise an EIA study report. The court stated that:

“The purpose of advertisement is to ensure that members of public do see the proposed project and give their comments as to whether the project is viable or not. If they object to it, the reasons for such objection must be given. In this case the members of public were denied sufficient opportunity to respond and make their comments.”

3.3.6 Sustainable Use of Natural Resources

On sustainable use of natural and environmental resources, Article 42 (a) provides that “Every person has the right to a clean and healthy environment, which includes the right— (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69.” Clause 1 (a) of the Article 69 referred expounds on the constitutional expectation by stating that “The State shall—ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources....” These provisions impute an obligation on the part of corporations to ensure sustainable use of natural resources through taking all necessary steps to conserve such resources for future generations.

The implication arises out of the concept of sustainable development. This concept is one of the foundations of the international agenda on corporate environmental accountability since it can be identified as a constitutional standard applicable to the business community. Charles Okidi defines the implication by arguing that it envisages that “all environmental management

⁴⁵¹ 1 Kenya Law Reports (Environment and Land) 2006 pp. 772-783.

strategies be aimed at meeting the development objectives of present generation without jeopardizing the interests of the future generation to enjoy the same....”⁴⁵²

The specific implication of the requirement of sustainable use of environmental and natural resources on corporations in Kenya as envisaged under Article 42 (a) as read with 69 (1) (a) of the Constitution shall be the constitutional demand for and entrenchment of corporate sustainability in Kenya.

3.3.6.1 Corporate Sustainability

Corporate sustainability as a consequence of constitutional environmental rights arises from the rights requirement for sustainable development.⁴⁵³ In fact, it is an offshoot of sustainable resource utilization. The need for sustainable development comes from the realization that the development, centered only on economic growth paradigms may be unsustainable and there is need for a more proactive role by corporations in the development process.⁴⁵⁴

Generally, corporate sustainability can be regarded as the corporate response to sustainable development represented by strategies and practices that address the key issues for the world’s sustainable development.⁴⁵⁵ Sustainable development is about creating the conditions for better quality of life for everyone, now and in the future, based on eco-efficiency and good environmental governance.

⁴⁵² Charles O. Okidi, “Concept, Function and Structure of Environmental Law,” in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (ILEG, CASELAP, EAEP: Nairobi, 2008) at p. 30.

⁴⁵³ See Judd F. Sneirson, “Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance,” 94 *Iowa Law Review* (2009), pp. 1019-1020.

⁴⁵⁴ *Ibid* note 454, at p. 1019. See also Pogutz, Stefano, Valerio Micale and Monika I. Winn. “Corporate Environmental Sustainability Beyond Organizational Boundaries: Market Growth, Ecosystems Complexity and Supply Chain Structure as Co-Determinants of Environmental Impact,” 1 *Journal of Environmental Sustainability* (2011): 39-60.

⁴⁵⁵ *Ibid* note 454, at p. 997.

Corporate sustainability implies that a corporation's services or product compete in the market in a manner that reduces environmental degradation. Price Waterhouse Coopers (PWC) defines corporate sustainability as aligning an organization's products and services with stakeholder expectations, thereby adding economic, environmental and social value.⁴⁵⁶ The scope of corporate sustainability largely entails companies contributing effectively to sustainable development.

In summation, corporate sustainability is viewed an alternative to the traditional growth and profit-maximization model in corporate governance.⁴⁵⁷ While corporate sustainability recognizes that corporate growth and profitability are important, it also requires the corporation to pursue societal goals. Specifically, such goals relate to sustainable development in the form of environmental protection, social justice and equity, and economic development.⁴⁵⁸

Consequently, the corporate sustainability implications of constitutional environmental rights are twofold: firstly, companies shall be expected to integrate environmental responsibility at all levels of their operation. Connected to this, companies are required to find sustainable solutions for natural resource use in order to reduce company's impact on the environment. In addition, the corporation is required to manage environmental risks ensuring reduction in waste, pollution and emissions. Besides, such rights shall demand of the corporation to maximize the efficiency and productivity of all assets and resources including improvements in the management of water,

⁴⁵⁶ Michael Adams, Barry Thornton, and Mohammad Sepehri, "The impact of the pursuit of sustainability on the financial performance of the firm," *op. cit.*

⁴⁵⁷ See Frank Figge, Tobias Hahn, Stefan Schaltegger and Marcus Wagner, "The Sustainability Balanced Scorecard: Linking Sustainability Management to Business Strategy," 11 *Business Strategy and the Environment* (2002), at p. 271.

⁴⁵⁸ *Ibid* note 457, at p. 272.

energy and materials.⁴⁵⁹ Secondly, corporate environmental performance shall be required to be measured against evolving environmental priorities and targets integrated into the operational process of corporate governance.

3.4 Implications Auxiliary to Primary Legal Implications

The constitutional environmental rights present certain implications as a consequence of non-compliance with or adjustments for compliance with the rights. For the purposes of this thesis, these are termed auxiliary legal implications since they arise out of the direct consequences of the right but fall into the core of corporate governance. The implications are discussed below.

3.4.1 Corporate Restructuring

The implication of the rights may result in corporate restructuring to enable the corporation comply with the demands of constitutional environmental rights in Kenya. In terms of a microeconomic restructuring there might occur changes both at the company level or at the levels of its particular parts. Restructuring represents an essential reconstruction of an enterprise strategy, structures and processes and their tuning with the holistic demands of the Constitution.

The specific forms of restructuring which the constitutional environmental rights may trigger include portfolio, financial and organizational restructuring.⁴⁶⁰ Portfolio restructuring involves changes in the asset composition of the organization, that is, addition or disposal of assets from the organization's business. It includes acquisitions, asset sales, divestitures, liquidations, spin-offs or a combination thereof in order to dispose of the portfolio costily under the right or acquire those beneficial thereunder towards fulfillment of the right. Environmental liability may cause

⁴⁵⁹ *Ibid* note 457, at p. 272.

⁴⁶⁰ P. A. Gaughan, *Mergers, Acquisitions and Corporate Restructuring*, 3rd ed. (New York: John Wiley & Sons, 2002) pp. 1-5.

operations which anticipate or incur losses in one portfolio to restructure the same for increased compliance.

Financial restructuring on the other hand involves changes in the capital structure of an organization which includes leveraged buyouts, leveraged recapitalisation and debt for equity exchanges.⁴⁶¹ This implies that corporations shall cause financial adjustment to accommodate the legal pressures presented by the constitutional environmental rights in Kenya.

Organizational restructuring involves the reorganization of the institutional structure which include: divisional redesign, reducing the hierarchical level, reduction in product diversification, compensation revision, improving governance and workforce reductions.⁴⁶² However, it is more dependent upon the circumstances in which it is initiated. In the instance of constitutional environmental rights, the reorganization may include an establishing an organization's component to address environmental accountability of the corporation at the Board and the Management levels of the organization.⁴⁶³

3.4.2 Corporate Strategy for Managing Environmental Risks

The constitutional environmental rights shall ultimately require corporations to internalize the risks of (non-compliance with) the rights under Article 42. The corporations may be driven to take strategic measures in pursuit of the proactive or precautionary purport of the Constitution hence the establishment of sound corporate strategy for the management of environmental risks.⁴⁶⁴ Among the documented implications of the strategies include the reduction in operating

⁴⁶¹ *Ibid* note 460, at p. 1.

⁴⁶² *Ibid* note 460, at p. 1.

⁴⁶³ *Ibid* note 460, at p. 5.

⁴⁶⁴ Scott Victor Valentine, "The Green Onion: A Corporate Environmental Strategy Framework," *Corporate Social Responsibility and Environmental Management* (2009) pp. 1-15.

costs, the trigger for sustainable utilization of resources, and the stimulation of innovation in production technology.⁴⁶⁵ The strategy generally incorporates all mechanisms that can be used to effectively internalize all the implications of constitutional environmental rights and practical mechanisms for addressing the implications.

3.4.3 Financial Implications

Constitutional environmental rights require an investment to ensure a sustained commitment for compliance from the corporation. Risks include community or political opposition leading to loss of legal licence to operate, reputational damage, costly litigation and other financial implications. The financial implications are discussed below. These are addressed in this thesis demonstrate the possible financial costs of [non-]compliance with the right to clean and healthy environment.

3.4.3.1 Financing Corporate Liability and Compliance

Corporate liability for constitutional environmental rights will affect corporations and the economy by influencing the behaviour of individual corporations.⁴⁶⁶ Specifically, expanded liability envisaged by the scope of Article 42 will affect the costs and benefits associated with corporate decisions.⁴⁶⁷

Environmental liability shall also affect aspects of waste management as well as corporate aspects related to locational decisions which shall require the consideration of potential legal financial liabilities. This may also imply the costs of documenting the environmental status of a

⁴⁶⁵ *Ibid* note 464, at p. 2.

⁴⁶⁶ Reinier H. Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls," *op. cit.*

⁴⁶⁷ Christina Simeone, *The Necessity and Possibilities of Constitutional Environmental Rights* (Master of Environmental Studies Thesis: University of Pennsylvania, 2006) at p. 1-5.

site before authorizing its acquisition, and legal and technical experts will have to sign off on the documentation before it can be submitted to a company's Board for decision at a cost.⁴⁶⁸

Environmental liabilities can also lead to a more rigorous testing of the environmental consequences of new products and processes.⁴⁶⁹ This may reduce the capital available for investment in other portfolios and related factors of production, leading to a decline in measured productivity.⁴⁷⁰ A similar effect can be expected from any environmental liability-induced decline in the value of existing corporate assets since resources will be devoted to replacing assets that could continue to function if these liability concerns would be absent.⁴⁷¹

3.4.3.2 Financing Agency Costs

In corporate governance, agency relationship is regarded as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some act on their behalf which involves delegating some decision making authority to the agent.⁴⁷² If both parties to the relationship are utility maximizers, the agent is unlikely act in the best interests of the principal since the agent wants to maximize utility suitable to him or her.⁴⁷³ Hence, the principal can limit divergences from his interest by establishing appropriate incentives for the agent and by incurring monitoring costs designed to limit the irregular activities of the agent.⁴⁷⁴ In addition in some situations it will pay the agent to expend resources (bonding costs) to guarantee that he will

⁴⁶⁸ *Ibid* note 467, at p. 1.

⁴⁶⁹ *Ibid* note 467, at p. 24.

⁴⁷⁰ Gallhofer, S. and J. Haslam, "The Direction of Green Accounting Policy: Critical Reflections," 10 *Accounting, Auditing, and Accountability Journal* 2(1997): 148-174.

⁴⁷¹ Reinier H. Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls," *op. cit.*

⁴⁷² Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure." *Journal of Financial Economics* 3, no. 4 (1976): 305-360.

⁴⁷³ Eugene F. Fama, "Agency Problems and the Theory of the Firm," *The Journal of Political Economy* 88, no. 2 (April 1980): 288-307.

⁴⁷⁴ *Ibid* note 473, at p. 288.

not take certain actions which would harm the principal or to ensure that the principal will be compensated if he does take such actions.⁴⁷⁵

However, it is generally unfeasible for the principal to ensure that the agent will make optimal decisions from the principal's viewpoint at zero cost.⁴⁷⁶ In most agency relationships the principal and the agent will incur positive monitoring and bonding costs (non-pecuniary as well as pecuniary), and in addition there will be some divergence between the agent's decisions⁴⁷⁷ and those decisions which would maximize the welfare of the principal.⁴⁷⁸ The financial equivalent of the reduction in welfare experienced by the principal as a result of this divergence is also a cost of the agency relationship commonly referred to as "residual loss".⁴⁷⁹ Consequently, agency cost is defined as the sum of the monitoring expenditures by the principal, the bonding expenditures by the agent, and the residual loss.⁴⁸⁰ The agency costs are therefore the costs involved problem of inducing an agent to behave as if the agent were maximizing the principal's welfare is quite general.⁴⁸¹

Since the relationship between the shareholders and the managers of a corporation considering those in charge of environmental compliance fits the definition of a pure agency relationship, the issues associated with the "separation of ownership and control" in the modern diffuse

⁴⁷⁵ *Ibid* note 473, at p. 290.

⁴⁷⁶ *Ibid* note 473, at p. 290.

⁴⁷⁷ Patrick McColgan, "Agency Theory and Corporate Governance: a Review of the Literature from a UK Perspective" Working Paper Series. University of Strathclyde, May 22, 2001. <http://accfinweb.account.strath.ac.uk/wps/journal.pdf>.

⁴⁷⁸ *Ibid* note 477, at p. 11.

⁴⁷⁹ *Ibid* note 477, at p. 4.

⁴⁸⁰ Eugene F. Fama and Michael C. Jensen, "Agency Problems and Residual Claims." *Journal of Law and Economics* 26, no. 2 (June 1983): 327-349.

⁴⁸¹ *Ibid* note 480, at p. 348-349.

ownership corporation are intimately associated with the general problem of agency costs.⁴⁸²

Relevant to the relationship and associated costs, section 145 (4) of EMCA provides that:

“An employer or principal shall be liable for an offence committed by an employee or agent against this Act, unless the employer or principal proves that the offence was committed against his express or standing directions.”

This provision addresses the principal agent relationship by imputing liability on the principal unless authority for the agent to act in manner leading to environmental damage is proved as lacking.

3.4.3.3 Corporate Financial Relationships and Environmental Rights

Financial markets and the financial services industry are key to sustainability as they raise, allocate and price capital, and provide risk coverage, influencing access to financing and risk protection and determining which government, business or individual activities get financed.⁴⁸³

The impact of Article 42 extends to the finance industry which should be accountable to the stakeholders to ensure their lending operations contribute to creating healthy environment that preserves the ecological well-being of the planet.⁴⁸⁴

Against the foregoing background, a business case for sustainability in the finance sector has been developed. This case includes taking into account social and environmental aspects, investors minimizing risk, further improving the TBL and creating long term value of the corporation.⁴⁸⁵ This is further justified by the argument that responsible business conduct is a means of maintaining reputation and that integrating environmental and social issues into

⁴⁸² See Eugene F. Fama, “Agency Problems and the Theory of the Firm” *op cit*.

⁴⁸³ Aloy Soppe, “Sustainable Corporate Finance,” 53 *Journal of Business Ethics*, (2004), pp. 213-224.

⁴⁸⁴ Francis Okomo-Okello, “The Role of the Private Sector (Banks) in Promoting Compliance with Environmental Law (The Kenyan Experience),” 1 *Kenya Law Review* (2007) pp. 30-80.

⁴⁸⁵ *Ibid* note 484, at p. 42.

business evaluation processes may lead to fresh business opportunities.⁴⁸⁶ It has also been noted that integrating sustainable development into overall policies improves morale and provides a strong and confident long-term relationship with stakeholders, hence building good operational environment for corporate governance.⁴⁸⁷

The foregoing amount to sustainable corporate finance which can be defined as the provision of financial capital and risk management products and services in ways that promote or do not harm economic prosperity, the environment and community well-being.⁴⁸⁸ In fact, the Constitution impliedly demands sustainable corporate financing under Article 42 as read with Article 69.

3.5 Carbon Trading as an Implication of Constitutional Environmental Rights

The proactive intendment of constitutional environmental rights may act as a compelling factor for corporations to participate in the emissions trading schemes (ETSs). The Kyoto Protocol to the UNFCCC was adopted in 1997 and established emissions trading mechanism aimed at reducing green house gas (GHG) emissions while attaching enormous financial incentives and penalties for such reduction.⁴⁸⁹ This shall open up significant opportunities for businesses in the global carbon markets. Kenyan corporations with substantive GHG emissions may consider participating in emissions trading for the purposes of fulfilling their respective commitments under the Protocol.⁴⁹⁰ The aim is to ensure that the GHG emissions in Kenya meet the Kyoto targets.

⁴⁸⁶ *Ibid* note 484, at p. 42.

⁴⁸⁷ *Ibid* note 484, at p. 43, 56.

⁴⁸⁸ Aloy Soppe, "Sustainable Corporate Finance," *op. cit.*

⁴⁸⁹ Shann Turnbull, "Money, Markets and Climate Change," (2009) available at <http://ssrn.com/abstract=1304083> (accessed on February 3, 2011).

⁴⁹⁰ *Ibid* note 489, at p. 1.

An ETS works by setting a target with a pricing mechanism to meet that target.⁴⁹¹ Countries, such as Kenya, that are parties to the Kyoto Protocol and who meet their emissions reduction targets shall be allowed to trade emission units generated through any surplus reductions on the international emission trading market.⁴⁹²

Corporations will need to consider how they can reduce carbon emissions in their business operations towards meeting the Article 42 goals. The industries and corporations operating therein, that will be most heavily affected by the Kyoto Protocol will likely to be those in the power generation, transport and manufacturing businesses as well as those in construction and agricultural production.⁴⁹³ Operating costs would increase and, at the end of the day, those costs would be passed on by increases in the cost of energy and a range of goods and services to the consumers.⁴⁹⁴

Furthermore, directors of companies that have international operations and affiliations or with significant international markets would also need to incorporate the various legal and regulatory developments overseas into their business plans.⁴⁹⁵ These businesses would need to consider, for instance, participation in the recently established Africa Carbon Exchange (ACX) based in Nairobi with lessons from the ETS in the United Kingdom, Europe and also in many states in the United States of America.

⁴⁹¹ *Ibid* note 489, at p. 15.

⁴⁹² *Ibid* note 489, at p. 18.

⁴⁹³ *Ibid* note 489, at p. 7.

⁴⁹⁴ *Ibid* note 489, at p. 12.

⁴⁹⁵ Donald F. Larson, *et al* (2008) "Carbon Markets, Institutions, Policies, and Research," *Policy Research Working Paper 4761*, The World Bank, New York.

3.6 Chapter Conclusion

This Chapter has examined the challenges peculiar to enforcing the constitutional environmental rights under the Constitution. Concerning these challenges, the Chapter has argued that there is need to address the challenges to facilitate optimal implementation by removing structural technicalities on the corporate legal personality. The Chapter has made preliminary proposals addressing these challenges for optimal assessment of implications. For corporate responsibility and accountability purposes, addressing such challenges would be helpful in imposing effective externalities through certain primary legal implications arising from the direct expectation of the constitutional environmental rights. In addition, this Chapter has argued that certain secondary implications will apply to the corporation as a result of (non)compliance with the environmental human rights and includes resultant financial implications. The Chapter has also argued that these implications of constitutional environmental rights have to be considered as external costs which must be internalized by corporations to meet the demands of Article 42. Chapter Four of this thesis assesses some modalities for internalization to ensure corporate responsibility and accountability for constitutional environmental rights.

CHAPTER FOUR

ADDRESSING THE IMPLICATIONS OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS FOR CORPORATE SUSTAINABILITY

4.1 Introduction

The ultimate effect of constitutional environmental rights on corporate governance is the requirement that corporations design and adopt [proactive] approaches to dealing with the environmentally harmful products and production processes. This constitutional demand impliedly requires corporations to internalize the expectations of constitutional environmental rights as external legal costs.⁴⁹⁶ This ensures the integration environmental considerations into business decisions, systems, processes and outcome thereof.⁴⁹⁷ This effect has the implication of requiring the establishment and operation of mechanisms facilitative of addressing the implications highlighted in the previous Chapter of this thesis.

This Chapter outlines corporate level mechanisms for addressing the implications to ensure compliance with the Constitution. The Chapter therefore assesses the strategies which are essentially a product of the corporation internalizing the requirements of constitutional environmental rights in Kenya. It evaluates the use of corporate governance as a tool for ensuring corporate compliance with constitutional environmental rights. The Chapter attempts to answer

⁴⁹⁶ See Elisa Morgera, *Corporate Accountability in International Environmental Law*, (New York: Oxford University Press, 2009), at pp. 150 and 182 respectively. See also, generally, Tim Hayward, *Constitutional Environmental Rights*, (London: Oxford University Press, 2005) at 106-110. See also, generally, Adebajji Adekoya & Emmanuel Ekpenyong, "Corporate Governance and Environmental Performance: Three Point Strategy for Improving Environmental Performance among Corporation in Africa," IALA Conference Proceedings, 29th Annual Conference of the International Association for Impact Assessment, 16-22 May 2009, Accra International Conference Centre, Accra, (on file with the author).

⁴⁹⁷ See generally Kiarie Mwaura, "Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil" *Harvard Law School's Human Rights Program Working Paper Series*, (2008) [http://www.law.harvard.edu/programs/hrp/Mwaura Working Paper.pdf](http://www.law.harvard.edu/programs/hrp/Mwaura%20Working%20Paper.pdf) (accessed on November 20, 2011). See also OECD, "Annual OECD Roundtable on Corporate Responsibility—Developing a Proactive Approach to the OECD Guidelines: Summary of Discussions," (19 June 2006).

the question: how can the implications of constitutional environmental rights in Kenya be internalized in corporate governance for optimal compliance therewith?

4.2 Designing Corporate Environmental Management Systems

To address the constitutional expectation of environmental integration, embedding environmental management systems in corporate governance is a recommended tool. This will ensure that corporations incorporate environmental management into their overall management systems to address corporate impact on the environment. Cary Coglianese and Jennifer Nash have argued that significant and long-term improvement in a corporate environmental performance requires change in organizational structures and corporate culture.⁴⁹⁸ Instrumental towards this end is the formal environmental management systems (EMS) development and implementation which requires a substantial, organization-wide undertaking, especially under leading external EMS standards. This process can have a fundamentally transformative effect on corporation's organizational architecture and culture.⁴⁹⁹ Comprehensive EMS implementation entails integrating environmental management issues into the company's existing internal governance systems.⁵⁰⁰ Such institutional restructuring integrates environmental considerations with other primary corporate functions, resulting into corporate cultural transformation beneficial to the company's environmental performance and outcomes.⁵⁰¹

Consequently, as a result of this requirement on integration, the environmental governance framework in Kenya needs to establish and apply mechanisms or guidelines for design and

⁴⁹⁸ Cary Coglianese and Jennifer Nash, "Environmental Management Systems the New Policy Agenda," in Cary Coglianese and Jennifer Nash (eds), *Regulating From The Inside: Can Environmental Management Systems Achieve Policy Goals?* (Resources for the Future: Washington D.C, 2001) at p. 11.

⁴⁹⁹ See various propositions on this argument in David Case, "Changing Corporate Behaviour through Environmental Management Systems," 31 *William and Mary Environmental Law Review*, (2006), pp. 75-79.

⁵⁰⁰ *Ibid* note 499, at p. 100-101.

⁵⁰¹ *Ibid* note 499, at p. 101.

possibly adoption of corporate EMS. The two most frequently used guidelines for EMS design and certification are the international standard, ISO 14001, and the European Union (EU) standard, Eco-Management and Audit Scheme (EMAS).⁵⁰²

ISO 14001 provides guidelines by which corporations may design and implement an EMS that identifies the organization's environmental policy, the environmental aspects of their operations, legal and other requirements.⁵⁰³ The ISO standards also provide for a set of clearly defined environmental objectives, targets for environmental improvement, and a set of environmental management programs.⁵⁰⁴ Moreover, ISO 14001 requires a system of implementation and operation, including a clear structure of responsibility for environmental management, programs for training, awareness and competence among all employees of the corporation. This system also incorporate internal and external communication of the EMS, a system of environmental management documentation, a documentation control system, procedures for operational controls of environmental impacts, and emergency preparedness and response.⁵⁰⁵ ISO 14001 includes provisions for creating a system of checks and corrective action that includes monitoring and measurement, reporting on non-compliance and taking corrective and preventative action, as well as record-keeping with regard to environmental management.⁵⁰⁶ The ISO standards also make requirement for EMS audits and a management review process through

⁵⁰² See generally David Morrow and Dennis Rondinelli, "Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification," 20 *European Management Journal* 2(2002), pp. 159-171. See also Juergen Freimann and Michael Walther, "The Impacts of Corporate Environmental Management Systems: A Comparison between EMAS and ISO 14001," Paper presented at the EASY-ECO Evaluation of Sustainability Euro Conference, May 23 - 25, 2002, Vienna / Austria.

⁵⁰³ See David Case, "Changing Corporate Behaviour through Environmental Management Systems," *op. cit* at pp. 104-105.

⁵⁰⁴ ISO, *ISO 14001: Environmental Management Systems - Specification with Guidance for Use* (ISO: Geneva, 1996).

⁵⁰⁵ David Morrow and Dennis Rondinelli, "Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification," *Ibid* note 502, at p. 162.

⁵⁰⁶ David Morrow and Dennis Rondinelli, "Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification," *ibid* note 502, at p. 162.

which the corporations' Boards and management periodically reassesses the suitability, effectiveness, and adequacy of the EMS to assure continuous improvement.⁵⁰⁷

In Kenya, the Kenya Bureau of Standards (KEBS), which is charged with enforcing standards and assuring quality of goods in Kenya, encourages the adoption of ISO 14001:2004 by providing training opportunities on the same through its National Quality Institute (NQI).⁵⁰⁸ The voluntary character of this approach may not necessarily lead to the adoption of the EMS. This thesis proposes a progressively mandating approach.

On the other hand, the EMAS registration, which is administered by a State authority, provides that corporations registered thereunder must report on environmental effects and legal requirements of a corporate operation.⁵⁰⁹ EMAS requires internal system compliance and performance audits, and external verification must be conducted periodically.

ISO 14001 and EMAS; therefore, adopt different regulatory strategies. ISO 14001 provides guidelines that can be implemented by almost any type of organization in any country and was designed primarily to improve management on a purely voluntary basis.⁵¹⁰ EMAS, on the contrary, is designed to bring about changes in environmental performance as a pseudo-mandatory legal requirement for corporations registered under it.⁵¹¹ It is pseudo-mandatory because it involves the State giving corporations the condition that they either adopt the EMS in

⁵⁰⁷ David Morrow and Dennis Rondinelli, "Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification," *op. cit* at p. 162.

⁵⁰⁸ See, for example, KEBS, "Training Programme Year 2012," (KEBS: Nairobi, 2012) at p. 8

⁵⁰⁹ See Juergen Freimann and Michael Walther, "The Impacts of Corporate Environmental Management Systems: A Comparison between EMAS and ISO 14001," *Ibid* note 502, at p. 1.

⁵¹⁰ See also David Morrow and Dennis Rondinelli, "Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification," *op. cit* at pp. 170-171.

⁵¹¹ See generally David Case, "The EPAs Environmental Stewardship Initiative: Attempting to Revitalize a Floundering Regulatory Reform Agenda," 50 *Emory Law Journal* 1, at p. 16-26. See also David Case "Changing Corporate Behaviour through Environmental Management Systems," *op. cit* at pp. 108-111.

exchange for limited regulatory controls, or fail to adopt and face heavy regulatory controls.⁵¹²

The EMAS approach is generally suitable for optimal realization of the goals of constitutional environmental rights.

However, the EMAS approach would be strengthened if it taps into the merits presented by ISO certification and infuses some level of compulsion on corporations. In this regard, Kenya can adopt the EMAS approach but customize the approach to incorporate ISO 14001 as a key element. In this integrated approach, the EMAS approach which goes beyond the scope of ISO 14001 by establishing minimum standards for auditing and the elaboration of environmental reports as a legal standard.⁵¹³

As a benefit, EMS adoption enables corporations to realize sound environmental performance by controlling the impact of an organization's activities, products or services on the environment.

4.3 Corporate Environmental Due Diligence and Impact Assessments

Corporate environmental human rights due diligence and EIAs are some of the tools that have been developed to assist corporations in effecting their EMSs. Without the results from the EIAs and due diligence, corporate environmental management may have no input to initiate an action.

In this sense, due diligence and EIAs are regarded as forming part of EMSs.

Whereas EIA is some form of due diligence and is already entrenched in the Kenyan law vide EMCA, the beginning point for due diligence on environmental rights as human rights need to be considered and provided for in the law. This is so because the law largely provides for the impact

⁵¹² David W. Case, "Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective," *University of Colorado Law Review* 76 (2005), at p. 379-380.

⁵¹³ See Juergen Freimann and Michael Walther, "The Impacts of Corporate Environmental Management Systems: A Comparison between EMAS and ISO 14001," *op. cit.*

of corporate activity on the environment, without clearly addressing other related risks to the corporation which is essentially the gap filled by due diligence on environmental rights as human rights. Analyses and conclusions emanating from a due diligence investigation should not be strictly legal in nature, but rather should present a holistic assessment of impact hence widening the scope of corporate impact assessment. The rationale for this character is to provide creative modalities for balancing and managing risk of harm to stakeholders as well as to the corporation.⁵¹⁴ In effect, continuous due diligence and impact assessment should be integrated in a mandatory EMS proposed herein to internalize the implications of the rights.

One of the benefits of a risk-based approach to environmental human rights due diligence is that the outcomes of the due diligence process can be fed into the existing corporate risk control system, rather than adding a separate system (of regulation) that managers must comply with.⁵¹⁵ This places the due diligence process as one of several inputs to the larger risk management of a company. It also locates human rights due diligence alongside other inputs that managers need in order to both meet basic standards and improve business performance. In addition, in the value of due diligence can also be found in section 145 (1) of EMCA which states that:

“When an offence against this Act, is committed by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence.”

The provision makes it possible to undertake holistic due diligence, properly undertaken, may protect companies against the risk of civil and criminal liabilities for alleged participation in human rights violations.

⁵¹⁴ Elisa Morgera, *Final Expert Report: Corporate Responsibility to Respect Human Rights in the Environmental Sphere* (2010) a study commissioned by the EU, *op. cit.*

⁵¹⁵ *Ibid* note 514, at p. 8.

However, the challenge in deriving full benefit from the use of the environmental human rights due diligence method is its integration into corporate risk control systems. The reason for this is that corporations are generally acclimatized to centralized risk management systems in their legal and financial functions. Many corporations are hesitant to adopt the same approach in managing nonfinancial or non-legal risks.⁵¹⁶

Therefore, controlling risk may begin with a sound corporate policy under a corporation's governing instruments. This involves basic questions about environmental human rights risk at all the appropriate decision-making moments in the corporation's processes, as well as conducting in-depth investigations into identified sources of risk. Thus, integration of due diligence to a corporate control and decision making system is required to identify and assess risks and prevent risks from materializing as harm.⁵¹⁷

In addition to human rights due diligence and EIAs, Strategic Environmental Assessment (SEA) can be a valuable tool in internalization of the duty to comply with constitutional environmental rights. NEMA has defined SEA as "a range of analytical and participatory approaches that aims to integrate environmental consideration into policies, plans and programmes and evaluate the interlinkages with economic and social considerations."⁵¹⁸ This means that SEA is a formalized and systematic process of evaluating the environmental effects of a policy, plan or programme

⁵¹⁶ Business & Human Rights Initiative, *How to Do Business with Respect for Human Rights: A Guidance Tool for Companies*, (The Hague: Global Compact Network Netherlands, 2010) at pp. 27-29 and 43-44 respectively.

⁵¹⁷ Gary R. Weaver, Linda Klebe Treviño, and Philip L. Cochran, "Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures and Corporate Ethics Practices," 42 *Academy of Management Journal* (1999) at p. 552.

⁵¹⁸ NEMA, *National Guidelines on Strategic Environmental Assessment in Kenya*, (Nairobi: NEMA, 2011) at p. 1.

and its alternatives.⁵¹⁹ The process includes the preparation of an evaluation report and the application of the evaluation findings in decision-making processes. SEA enlarges the scope of EIAs to the influence of decision-making processes hence strengthening EIAs.⁵²⁰ On the enlargement of EIA scope, NEMA has stated that:

“This process extends the aims and principles of EIA upstream in the decision-making process, beyond the project level and when major alternatives are still opens.... SEA... represents a proactive approach to integrating environmental considerations into the higher levels of decision making.... In the SEA process, likely significant effects of a policy, plan, or program on the environment, which may include secondary, cumulative, synergistic, short, medium and long term, permanent and temporary impacts are identified, described and evaluated in the environmental report.”⁵²¹

Consequently, SEA confers several benefits in the internalization of constitutional environmental rights. Firstly, SEA commences at the preliminary diligence stages so that the strategic considerations can influence the type of projects to be implemented.⁵²² Secondly, SEA deals with impacts that may be difficult to consider at the project level. It deals with cumulative impacts of multiple projects, as well as the larger scale impacts of projects.⁵²³ Thirdly, SEA promotes better consideration of alternatives. This is the case since SEA affects the decision-making process at a stage where more alternatives are available for consideration.⁵²⁴ Fourthly, SEA incorporates environmental and sustainability considerations in strategic decision-making.⁵²⁵ Fifthly, SEA facilitates public participation in strategic decision-making.⁵²⁶

⁵¹⁹ László Pintér and Darren Swanson and Jane E. Barr, “Strategic Environmental Assessment: A Concept in Progress,” Annotated Training Module prepared for the World Bank Institute (2006) available at http://www.iisd.org/pdf/2006/measure_strategic_env.pdf (accessed on July 26, 2012).

⁵²⁰ UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (UNEP: Nairobi, 2004)

⁵²¹ *Ibid* note 518, at p. 1.

⁵²² *Ibid* note 520, at p. 8.

⁵²³ *Ibid* note 518, at p. 20.

⁵²⁴ *Ibid* note 518, at p. 4.

⁵²⁵ *Ibid* note 518, at p. 4.

⁵²⁶ *Ibid* note 518, at p. 13.

In Kenya, Regulation 42 (1) of the Environmental (Impact Assessment and Audit) Regulations, 2003 vests the responsibility for carrying out SEA on the Lead Agencies working closely with NEMA. This Regulation states that: "Lead agencies shall in consultation with the Authority subject all proposals for public policy, plans and programmes for implementation to a strategic environmental assessment to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others." The provision as worded may be construed to be applicable to the State only hence need for mandatory provision such as the EIA requirements which are clear. However, environmental matters (policies, plans and programmes) are generally public policy matters, whether initiated by the State or non-State actors thus making SEAs applicable to corporations.

4.4 Corporate Environmental Auditing

Corporate environmental auditing is an important tool for assuring the corporation and regulating authorities of the accuracy of a corporation's environmental information.. To establish an effective EMS, a company needs to undertake a degree of internal monitoring and auditing, mainly through EMSs. The International Chamber of Commerce has defined environmental auditing as:

"...A management tool comprising a systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing with the aim of contributing to safeguarding the environment by: facilitating management control of environmental practices; and assessing compliance with company policies, which would include meeting regulatory requirements..."³²⁷

This definition elaborates the generally accepted character of a sound environmental auditing framework, namely: systematic application through proper planning, documentation to provide

³²⁷ ICC, "An ICC (International Chamber of Commerce) Guide to Effective Environmental Auditing," ICC Publication No 483, ICC Publishing, Paris at p. 1.

and verifiable record of the audits.⁵²⁸ Such character also involves periodicity, objective evaluation, environmental performance as the main aim of auditing, facilitating management control through informed decision-making processes and compliance with the law.⁵²⁹

Corporate environmental auditing can be institutionalized in several forms. Firstly, in the form of environmental management audits, which are specifically designed to evaluate the effectiveness of environmental management systems of a corporation.⁵³⁰ Secondly, environmental compliance or performance audits which are specifically designed to test compliance both in terms of compliance with environmental laws and policies.⁵³¹ This audit category is the form currently applied in Kenya to assist in EIA quality control as defined under section 2 of EMCA which defines it as “the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment”. Thirdly, environmental assessment audit which is regarded as an instrument used to check that an EIA complies with the minimum legal requirements and also checks to ensure that due legal process has been followed.⁵³² Fourthly, waste audits which assess the waste management component of a corporate activity. In such audits, various aspects of waste management would be reviewed and the methods, procedures and systems checked and verified.⁵³³ Fifthly, environmental due diligence audits which evaluate the actual and potential environmental liabilities of a corporate operations.⁵³⁴ Sixthly, supply chain auditing which

⁵²⁸ South African Department of Environmental Affairs and Tourism, *Environmental Auditing*, Integrated Environmental Management Information Series, (South African Department of Environmental Affairs and Tourism: Pretoria, 2004) at p. 4.

⁵²⁹ *Ibid* note 528, at p. 4.

⁵³⁰ *Ibid* note 528, at p. 5.

⁵³¹ *Ibid* note 528, at p. 5.

⁵³² *Ibid* note 528, at p. 5.

⁵³³ *Ibid* note 528, at p. 6.

⁵³⁴ *Ibid* note 528, at p. 6.

emerged to provide corporate buyers with comprehensive environmental information on the products, components or materials their suppliers produce.⁵³⁵

As a practical action to institutionalize these forms of auditing, the corporation should incorporate auditing into the decision-making processes at the Board and management levels. This can be undertaken by integrating environmental audits as part of corporate risk control. One such mechanism would be through environmental accounting. It is noteworthy, though, that the effectiveness of internalized auditing would be actualized through applying the audit information in corporate adjustments for sustainable environmental performance.

4.4.1 Environmental Accounting

Environmental accounting provides a framework for organizing information on the status, use, and value of natural resources and environmental assets as well as expenditures on environmental protection and resource management.⁵³⁶ Environmental accounting provides reports for both internal use such as generating environmental information to help make management decisions on pricing, controlling overhead and capital budgeting, and for external use such as disclosing environmental information of interest to the public and to the investors, lending agencies and Government.⁵³⁷

Presently, environmental accounts have been classified into four main categories of accounts, namely: natural resource asset accounts which primarily account for stocks of natural resources

⁵³⁵ *Ibid* note 528, at p. 6.

⁵³⁶ INTOSAI Working Group on Environmental Auditing (WGEA), *Environmental Accounting: Current Status and Options for SAIs*, (INTOSAI, 2010).

⁵³⁷ M. Bartolomeo *et al.*, "Environmental Management Accounting In Europe: Current Practice And Future Potential, 9*The European Accounting Review* 1 (2000) pp. 31–52. See also Mehenna Yakhou and Vernon P. Dorweiler, "Environmental Accounting: An Essential Component of Business Strategy," 13 *Business Strategy and the Environment* (2004), at 65–77.

and any changes in the natural resources.⁵³⁸ Secondly, pollution and material physical flow accounts which are concerned with industry level information on about the quantity of resources such as energy, water, and raw materials that are used in economic activities, and quantity of residuals such as solid waste, air emissions, and wastewater generated by these activities.⁵³⁹ These accounts also provide data on pollution and material flows in relation to other countries, such as trans-boundary pollution and exports of goods. Thirdly, monetary and hybrid accounts which focus on expenditures and taxes related to protecting and managing the environment, as well as the economic contribution of environmental services industries.⁵⁴⁰ Finally, environmentally-adjusted macroeconomic aggregates which apply all the foregoing forms of environmental accounts to adjust product and income accounts for assessing the overall environmental health and economic progress based on environmental goods.⁵⁴¹

The emphasis for a framework on environmental accounting is to develop guidelines to assist in quantitative and qualitative identification of environmental issues and evaluation and reporting of those issues.⁵⁴² To actualize the benefits of accounting and auditing in Kenya, Francis Okomo-Okello aptly recommends that:

“...serious consideration should be given by Institute of Certified Public Accountants of Kenya (ICPAK) to the introduction of the relevant International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS) as well as the International Auditing Standards (IAS) to impose certain disclosure requirements and address materially significant environment-related liabilities. It is also imperative to formulate and implement Financial Sector Guidelines to provide for a framework that could enhance environmental performance and facilitate voluntary compliance with prescribed environmental policies/guidelines.”

⁵³⁸ *Ibid* note 536, at p. 9.

⁵³⁹ *Ibid* note 536, at p. 10.

⁵⁴⁰ *Ibid* note 536, at p. 11.

⁵⁴¹ *Ibid* note 536, at p. 11.

⁵⁴² Mehenna Yakhou and Vernon P. Dorweiler, “Environmental Accounting: An Essential Component of Business Strategy,” *op. cit* at p. 76-77.

This proposal should be extended to public sector accounting, for instance, under the International Public Sector Accounting Standards (IPSAS) to enhance sustainable public procurement.

4.4.1.1 The Application of Environmental Taxes and Fiscal Incentives

Environmental accounting includes accounting for environmental taxes and fiscal (dis)incentives in environmental regulation. Environmental taxes are taxes on environmental pollutants or on goods whose use generates such pollutants.⁵⁴³ Law and economics theories suggest that taxes on polluting emissions will reduce environmental harm in the least costly manner, by encouraging changes in behavior by those corporations that can reduce their pollution at the lowest cost.⁵⁴⁴

The case for applying environmental taxes has been built on the foundation generally beneficial to attaining the aspirations of the right to a clean and healthy environment. The first rationale posited is that pollution, although regarded as a cost of producing goods and services is not borne by the polluting corporation.⁵⁴⁵ Instead, this cost is borne by the stakeholders using a particular environment in the form of damage to that environment. Consequently, environmental tax aims at ensuring that polluters face the true cost of their activities by charging them for the damages caused to others, hence imposing tax burden on pollution costs as apportioned to a polluter.⁵⁴⁶ In fact, it has been propounded that direct taxes on emissions are economically efficient because they give polluters an incentive to reduce their pollution.

⁵⁴³ See generally J. Bebbington "A Review Essay on Environmental Accounting" 10 *Accounting, Auditing and Accountability Journal* 3 (1995) pp. 365–376. See also, generally, Arlen, Jennifer H., and Reinier H. Kraakman, "Controlling Corporate Misconduct: A Comparative Analysis of Alternative Corporate Incentive Regimes," 72 *New York University Law Review*, (1997): 687-779.

⁵⁴⁴ See also Mehena *et al* *ibid* note 542, at p. 75.

⁵⁴⁵ See UN Division for Sustainable Development, *Environmental Management Accounting Procedures and Principles*, (UN: New York, 2001) at p. 11.

⁵⁴⁶ UNEP, *The Use of Economic Instruments in Environmental Policy: Opportunities and Challenges*, (UNEP: Nairobi, 2004) at p. 14.

In addition, environmental taxes are therefore useful drivers for the institutionalization and actualization of carbon trading schemes in Kenya which is an implication of the constitutional environmental rights in Kenya. The schemes limit the quantity of allowable emissions by issuing a fixed quantity of emissions permits, which polluters may then trade among themselves.⁵⁴⁷ The permit price plays a role analogous to a fiscal (dis)incentive because polluters with high costs of reducing their emissions will instead buy permits that let them continue to emit, while those that can cut emissions at lower cost will do so and then sell their unused permits.⁵⁴⁸

Derivable from the foregoing need and useful in actualizing the taxes and related fiscal incentives to Kenya, Francis Okomo-Okello recommends that:

“...consideration should be given to the implementation/introduction of fiscal incentives or disincentives as contemplated in Section 57 of EMCA; such incentives could include conversion of some of the tax holiday benefits into environmental rebates and/or green certificates with monetary value awards for such positive environmental contribution as planting trees, reafforestation and environmental clean ups. In addition, tax breaks/reliefs should be extended to Corporates that undertake CSR/CSI Programs focusing on environmental protection and conservation.”⁵⁴⁹

Overall, this thesis submits that practical and strict enforcement of auditing and monitoring framework under EMCA shall be useful for internalizing environmental impact of the corporation. This shall require improved environmental policing under the framework law.

4.5 Environmental Performance Reporting

Environmental performance generally means the performance of an organization in prescribed environmental parameters. In economies where environmental management practices have been

⁵⁴⁷ See generally P. Ekins and T. Barker “Carbon Taxes and Carbon Emissions Trading,” 15 *Journal of Economic Surveys* 3 (2001) at pp. 325-327.

⁵⁴⁸ See also UN Division for Sustainable Development, *Environmental Management Accounting Procedures and Principles*, *op. cit.* at p. 109.

⁵⁴⁹ See Francis Okomo-Okello, *op. cit.* note 80, at p. 72.

widespread, the demand for high quality environmental reports is on the rise.⁵⁵⁰ Corporations are facing even greater pressure to publish thorough reports on their environmental performance, including quantitative information going back several years and reference to negative impact.⁵⁵¹ This trend is evident in most OECD countries where a company implementing the OECD Guidelines should consider undertaking a certain amount of environmental reporting.⁵⁵² The scope of corporate environmental performance includes consideration of a broad range of positive and negative effects of corporate behaviour on various stakeholders as outlined in Chapter One of this thesis. Access to information rights which requires disclosure and reporting in governance shall form a useful entry point for performance reporting in Kenya. However, Kenya presently lacks a formalized and elaborate environmental performance reporting system for corporations. However, some relevant but unclear rules regarding disclosure can be derived from the securities regulation framework in Kenya. For instance, Regulation 12 (1) (a) of the Capital Markets (Public Offers, Listing and Disclosure) Regulations, 2002 (made under the Capital Markets Act) states that:

“In addition to the information required to be disclosed by virtue of the Regulations, a prospectus or an information memorandum shall subject to those Regulations, contain all such information as investors would reasonably require, and reasonably expect to find therein, for the purpose of making an informed assessment of ...the assets and liabilities, financial position, profits and losses, and prospects of the issuer of securities....”

This regulation is inadequate because of two reasons; first, it leaves the definition of what is material to reasonableness which is a contested concept in law. Second, it assumes Kenya has a

⁵⁵⁰ David W. Case, “Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective,” *op. cit* at p. 379.

⁵⁵¹ *Ibid* note 499, at p. 101. See also, generally, Cormier, Denis and Irene M. Gordon. “An Examination of Social and Environmental Reporting Strategies,” 14 *Accounting, Auditing & Accountability Journal*, 5 (2001): 587-617.

⁵⁵² Section V Point 2 of the OECD Guidelines states that enterprises should “provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise...” and “engage in adequate and timely communication and consultation with the communities directly affected....”

sound accounting system which includes non-financial aspects of a corporation with financial impact. In the absence of such a framework, the provision may not comprehensively aid disclosure of environmental considerations when listing or giving a public offer. The Companies Act is equally silent on reporting for other considerations other than matters of shareholding and financial accounts. For instance, section 125 of the Companies Act provides that:

“Every company having a share capital shall, once at least in every year, make a return containing, with respect to the registered office of the company, registers of members and debenture holders, shares and debentures, indebtedness, past and present members and directors and secretary, the matter specified in Part I of the Fifth Schedule, and the said return shall be in the form and shall be made up to the date set out in Part II of that Schedule or as near thereto as circumstances admit...”

This provision signifies constructive exclusion of other considerations of the corporations' activities such as interaction with the environment. Financial accounting as undertaken in compliance with the provision does not accommodate environmental accounting and reporting. These frameworks thus need to be reviewed to accommodate environmental considerations as proposed in this thesis.

4.5.1 Possible Contents of Environmental Performance Reports

In the absence of internationally agreed reporting standards, the content of such reports ranges from rudimentary information to comprehensive sustainable development reporting. Environmental reporting refers to the practice of making information on environmental performance available to the public. The public generally means affected stakeholders or right-holders, whether in a separate environmental report or included in the company's annual report.⁵⁵³ There are certain standards to help firms decide which information should be included

⁵⁵³ See generally OECD, *An Overview of Corporate Environmental Management Practices*, (OECD: Paris, 2003)

in their environmental performance reports.⁵⁵⁴ For instance, the Global Reporting Initiative (GRI), a multi-stakeholder initiative set up by Coalition for Environmentally Responsible Economies (CERES). The ultimate object of GRI is to bring corporate social reporting at par with financial reporting by developing a set of guidelines for companies to follow.⁵⁵⁵

Concerning the depth of reporting, due to the same lack of agreed standards for environmental reporting, environmentally ethical corporations have resorted to making their own considerations as regards depth of their reporting. The indicators of differences between the contents and scope of existing environmental performance reports are varied. They include: the consideration on whether to publish quantitative data or not; whether performance is compared with targets or not, whether the report is verified by a third party or not; and whether the report includes environmental cost accounting.⁵⁵⁶

This thesis argues that accurate, verifiable environmental reporting should be adopted by corporations in Kenya to optimize compliance with the constitutional environmental rights. This may be achieved through legislative measures to leverage environmental reporting to the level of financial reporting, for instance under the capital markets and securities regulation frameworks as well the company law framework. Such performance reporting shall enable stakeholders determine their relationship with the corporations.

4.6 Environmental Policy Statements

An environmental policy statement (EPS) is a statement by an organization (of which a corporation is) of its intentions and principles in relation to its overall environmental

⁵⁵⁴ *Ibid* note 553, at p. 14.

⁵⁵⁵ *Ibid* note 553, at p. 2.

⁵⁵⁶ *Ibid* note 553, at p. 2-3.

performance.⁵⁵⁷ The statement provides a framework for action and for setting of the organization's environmental objectives and targets which are then generally applied in performance determination.⁵⁵⁸ In fact, several companies in the progressive economies publish environmental policy statements.⁵⁵⁹ Most of these businesses have operations in Kenya as well hence the need to formalize EPS as a legal requirement. EPSs form an instrumental beginning point for corporate EMSs since they states the corporations' perspective and overall environmental performance objectives.

4.6.1 Possible Content of Environmental Policy Statements

The content of an EPS is crucial to the utility of such statements.⁵⁶⁰ Content requirements of the EPS for a corporation includes: appropriate environmental impacts, and a framework for setting environmental objectives and targets. It may also contain commitment to comply with constitutional environmental rights as well as other environmental laws and regulations. The scope should also consider documentation and implementation mechanisms for the EPS. In addition, EPS also incorporate commitment to communicate the policy to the internal and external stakeholders or right-holders.⁵⁶¹ By including legal compliance explicitly in the policy statement, individuals responsible for the implementation of the statement are likely to become personally associated with the company's legal obligations in this respect.⁵⁶²

In summation, a formal EMS requires the corporations' management to develop an environmental policy to guide implementation and operation of the system. The policy guides

⁵⁵⁷ *Ibid* note 553, at p. 3.

⁵⁵⁸ *Ibid* note 553, at p. 3-4.

⁵⁵⁹ *Ibid* note 553, at p. 3-4.

⁵⁶⁰ *Ibid* note 553, at p. 5.

⁵⁶¹ *Ibid* note 553, at p. 5 and 7.

⁵⁶² *Ibid* note 553, at p. 7.

identification of the organization's environmental impacts and determination of environmental goals and objectives. This process may create new or increased levels of the organization, and inculcate innovative modes of perceiving environmental impacts by the Board, management and employees.⁵⁶³

4.7 Corporate Environmental Strategies

Corporate environmental strategies outline the organizing philosophy that a corporation bears hold regarding corporate environmental obligations, and practical steps towards actualizing the philosophy. Corporate environmental strategies address the extent to which environmental issues are integrated into a company's decisions on starting new businesses, the choice of technology, plant locations, as well as research and development investments.⁵⁶⁴ Such strategies capture corporate environmentalism which entails, internalization of environmental concerns facing corporation and integration of environmental issues with a corporation's strategic plans.

There are several categories of corporate environmental strategies, which can be considered in a typology of broad and specific strategies. Broadly, strategies at the functional level corporate environmental strategies provide for the inclusion of environmental concerns in long term plans within such business functions as purchasing, production, marketing and personnel.⁵⁶⁵ Specifically, environmental strategies attend to these specific functions elaborately as discussed

⁵⁶³ Bradley C. Karkainen, "Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?" 89 *Georgetown Law Journal* (2001), pp. 369-370. See also David W. Case, "Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective," *op. cit.*, at p. 379.

⁵⁶⁴ Subhabrata B. Banerjee, and Easwar S. Iyer, and Rajiv K. Kashyap, "Corporate Environmentalism: Antecedents and Influence of Industry Type," 67 *Journal of Marketing* 2 (2003), 106-122. See also, generally, Graaf, Frank J. de, and Cor A. J. Herkströter. "How Corporate Social Performance Is Institutionalised within the Governance Structure," 74 *Journal of Business Ethics*, 2 (2007): 177-189.

⁵⁶⁵ Thomas L. Wheelen, and David J. Hunger, *Strategic Management and Business Policy*, (Upper Saddle River: Pearson - Prentice Hall, 2006).

hereinafter. In addition, purchasing environmental strategy has been entrenched as a form of corporate environmental strategy. Such strategies encompass the long-term supply chain management operations intended to stimulate recycling, reuse, and resource reduction.⁵⁶⁶ Purchasing environmental strategy promotes purchasing activities that reduce waste sources, promote recycling.⁵⁶⁷

Besides, production environmental strategy has been applied as a corporate environmental strategy. It addresses three basic questions, namely: product planning, corporate environmental disclosure policy, and pollution-prevention programmes.⁵⁶⁸ Decisions pertaining to operations where environmental issues have to be considered include product planning, capacity planning and scheduling, process design, workforce management, inventory management, and quality management.⁵⁶⁹

Moreover, marketing environmental strategy has been used to apply to all activities designed to generate and facilitate commerce to satisfy human needs with the emphasis that these activities create the smallest possible negative impact on the natural environment.⁵⁷⁰ If the environmental marketing offers a competitive advantage, then consumers shall prefer environmental products to competing 'non-green' products.⁵⁷¹

⁵⁶⁶ Craig R. Carter and Joseph R. Carter, "Interorganizational Determinants of Environmental Purchasing: Initial Evidence from the Consumer Products Industry," 29 *Decision Sciences* 3 (1998), 659-684.

⁵⁶⁷ Hokey Min and William P. Galle, "Green Purchasing Practices of US Firms," 21 *International Journal of Operations & Production Management*, 9 (2001), at p. 1222-1223.

⁵⁶⁸ Art Kleiner, "What Does It Mean to Be Green?" *Harvard Business Review*, 69 (1991), 4-11.

⁵⁶⁹ Mahesh C. Gupta, "Environmental Management and Its Impact on the Operations Function," 15 *International Journal of Operations & Production Management*, 8 (1995) 34-52, at p. 34.

⁵⁷⁰ *Ibid* note 569, at pp. 50-51.

⁵⁷¹ See generally Michael J. Polonsky, "A Stakeholder Theory Approach to Designing Environmental Marketing Strategy," 10 *Journal of Business & Industrial Marketing*, 3 (1995), 29-46.

Finally, personnel environmental strategy which is concerned with training employees and building their awareness and capacity about environmental issues, which enables managers to increase employees' active involvement in activities related to EMS.⁵⁷² Environmental human resource management is crucial for environmental strategy because through the education and increased awareness of employees, the corporation inculcates a level of environmental ethic beneficial to environmental orientation.⁵⁷³ These can be internalized in the decision-making systems and processes including through SEAs in the broader corporate environmental strategies. This will trickle down into the operational aspects of the corporation hence contributing to corporate sustainability.

In Kenya, the constitutional environmental rights do not require the development of environmental strategies. However, the rights if optimized through clarified corporate responsibility provide for a driver in the market which can compel corporations to adopt proactive strategies. Corporate environmental strategies, like other corporate strategies, are largely results of market forces generating benefits for corporations with strategies and *vice versa*.

4.7.1 Possible Results of Environmental Strategies

It has been argued that corporations with more developed environmental strategies are likely to perform better than those with a less developed environmental strategies.⁵⁷⁴ This is likely to be the case since "... properly constructed regulatory standards, which aim at outcomes and not

⁵⁷² See, generally, James Maxwell, Sandra Rothenberg, Forrest Buscoe, and Alfred Marcus, "Green Schemes: Corporate Environmental Strategies and Their Implementation," 39 *California Management Review* 3 (1997) 118-134.

⁵⁷³ See, generally, Scott Victor Valentine, "The Green Onion: A Corporate Environmental Strategy Framework," *Corporate Social Responsibility and Environmental Management* (2009) p. 1.

⁵⁷⁴ Tomaž Čater, Janez Prašnikar, Barbara Čater, "Environmental Strategies and Their Motives and Results in Slovenian Business Practice," 11 *Economic And Business Review* 1 (2009), 55-74.

methods, will encourage companies to re-engineer their technology. The result in many cases is a process that not only pollutes less, but also lowers costs or improves quality..."⁵⁷⁵ This in effect induces corporate sustainability.

Paul Kleindorfer⁵⁷⁶ has summarized the factors which could lead to higher profitability because of corporate sustainability to include firstly, the corporate image increases customer satisfaction and loyalty. Secondly, synergies between lean manufacturing and green manufacturing raise plant-level productivity as well as revenues and market share. Thirdly, reverse logistics, remanufacturing and supply chain design are challenges increasingly met and turned into profitable outcomes. Fourthly, because regulatory scrutiny is costly, many companies commit themselves to go 'beyond compliance'. Fifthly, the risk of being held liable, or found negligent, for accidents or environmental damage; and finally improved tools and management systems for better product and process design which all promote more sustainable products and supply chains.

4.8 Sustainable Investment Management

Investment management is generally defined as the professional management of assets and securities on behalf of investors, with the purpose of meeting stated financial goals.⁵⁷⁷

Sustainable investment management is, therefore, incorporating sustainability as a fundamental consideration hence making the traditional investment management concept to transcend

⁵⁷⁵ Michael E. Porter, "America's Green Strategy," 264 *Scientific American*, 4 (1991), at p. 96.

⁵⁷⁶ Paul Kleindorfer, "Implications of Globalization and Sustainability for Emerging Business Models," in Prašnikar, Janez (ed.), and Andreja Cirman, (ed.): *New Emerging Economies and Their Culture*, (New York: Nova Science, 2007): 21-37.

⁵⁷⁷ UNEP FI, *A Legal Framework for Integration of Environmental, Social and Governance Issues into Institutional Investment*, *op cit* at p. 7.

financial objectives.⁵⁷⁸ Generally, the laws related to sustainable investment management are concerned with the optimal decision-making which internalizes holistic performance of a company considering the value a company generates within the context of the economy, society and the natural environment.⁵⁷⁹

Sustainability in the market also acknowledges the predominance of the modern portfolio theory in as well as law and economics theoretical considerations on investment management, in which portfolios of investments are selected based on their overall risk-reward characteristics.⁵⁸⁰ This is as opposed to individual securities being selected on the basis of their individual risks and returns.⁵⁸¹ Selecting an appropriately diversified portfolio is a crucial part of effective portfolio management as it determines the risks an investor acquires with a portfolio which risk induce environmental risks.⁵⁸²

4.8.1 The Case for Sustainable Investment Management

A business case and a social case for sustainable investment management have been made to support this approach in addressing corporate environmental responsibility. In this argument, there is a correlation between improvement in companies' environmental performance and their economic performance.⁵⁸³ This is the case since fiduciary responsibility has shifted towards

⁵⁷⁸ Stéphanie Giamporcaro, "How Can Innovative Financial Tools Be Applied to Facilitate an Environmentally Responsible Growth in South Africa? Drawing Lessons from Local and International Experiences in the Application of Responsible Investment Approaches," Paper presented at the Oikos-PRI Young Scholar Academy 2009, "Responsible Investment: Integration, Engagement, and Transparency," Gais, Switzerland, February 8–13, 2009.

⁵⁷⁹ See generally M. Schoder, "The Performance of Socially Responsible Investments: Investment Funds and Indices," 18 *Financial Markets and Portfolio Management* 2 (2004) 122-142.

⁵⁸⁰ UNEP FI, *A Legal Framework for Integration of Environmental, Social and Governance Issues into Institutional Investment*, *op cit*

⁵⁸¹ *Ibid* note 580, at p. 7.

⁵⁸² Stéphanie Giamporcaro, Lise Pretorius, and Martine Visser, "Responsible Investment: A Vehicle for Environmentally Sustainable Economic Growth in South Africa?" Environment for Development Discussion Paper Series (2010)

⁵⁸³ *Ibid* note 580, at p. 11 and 28.

mandating corporations to consider the “social, environmental, political and cultural effects of investments, both positive and negative, over the short and long term as a fundamental part of the investment process.”⁵⁸⁴ Consequently, sustainable investment management identifies risks and opportunities not depicted by conventional financial analysis.

On the social case, the principle of the beneficiaries’ or principals’ best interests in investment is broadened beyond financial benefit, to prioritizing other stakeholders’ interests over profit.⁵⁸⁵

Certain investors operate from the premise that they have an obligation to act to promote adherence to international treaties and norms, particularly those that foster sustainable development and political stability.⁵⁸⁶ Moreover, it has been argued that “broadly diversified public sector funds whose beneficiaries are the taxpayer assert that externalizing the costs of poor corporate environmental performance onto other companies or to the State is not in the best interests of the fund and its beneficiaries.”⁵⁸⁷

Consequently, investors have a responsibility to demand, support and encourage companies to achieve higher standards of corporate environmental accountability legitimately.⁵⁸⁸ Investors as stakeholders of the corporations, in which they invest, have an obligation to act in a manner mitigating any negative social or environmental impacts of these companies.⁵⁸⁹ This basically

⁵⁸⁴ UNEP FI, *A Legal Framework for Integration of Environmental, Social and Governance Issues into Institutional Investment*, *op. cit* at p. 28.

⁵⁸⁵ *Ibid* note 580, at p. 28.

⁵⁸⁶ *Ibid* note 580, at p. 28.

⁵⁸⁷ *Ibid* note 580, at p. 28.

⁵⁸⁸ *Ibid* note 580, at p. 28.

⁵⁸⁹ *Ibid* note 580, at p. 28.

includes refusal to invest in corporations or projects that are in contravention of to right to clean and healthy environment.⁵⁹⁰

Sustainable investment management is therefore recognition that environmental considerations are capable of affecting investment decision-making in two distinct ways: they may affect the financial value to be ascribed to an investment as part of the decision-making process. They may also be relevant to the objectives that investment decision-makers pursue.

4.8.2 Screening Investments

Screening of investments is one method of incorporating environmental considerations into the investment decision-making process, applying environmental 'screens' to the choice of investments.⁵⁹¹ The three basic types of screening that we understand are typically used by modern day investment practitioners are as follows.⁵⁹² Firstly, passive screening which involves making investment decisions by following indices with environmental benchmarks, such as the Dow Jones Sustainability Index, and the FTSE4 Good Global Index.⁵⁹³ Second, positive screening which sets inclusive criteria that must be met before an investment is included within a portfolio, such as strong employee relations, good corporate governance, consistent product safety, and superior environmental performance.⁵⁹⁴ Thirdly, negative screening which applies criteria to exclude companies on the basis of environmental and related social and corporate

⁵⁹⁰ Stephanie Giamporcaro, Lise Pretorius, and Martine Visser, "Responsible Investment: A Vehicle for Environmentally Sustainable Economic Growth in South Africa?" *op. cit.*

⁵⁹¹ See UNEP FI *op. cit.*, at p. 24.

⁵⁹² *Ibid* note 580, at p. 25.

⁵⁹³ *Ibid* note 580, at p. 25.

⁵⁹⁴ *Ibid* note 580, at p. 25.

governance performance. Negative screens may be applied to exclude, for example, organizations whose activities and products in breach constitutional environmental rights.⁵⁹⁵

4.8.3 The Role of Law in Sustainable Investment Management

4.8.3.1 Due Process of the Law

One element of the law governing investment decision-making that is common to all the jurisdictions is the requirement that decision-makers follow the correct process in reaching their decisions.⁵⁹⁶ In Kenya, this requirement shall flow from the general fiduciary duties of prudence. In these duties, compliance with the correct process requires decision-makers to have regard to all considerations relevant to the decision, including those that impact upon value.⁵⁹⁷ Decision-makers are required to have regard to environmental considerations in every decision they make.⁵⁹⁸ This is because there is a body of credible evidence demonstrating that such considerations often have a role to play in the proper analysis of investment value hence must be embraced to give appropriate value to all stakeholders.⁵⁹⁹

Taking account of environmental considerations does not mean that each consideration or category of considerations is to be given the same weight or that decision-makers must agree on the weight to be given to each consideration.⁶⁰⁰ There will inevitably be variations as to how considerations are to be defined and analyzed. In some cases, the decision-maker may ultimately

⁵⁹⁵ *Ibid* note 580, at p. 25.

⁵⁹⁶ Michael R. Siebecker, "Trust & Transparency: Promoting Efficient Corporate Disclosure through Fiduciary-Based Disclosure," 87 *Washington University Law Review* (2009), 115-123.

⁵⁹⁷ See also Asset Management Working Group of the UNEP FI, *Fiduciary Responsibility: Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues into Institutional Investment*, Report (2009) UNEP FI.

⁵⁹⁸ *Ibid* note 580, at p. 1.

⁵⁹⁹ Benjamin J. Richardson, "Can Socially Responsible Investment Provide and Means of Environmental Regulation," 35 *Monash University Law Review* 2 (2009) 262-295, at p. 292.

⁶⁰⁰ Benjamin J Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" 46 *Osgoode Hall Law Journal* (2008): 243-291 at p. 243.

conclude that the environmental considerations relevant to a particular investment do not have a material impact upon financial performance. However, such doctrinal differences do not justify a failure to identify such considerations and then assess their weight.⁶⁰¹

Investment decision-makers have claimed that environmental considerations are difficult to quantify. On the contrary, these considerations can be quantified similar to the approach used in quantifying business goodwill and other equivalently nebulous intangibles. A possible way of addressing the problem of intangible has been stated thus:

“Essentially the problem of intangibles can be reduced to the difference between quantitative and qualitative data. Accounting standards are not set in stone, and have evolved and changed over time. It is imperative that accounting standards and systems are altered to account for such intangibles.”⁶⁰²

A majority of the jurisdictions have legislated to require investment decision-makers, particularly in the institutional investors' context, to disclose the extent to which they take environmental considerations into account.⁶⁰³ Such legislative endorsement of the relevance of environmental considerations to investment decision-making constitutes a boost to having environmental considerations at some compelling level. For example, beneficiaries under the Retirement Benefits Act can endorse environmental considerations as part of investment restrictions under section 37 (1) (b) of the Act which states that “No scheme funds shall be—(b) invested contrary to any guidelines prescribed for that purpose”.

⁶⁰¹ *Ibid* note 601, at p. 243.

⁶⁰² UNEP FI, *A Legal Framework for Integration of Environmental, Social and Governance Issues into Institutional Investment*, *op cit*, at p. 11.

⁶⁰³ *Ibid* note 580, at p. 82.

4.8.3.2 Fiduciary Duties

Corporate law imposes fiduciary duties on directors and officers of a corporation in investment of a corporation's funds. Where they apply, fiduciary duties restrict the objectives that investment decision-makers may pursue. Investment decision-makers must act only in the interests of the beneficiaries for whom they act and in accordance with the terms of the fiduciary relationship.⁶⁰⁴ Where the purpose of their investment authority is to seek a financial return for the beneficiaries, decision-makers must treat this as their overriding objective when making decisions in relation to the funds they control.⁶⁰⁵ The duty to act in the interests of the beneficiaries means that no investment decision should be made solely in the interests of or to give effect to the personal views of the decision-maker.⁶⁰⁶ The beneficiaries are bound by the constitutional environmental rights and obligations attendant thereto hence assumed environmentally conscious and ethical.

Company law in Kenya relies on the common law prescription of fiduciary duties generally. At common law, fiduciaries can only exercise their powers honestly and *bonafide* for the benefit of the company as a whole. Environmental rights considerations may affect the value of the corporation.

Consequently, a decision-maker should integrate environmental considerations into an investment decision to give effect to the interests of the beneficiaries in relation to matters beyond financial return. It is arguable that the implication of environmental rights on investment

⁶⁰⁴ Benjamin J. Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" *op. cit.*

⁶⁰⁵ UNEP FI, *A Legal Framework for Integration of Environmental, Social and Governance Issues into Institutional Investment*, *op cit*, p. 11.

⁶⁰⁶ *Ibid* note 580, at p. 12.

decision-making may exclude investments that conflict with the values and that the concept of beneficiaries' best interests may transcend investors' financial interests to include environmental concerns.⁶⁰⁷

A decision-maker who chooses to exclude an investment or category of investments on this basis will need to be able to point to a consensus amongst the beneficiaries in support of the exclusion.⁶⁰⁸ Whilst there is little legal guidance directly on this point, it can also be argued that even in the absence of such express consensus; there will be a class of investments that a decision-maker is entitled to avoid. This is especially on the grounds that environmental characteristics of such investments are likely to make them so repugnant to beneficiaries that they should not be invested in, regardless of the financial return that they are expected to bring.⁶⁰⁹ One possible modality of defining the parameters of this category include investments that are linked to clear breaches of norms such as constitutional environmental rights.

There may also be cases where a decision-maker has exhausted the analysis of financial criteria, including value-related environmental considerations. In such cases, the decision-maker would be entitled to select an alternative on the basis of its non-value-related environmental characteristics, hence conformity with his or her fiduciary duties.⁶¹⁰

This thesis argues that even though sustainable investment management has traditionally been applied to institutional investors and lenders, the concept should be extended by law to all investing corporations for as to prevent financing of projects that are endanger the environment.

⁶⁰⁷ *Ibid* note 601, at p. 243-245.

⁶⁰⁸ *Ibid* note 601, at p. 243-245.

⁶⁰⁹ See generally Benjamin J Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" *op. cit.*

⁶¹⁰ See generally Benjamin J Richardson, "Can Socially Responsible Investment Provide and Means of Environmental Regulation," *op. cit.*

4.9 Chapter Conclusion

In this Chapter, various means through which the implications of the constitutional environmental rights can be internalized as mandatory external costs of legal character have been assessed. The role of law is to establish a controlling and facilitative regulatory environment for the actualization of these measures by the corporations in Kenya. Consequently, there is need to align the concerned regulatory instruments to fit in the textual architecture as well as the purport of constitutional environmental rights in Kenya. Some recommendations towards actualizing a facilitative and control-based regulatory environment are proposed in Chapter Five. These shall be vital in fulfilling the intendment of the constitutional environmental rights on the corporation, that is: compelling corporate responsibility to not only refrain from breaching the rights, but also take proactive measures towards the fulfillment of constitutional environmental rights in Kenya.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Purpose

This Chapter provides a summation of the discussion ensuing in the preceding Chapters with the main object emphasizing the argument and additional recommendations as obtains in the preceding substantive Chapters in the project for purposes of fulfilling the objectives of the project. The recommendations shall be aimed at legal and policy considerations that can aid corporate governance and state regulatory framework for sustainable implementation of the constitutional environmental rights in Kenya.

5.1.1 Conclusion

This thesis has established the nexus between business, human rights and corporate governance as a general context of corporate linkages between corporate governance and constitutional environmental rights. In so doing, the thesis has assessed environmental human rights arguing and finding that it is one of the legitimate claims in the governance of the corporation. To exemplify the foregoing claim, the thesis has attempted to incorporate some sectoral corporate environmental impacts including environmental pollution and waste management, climate change, and biodiversity. The legitimacy of human rights as claims in corporate governance has been applied to justify the introduction of constitutional environmental rights as a mechanism for safeguarding and vindicating such legitimate claims by the environmental rights-holders. Consequently, thesis has assessed the linkages between human rights and environmental protection, as well as the interconnection with the role of business and corporate governance with the rights generally. The thesis has therefore concluded that human rights and legitimate claims in corporate governance.

In addition, this thesis has interrogated the scope of the right to clean and healthy environment as provided for under Article 42 of the Constitution of Kenya, 2010 and its overall applicability to corporations. In undertaking the foregoing, the thesis has highlighted the history of the right in Kenya by assessing the situation prior to the promulgation of the Constitution and after. In effect, the thesis has also attempted to contextualize constitutional environmental rights through assessing the jurisprudence likely to be involved in implementing the right. In this regard, the study has argued that the scope of Article 42 of the Constitution is expressly extended to corporations hence corporations are bound to comply. On this point, the study has argued that the constitutional environmental rights present certain implications on corporate governance. Particulate to the scope of the right, the thesis has assessed the historical origins of the right in Kenya as well as justification and character of the right. The thesis argues that the constitutional environmental rights as structured under Constitution are justiciable in relation to corporations. The thesis has consequently concluded that the justiciability of the rights in relation to corporations has implications on corporate governance.

In interrogating the implications of the constitutional environmental rights on corporate governance, this thesis has assessed some challenges peculiar to implementation of the rights in relation to corporations. The thesis has, therefore, proceeded to proffer some possible modalities for addressing the challenges. This, it has been argued, is useful to ensuring optimal implementation of the right in relation to corporations in Kenya. On this element, the thesis suggests that the challenges, namely, corporate legal personality, mental element of corporations and jurisdictional challenges have to be addressed for the right to clean and healthy environment to be implemented effectively in Kenya.

This thesis has also assessed the legal and related implications of the right on corporate governance. This is undertaken with the object of evaluating appropriate strategies for corporate adjustment to accommodate corporate motivated compliance and sustainable business. In this regard, this thesis has argued that the salient legal implications of the right on corporate governance include integration of the right into corporate decision-making infrastructure, precautionary and preventive requirements on corporate environmental interactions, sustainable use of environmental resources, disclosure of environmental information and public participation. These implications, the thesis argues, must be applied in the corporation's duty to respect constitutional environmental rights. Besides, the thesis has also argued that these implications bear secondary implications which are structural and financial in character. The study, therefore, argues that the overall implication being external cost or incentives of the right on corporate governance. In summation, the thesis concludes that the implications of the constitutional environmental rights in Kenya take legal and other forms arising out of the legal effect thereof.

This thesis has examined the legal and the related structural and financial considerations to address the implications for compliance with the constitutional standards as the minimum threshold standards. This, the study undertakes broadly and in principle. In so doing, it argues that adjustments denote internalization of the costs which the right is deemed to impose on corporate governance. As a result, the thesis has made proposals for systemic legal adjustment in corporate governance to establish a balance of between the optimal implementation constitutional environmental rights and good corporate governance. Consequently, the thesis concludes that corporate governance can be used innovatively to address the implications of

constitutional environmental rights in Kenya using various corporate governance tools to tackle the implications.

The thesis concludes that, for effectiveness of the rights, the proposals using corporate governance tools to address the demands of constitutional environmental rights in Kenya should be anchored in the law. To actualize and realize the broad principle-based proposals made in this thesis through the law, the thesis provides some practical recommendations hereinafter.

5.2 Recommendations

The practical recommendations in this study aimed at actualizing the tools for internalizing costs of the constitutional environmental rights can be drawn. This thesis makes recommendations that deal with legislative, policy and regulatory alignment with the constitutional expectations.

5.2.1 Legislative Alignment with the Constitution

These recommendations are aimed at making provisions in various legislative instruments to reflect the tools for internalizing and actualizing the expectations of the constitutional environmental rights. In making these legislative proposals, the thesis takes the approach a legal framework governing corporations and the environment exist in Kenya but the same is inadequate. Therefore, the proposals are intended to fill in the legislative gaps, where they are established in this thesis, and strengthen the framework to accommodate the expectations of constitutional environmental rights in Kenya.

5.2.1.1 Anchoring Corporate Environmental Management Systems in the Law

The context for anchoring EMS in the law proceeds from the premise that several critical problems substantially fall outside the effective control of traditional environmental regulation in

Kenya. This corporate behaviour substantially impacts such under-regulated concerns as climate change. Non-Point Source (NPS) air and water pollution such as the runoffs into Lake Naivasha polluted by floricultural activities, risks related to manufacturing and use of toxic chemicals, and wasteful consumption of natural resources and energy supplies.⁶¹¹ Therefore, efforts to induce corporate environmental behaviour beyond compliance by corporations should be harnessed. This should be aimed at encouraging or mandating corporations to achieve environmental performance that exceeds the minimum requirements of environmental law and regulation. This is fundamental in addressing the under-inclusiveness problem of the existing EMCA regulatory regime. Incorporating the “beyond compliance” regulation of corporate environmental behaviour is an important principle underlying the goal of sustainable development envisaged under Article 42 (a) of the Constitution. Hence, EMS should be incorporated into EMCA, the Companies Act or sectoral legislation dealing with the activities in which a corporation is involved such as Agriculture Act, and Forest Act among others.

The recommendation for anchoring EMS in the law is also founded on the basis that regulatory policies mandating environmental management frameworks induce the internalization of environmental values and social norms. This shall in turn cause corporate behaviour that facilitates sustainability and increased environmental protection.⁶¹² Cary Coglianese and Jennifer Nash characterize this as “management-based” environmental regulatory strategy “used by those outside an organization to change the management practices and behaviour or those on the

⁶¹¹ David Case, “Changing Corporate Behaviour Through Environmental Management Systems,” 31 *William and Mary Environmental Law Review*, (2006), pp. 82-83.

⁶¹² *Ibid* note 611, at p. 101.

inside.”⁶¹³ Indeed, regulatory policy for mandating EMSs can effectuate internalization of the law and social norms in corporate behaviour thus promoting the goal of sustainable development.⁶¹⁴

Indeed, the very nature of EMS design and implementation is to “embark on a prolonged and fundamental program for [organizational] change.”⁶¹⁵ Thus, fully operational EMS shall influence the perceptions, actions and decision-making of the Board, officers and other stakeholders. David W. Case has succinctly stated this proposition that:

“...the realignment of organizational structures and culture in order to focus more specifically on environmental concerns will result in behavioural change through increased awareness of environmental impacts. This enhanced knowledge base will potentially lead to more effective organizational decision-making regarding environmental performance and outcomes. Perhaps the most significant potential driver of corporate environmental behavioural change, however, may be the opportunity to link the substantial information-generating capabilities of formal EMSs with public information disclosure mechanisms. Indeed, the potential for EMSs to produce environmental performance data that companies would not otherwise generate has important implications for policy makers interested in expanding the use of informational regulation as an environment protection policy tool.”⁶¹⁶

This recommendation is enhanced by the finding that the linkages between formal EMSs and corporate environmental information disclosure mechanisms are mandated by some EMS standards and guidelines. For instance, EMAS regulation mandates the extensive public environmental performance reporting.⁶¹⁷ This renders EMAS principally “an information disclosure-based system designed to promote transparency in the environmental operations and performance of participating businesses.”⁶¹⁸ Indeed, the primary objective of EMAS is public

⁶¹³ Cary Coglianese and Jennifer Nash, “Management-Based Strategies for Improving Private Sector Environment Performance,” 36 *Environmental Law Reporter*, (2006) at p. 10,003-10016.

⁶¹⁴ David Case, “The EPAs Environmental Stewardship Initiative: Attempting to Revitalize a Floundering Regulatory Reform Agenda,” 50 *Emory Law Journal* 1, at p. 16-26.

⁶¹⁵ *Ibid* note 614, at p. 16-26.

⁶¹⁶ David Case, “Changing Corporate Behaviour through Environmental Management Systems,” *op. cit* at p. 109.

⁶¹⁷ *Ibid* note 611, at p. 104-105.

⁶¹⁸ *Ibid* note 611, at p. 100.

environmental performance information disclosure, which is achieved through the mandatory preparation of a formal corporate environmental report for disclosure.⁶¹⁹ This could be useful in informing public perception in interacting with the corporation.

Regulatory strategies encouraging or mandating EMS adoption may positively impact on corporate behaviour by improving compliance rates. It may also contribute to the reduction of non-regulated environmental impacts and risks of corporation activities. Indeed, some research findings suggest that EMS-based strategies may be more effective in improving non-regulated impacts of corporate environmental behaviour than those already the subject of conventional regulation.⁶²⁰

As part of the reflexive law strategy,⁶²¹ a primary objective of EMS-based approaches should be to encourage self-regulatory corporate behaviour to supplement, rather than substitute, traditional environmental regulation. In this regard, Perez, Amichai-Hamburger and Shterental conclude that:

“...we do recognize that self regulation schemes cannot replace the public regulation system. They should also be highly selective in their design and the domain to which they are applied. Further, self-regulatory schemes should also contain mechanisms that will discourage strategic manipulation of the scheme by participating firm....”⁶²²

To this point, the trend of formal EMS adoption by corporations has evolved within a semi-voluntary regime.⁶²³ In this regard, this study recommends that the potential public policy value

⁶¹⁹ David W. Case, “Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective,” *University of Colorado Law Review* 76 (2005), 379-401.

⁶²⁰ *Ibid* note 619 at p. 379-380.

⁶²¹ *Ibid* note 611, at pp. 105-106. See also Orts, Eric W., “Reflexive Environmental Law”, 89 *Northwestern Law Review* (1995): 1227-1339.

⁶²² Oren Perez, Yair Amichai-Hamburger & Tammy Shterental, “The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment and Organizational Citizenship Behavior,” Bar-Ilan University Public Law and Legal Theory Working Paper May, 2009, at. 47-48.

⁶²³ David Case, “Changing Corporate Behaviour through Environmental Management Systems,” *op. cit* at p. 111.

of EMSs should be considered from the initial standpoint of incentives to encourage voluntary EMS adoption by corporations. However, this should be aimed at initiating progressive transition towards a mandatory regulatory system. This can be undertaken through making a mandatory legislative provision under the framework law with sufficient transition period to enable corporations comply.

A mandatory regulatory strategy provides an opportunity to assess and address the disincentives that corporations may have in voluntary implementation of EMSs. Such disincentives include requirements for environmental performance information disclosure. Substantially, legal mandates rather than market forces or voluntary self-regulatory behaviour, are often the most important motivation underlying corporate environmental behaviour.⁶²⁴ To this end, the usefulness of EMAS model as opposed to the ISO approach is supported by Perez *et al* thus:

“The gap between the private considerations affecting the initial EMSs decision and the public benefits associated with EMSs provides the basic justification for providing regulatory incentives for EMSs; it could also justify requiring firms with a high risk profile to obtain EMSs. A regulatory scheme seeking to encourage the adoption of EMSs should provide substantial benefits to certified firms. We believe that the EU EMAS scheme constitutes a useful model in this context.”⁶²⁵

Consequently, this thesis recommends that a proper regulatory response should be based on the following pillars, namely: a requirement for publication of corporate environmental performance reports,⁶²⁶ a requirement to engage in consequential internal and external participation or communication; and the development of closer cooperation between national regulators and national accreditation bodies in supervising the work of EMS auditors⁶²⁷ This three prong

⁶²⁴ *Ibid* note 611, at p. 100-101.

⁶²⁵ Oren Perez, *et al*, *ibid* note 622, at p. 47.

⁶²⁶ To begin with, this can be undertaken according to the Global Reporting Initiative Sustainability Reporting Guidelines.

⁶²⁷ Dennis Rondinelli and G. Vastag, “The Value of ISO 14001 Environmental Management Systems,” 18 *European Management Journal* 5 (2000), 499–510.

approach shall provide regulatory incentives for corporations to incorporate more demanding environmental goals. It will also strengthen the monitoring and reflexive components of the. The advantage of this recommendation is that it does not interfere directly with the decisional autonomy of corporations adopting EMSs of choice hence consistent with self-regulatory intention in coexistence with legal oversight. The EMAS approach includes several components which respond to these concerns, and could therefore serve as a basic template for other environmental regulators. The application of EMAS should, however, incorporate aspects comprehensively considered under ISO 14001 for optimal internalization and fulfillment of constitutional environmental rights in Kenya.

5.2.1.2 Enhanced Environmental Disclosure and Reporting Requirements

Although alluded to as part of EMSs design and implementation, disclosure and reporting is specifically recommended as a legislative reform point through a mandatory framework. This is the case because reporting and disclosure supplies information on a company's policies, management and information systems. Disclosure also publishes and initiatives to manage exposure or capitalize on opportunities useful to overall corporate environmental management.⁶²⁸

Reporting and disclosure also includes information on any specific concerns, challenges and opportunities that a corporation has, or may encounter. Moreover, disclosure and reporting incorporates the modalities on risk management in its business as well as relevant metrics for measuring performance outcomes.⁶²⁹

⁶²⁸ David W. Case, "Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective," *op. cit.* at p. 379.

⁶²⁹ Carol A. Adams, "The Ethical, Social and Environmental Reporting-Performance Portrayal Gap," 17 *Accounting, Auditing & Accountability Journal* 5, (2004), 731-757. See also Hess, David, "Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency," 17 *Business Ethics Quarterly* (2007): 453-467.

The corporate environmental disclosure and reporting requirements under the implementing legal frameworks of the Capital Markets Act,⁶³⁰ EMCA⁶³¹ and Companies Act⁶³² are largely inadequate. Therefore, a legislative framework where Capital Markets Authority (CMA), National Environmental Management Authority (NEMA) and the Registrar of Companies formulate and enforce regulatory requirements for enhanced disclosure and reporting on corporate environmental performance by corporations, be they listed in the securities market or not should be developed. This implies that the definition of “materiality” under securities regulation and corporate law should be clarified and expanded to include indicators of corporate environmental performance such as the case of South Africa’s Johannesburg Stocks Exchange (JSE).⁶³³

To effectuate such an approach, internal and external compliance monitoring systems could be installed within mandatory requirements. Sanctions, penalties or other consequences for non-compliance should also be implemented. This regulatory approach should be accompanied by the amendment of non-securities legal and regulatory regimes affecting the corporation as recommended herein. Such amendments may include clarification of the scope of directors’ and trustees’ duties, as well as disclosure requirements for companies in respect of their corporate environmental performance. The specific elements for resources are recommended below.

⁶³⁰ See Regulation 12 of the Capital Markets (Listing, Public Offers and Disclosure) Regulations, 2002 made under the Capital Markets Act quoted *in extenso* in Chapter 4 p. 153.

⁶³¹ See Regulation 21 of Environmental (Impact Assessment and Audit) Regulations, 2003.

⁶³² See section 125 of the Act quoted and discussed *in extenso* in Chapter 4, p. 154.

⁶³³ Stéphanie Giamporcaro, Lise Pretorius, and Martine Visser, “Responsible Investment: A Vehicle for Environmentally Sustainable Economic Growth in South Africa?” Environment for Development Discussion Paper Series (2010).

(a) Environmental Accounting and Reporting: Proposals as to the Legal Framework

Several legal approaches have been applied to institute mandatory corporate environmental performance reporting. The framework can be administered under the environmental laws⁶³⁴ or through the company laws and law of accounts.⁶³⁵ This variation in approach, to an extent, connotes varying objectives in terms of the content and target companies, and subsequently the administration of the respective frameworks. Corporate disclosure has traditionally been addressed under company laws and laws of financial accounting.⁶³⁶ Perhaps this leads to the conclusion that the competency in regulating corporate disclosures rests within the CMA and the Registrar of Companies. However, it can be argued that these agencies traditionally focused on financial disclosures and lack the competency to interpret environmental information. Therefore, there is need for a harmonized approach combining competency and relevant policing infrastructure which generally lies with NEMA as well as accounting infrastructure which is domiciled at the CMA and Registrar of Companies. As a consequence, for Kenya, this study recommends that the framework be developed collaboratively by NEMA, CMA and Registrar of Companies, but the administration of environmental accounts should reside in the companies agencies which shall forward or avail such information for NEMA's action where necessary.

(b) Proposed Administration and Enforcement

In the proposed approach, NEMA shall rely on the information system of the Registrar of Companies and the CMA for publication of the accounts. At the same time the environmental

⁶³⁴ Environmental Protection Act in Denmark and Environmental Management Act in the Netherlands proffer this approach.

⁶³⁵ This approach is applied vide the company laws in Sweden and Norway. For Norway, see for instance, Beate Sjøfjell, "Towards a Sustainable Development: Internalising Externalities in Norwegian Company Law," University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2010-05 Papers from the *Sustainable Companies* Research Project (2010).

⁶³⁶ *Ibid* note 635, at pp. 6-9.

supervisory authorities and environmental protection agency shall then review the accounts or reports. Perhaps it would be administratively efficient to establish centralized database where the environmental information is shared among the relevant agencies involved in monitoring and enforcement of environmental human rights such as NEMA, and partly Registrar of Companies and CMA.

(c) Scope of Framework and Recommended Mandatory Provision

On the scope, the framework should be to companies subject to environmental permitting or whose activities fall under activities covered by the environmental law to begin with, then this can progressively extend to any corporate entity, irrespective of size.⁶³⁷ For effectiveness, the law should limit the obligation to report to corporations within sectors of high environmental impact categorized as such vide an elaborate review framework. The impact should accordingly include waste generation capacities.

It is recommended that the provision sufficient to attend to the scope may be structured per the Norwegian provision stating that:

“Information about conditions which may affect the external environment an account must be given of matters relating to the enterprise, including its resource used in production and products, which contributes to an impact on the external environment and of the measures which have been implemented or are being planned to prevent or reduce negative impacts on the environment.”

This provision, characteristic of Norway with some level of success, imposes the duty on the corporation to disclose particulars of compliance with environmental laws, steps taken or proposed to be taken towards adoption of clean technologies for prevention of pollution, waste minimization, waste re-cycling and utilization pollution control measures, investment on

⁶³⁷ This approach of characteristic of Germany but rightly so since most of the German corporations have matured over time in their sectors and can sustain the costs of such systems.

environmental protection and impact of these measures on waste reduction, water and other resource conservation.

(d) Rules on Content of Disclosure and Reporting

The framework should set rules on content, generically cover both management statement, and quantitative data on emissions and waste. It should also provide for information about environmental impacts of products and processes on changes in environmental resource use that have taken place in relations to previous years. The reports should state whether the environmental impacts have a direct or indirect influence on the financial performance to facilitate determination of effect. For instance, it is probable that corporations which do not invest in environmental management will not reflect any costs for management. In addition, the framework should stipulate the need for independent verification to attest to the quality of the reports, as the case is in corporate financial reporting.

(e) Enhanced Investor Disclosure Requirements

Regulators in Kenya may also establish enhanced disclosure and reporting requirements for investors themselves. For example, institutional investors and pension funds could be required to publicly report on their investment practices, and the extent to which they use corporate environmental performance as an indicator for investment decisions.⁶³⁸ As with other options for reform, the question would be the extent to which disclosure would be prescribed or left up to the institutional investors and what consequences should be prescribed for non-compliance.⁶³⁹ It

⁶³⁸ Schoder, M., "The Performance of Socially Responsible Investments: Investment Funds and Indices," 18 *Financial Markets and Portfolio Management* 2 (2004) 122-142.

⁶³⁹ Stéphanie Giamporcaro, Lise Pretorius, and Martine Visser, "Responsible Investment: A Vehicle for Environmentally Sustainable Economic Growth in South Africa?" Environment for Development Discussion Paper Series (2010)

should be noted that some institutional investor laws in Kenya already contain some provisions on extra-financial considerations for investment.⁶⁴⁰ The same should be applied to other corporate investors since fiduciary duties extend to adhering to the interest of the stakeholders with legitimate claims in the governance of the corporation.

Various ways exist to promote sustainability reporting in investments. One option is for the regulator to be passive and let sustainability reporting emerge as the result of market forces. Alternatively, the regulator may choose to introduce a range of measures to supplement the market forces: through regulations⁶⁴¹ dictating mandatory reporting by corporations providing incentives for investors to report through subsidies or penal sanctions or governmental endorsement of the Global Reporting Initiative (GRI) Guidelines and material motivation for adoption. It may also be pursued by transferring the regulatory power to self-regulating authorities but with the public regulators oversight, whose statutes may be either voluntary or mandatory such as the way Nairobi Stocks Exchange (NSE) and CMA operate. The latter model is recommended due to its relative success in capital markets and securities regulation.

Comparatively, the Securities and Exchange Commission (SEC) of the US issued the 'Guidance Regarding Disclosure related to Climate Change' in February 2010, to clarify the existing rules, by requiring companies to disclose material risks relating to climate change. Following the Gulf of Mexico oil spill in April 2010, the US government raised expectations for regulation on mandatory environmental and related disclosure. Such an approach is worth considering for Kenya.

⁶⁴⁰ For instance, sections 37, 38 and 39 the Retirement Benefits Act provide for this hence should be strengthened through clarity of expectation and specific obligations because of the fiduciary duty.

⁶⁴¹ Stéphanie Giamporcaro, Lise Pretorius, and Martine Visser, "Responsible Investment: A Vehicle for Environmentally Sustainable Economic Growth in South Africa?" *op. cit.*

5.2.1.3 Responsible Investment and the Law

Some basic strategies on extending and implementing environmentally responsible investment (RI) in the law can be outlined briefly. Firstly, the fiduciary duties of institutional investors should be reformed to ensure that the public costs of private investment are accounted for.⁶⁴²

Fiduciary duties, which generally govern how financial decision-makers manage the assets of beneficiary investors, do not prioritize investment for sustainable development in Kenya. The World Economic Forum (WEF) has thus recommended that authorities “modify ... fiduciary rules which discourage or prohibit explicit [financial decision-makers] consideration of social and environmental aspects of corporate performance.”⁶⁴³

Redefinition of fiduciary standards in a way that can promote sustainable development while holding financial decision-makers measurably accountable is recommended.⁶⁴⁴ Towards this end, fiduciary duties may be redefined to oblige fiduciaries, by legislation, to act for sustainable development or a similar general performance standard. The difficulty would be to design a performance standard with sufficient clarity to make fiduciaries accountable.⁶⁴⁵

The RI industry already makes extensive use of sustainability performance standards in evaluating and comparing potential investments which should be extended to the financial industry *per se*.⁶⁴⁶ Under a reformed standard, fiduciary investors should remain legally

⁶⁴² Benjamin J. Richardson, “Can Socially Responsible Investment Provide and Means of Environmental Regulation,” *Op. Cit.*, at p. 292.

⁶⁴³ See World Economic Forum, *Mainstreaming Responsible Investment*, (WEF: 2005) at p .10. See also John Glover, “Banks and Fiduciary Relationships,” (1995) 7 *Bond Law Review* at p. 50.

⁶⁴⁴ See Asset Management Working Group of the UNEP FI, *Fiduciary Responsibility: Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues into Institutional Investment*, Report (2009) UNEP FI.

⁶⁴⁵ *Ibid* note 644, at p. 1.

⁶⁴⁶ Justin Keeble, Sophie Topiol and Simon Berkeley, “Using Indicators to Measure Sustainability Performance as a Corporate and Project Level,” 44 *Journal of Business Ethics* (2003) at p. 149.

accountable to only their fund members or shareholders with respect to maximizing financial returns, but they shall be bound by sustainability requirements.

Apart from fiduciary duties, reform is needed to address the global scale of financial markets. Parallel sustainability standards must be etched into the international legal rules governing transboundary financial arrangements. New international rules would presumably have several advantages. Firstly, they would minimize “a race to the bottom,” as level standards would deter capital from running to the least or poorly regulated markets.⁶⁴⁷ Secondly, some institutional investors in global markets may even welcome some standardization of RI norms, as having to contend with different rules in different markets increases compliance costs.⁶⁴⁸ At the bare minimum, such reforms should include standards conducive to RI, such as mandatory disclosures of social and environmental risks, reforms to financial accounting to incorporate social accounting metrics, and even standards for democratizing investment fund governance to widen the range of stakeholder voices in investment decisions.⁶⁴⁹ This can be implemented by formal transnational governance mechanisms such as international legal instruments.

These and other conceivable reforms may seem implausible, but with a impending transnational environmental crisis, more radical alternatives may one day be contemplated if the financial sector is excluded from the contemporary environmental debate. Until RI is institutionalized and

⁶⁴⁷ Friedman A. and S. Miles, “Socially Responsible Investment and Corporate Social And Environmental Reporting in the UK: An Exploratory Study,” 33 *The British Accounting Review* 4 (2001) 523-548.

⁶⁴⁸ Rory Sullivan and Craig Mackenzie, *Responsible Investment* (Sheffield: Greenleaf, 2006).

⁶⁴⁹ Benjamin J. Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (Oxford University Press: New York, 2008) at p.509-566.

operationalised, it will likely remain a small, niche sector of the financial economy, unable to greatly influence the environmental practices of companies.⁶⁵⁰

5.2.1.4 Environmental Human Rights Due Diligence

Owing to the thin-line variation between due diligence for environmental human rights and EIAs, that is, the former connoting the broader province within which the latter would fall, one main recommendation is provided by this thesis, namely: amendment of EIA legislation to reflect the broader ideals of corporate environmental rights due diligence as a human rights issue. This can be undertaken through a two-pronged approach consisting of explicit incorporation of Human Rights Impact Assessment (HRIA) tools and reviewing EIAs to address operational shortcomings thereof.

5.2.1.4.1 Incorporation of Environmental Human Rights Considerations in EIAs

Elisa Morgera has argued that integrating HRIA in legislation on EIAs may assist in fulfilling the corporation's duty to respect constitutional environmental rights.⁶⁵¹ This is possible since the corporations shall be compelled to undertake comprehensive due diligence measures to assess the impact of their activities on the environment and related human health. In fact, the importance of this integration has been emphasized by the UN Global Compact (UNGC), International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC) as interposed thus:

“...the human rights focus to date has been almost primarily on labour standards and working conditions in supply chains, but other broader human rights issues – for

⁶⁵⁰ Benjamin J. Richardson, “Can Socially Responsible Investment Provide and Means of Environmental Regulation,” *op. cit* at 295.

⁶⁵¹ See Elisa Morgera, *Final Expert Report: Corporate Responsibility to Respect Human Rights in the Environmental Sphere* (2010) a study commissioned by the EU. See also Elisa Morgera, *Corporate Accountability in International Environmental Law*, (New York: Oxford University Press, 2009) at p. 179-180.

example, the conditions under which natural resources are ... [used or] processed – are now ...[supposed to be] considered [and practically actualized].⁶⁵²

Consequently, the law on EIAs under EMCA should be amended to specifically consider obligations under Article 69 of the Constitution.⁶⁵³

The consideration recommended would contribute to sustainable development and the operationalization of the UN Guidelines on Business and Human Rights whose domestication in Kenya through (primary or subsidiary) legislation is highly recommended in this thesis. The application of the framework under the Guidelines shall be critical to guiding Kenya in the relationship and obligations relating corporate responsibility for human rights of which the environmental rights are at the core. This shall also require environmental education among relevant stakeholders to leverage knowledge on corporate duties in relation to environmental human rights. The Guidelines are annexed in the Appendix of this thesis.

5.2.1.4.2 Addressing Past Shortcomings of EIAs

To enable EIAs operate effectively in apply human rights considerations as recommended, the deficiency of EIA process in Kenya to integrate holistic environmental concerns into decision-making should be addressed. SEA provides the influence on decision-making hence should be operationalised more seriously. This can be undertaken by formulation of positive regulations under EMCA aimed at compelling corporations to undertake SEA. The recommendation is based on the potential of SEA to strengthen and streamline EIAs through environmentally and socially sustainable development (ESSD). This is channeled by SEA addressing corporate environmental

⁶⁵² UN Global Compact, International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC) *Guide to Human Rights Impact Assessment and Management Road Testing Draft* (2007) at p. 11.

⁶⁵³ See Article 69 quoted *in extenso* at p. 3-4 of this thesis.

impact at source through integration in decision-making. SEA also incorporates policy and planning issues that are addressed either ineffectively or not at all by EIA, early warning of cumulative effects from programmatic or other, spatially related actions.⁶⁵⁴

⁶⁵⁴ UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (UNEP: Geneva, 2004) at p. 92.

BIBLIOGRAPHY

(a) Books

- Bottomley, Stephen. *The Constitutional Corporation: Rethinking Corporate Governance* (Surrey: Ashgate Publishers, 2007).
- Boyd, David R. *Unnatural Law: Rethinking Canadian Environmental Law and Policy*, (Vancouver: University of British Columbia Press, 2003).
- Boyle, Alan E. and Michael R. Anderson (eds.). *Human Rights Approaches to Environmental Protection*, (Oxford: Clarendon Press, 1996).
- Business & Human Rights Initiative, *How to Do Business with Respect for Human Rights: A Guidance Tool for Companies*, (The Hague: Global Compact Network Netherlands, 2010).
- Claessens, Stijn. *Corporate Governance and Development*, (Washington DC: Global Corporate Governance Forum, 2003).
- Clapham, Andrew. *Human Rights Obligations of Non-State Actors*, (Oxford: Oxford University Press, 2006).
- Coglianesi C. and Nash J (eds). *Regulating From the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington D.C: Resources for the Future, 2001).
- Doherty, B. and M. deGeus, (eds). *Democracy and Green Political Thought: Sustainability, Rights, and Citizenship*. (London: Routledge, 1996).
- Dworkin, Ronald. *Taking Rights Seriously* (London: Duckworth, 1978).
- Eliadis, Pearl, Margaret M Hill, Michael Howlett (eds). *Designing Government*, (Montreal: McGill-Queen's University Press, 2005)
- Esty, Daniel and Andrew Winston. *Green to Gold: How Smart Companies use Environmental Strategy to Innovate, Create Value and Build Competitive Advantage*, (New York: John Wiley Publisher, 2008).
- Feeney, Patricia. *Accountable Aid: Local Participation in Major Projects*, (Oxford: Oxfam International Publications, 1998).
- Freeman, Edward R. *Strategic Planning: A Stakeholder Approach* (Pitman: London, 1984).
- Gaughan, P. A. *Mergers, Acquisitions and Corporate Restructuring*, 3rd ed. (New York: John Wiley & Sons, 2002).

Hanlon, Joseph (Ed). *Independent Expert Study Group on the Evaluation of the Application and Impact of Sanctions against South Africa*, (London: Commonwealth Secretariat, 1990).

Hayward, Tim. *Constitutional Environmental Rights*, (London: Oxford University Press, 2005).

Hunter, David, James Salzman & Durwood Zaelke. *International Environmental Law and Policy*, Third Edition (New York: Foundation Press, 2007).

Institute for Human Rights and Business (IHRB). *The "State of Play" of Human Rights Due Diligence: Anticipating the Next Five Years,*" (London: IHRB, 2011).

Juma, Calestous and J.B. Ojwang (eds). *In Land We Trust: Environment, Private Property and Constitutional Change*, (Nairobi: Initiatives Publishers/London: Zed Books, 1996).

Mahoney, K.E. and P. Mahoney, (eds). *Human Rights in the Twenty-first Century: A Global Challenge*. (Dordrecht: Martinus Nijhoff, 1993)

Makoolo, Maurice O., Benson O. Ochieng' and Collins Odote, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*, (Ecogovernance Series No. 4) (Nairobi: Institute of Law and Environmental Governance, 2007)

Manzella, Lillian. *The International Law Standard for Corporate Aiding and Abetting Liability*, (Washington D.C: EarthRights International, 2006).

Morgera, Elisa. *Corporate Accountability in International Environmental Law*, (New York: Oxford University Press, 2009).

Mutunga, Willy. *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Sareat/Mwengo: Nairobi, 1999).

Nowak, M. (ed). *World Conference on Human Rights* (Vienna: Ludwig Boltzmann Institute of Human Rights, 1994).

Okidi, Charles O., P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (Nairobi: ILEG, CASELAP, EAEP, 2008).

Pedersen, E.R. & M. Huniche (eds). *Corporate Citizenship in Developing Countries: New Partnership Perspectives*, (Copenhagen: Copenhagen Business School Press, 2006).

Prašnikar, Janez and Andreja Cirman, (eds). *New Emerging Economies and Their Culture*, (New York: Nova Science, 2007)

Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and A Sample Code of Best Practice for Corporate Governance*, (Nairobi: Private Sector Corporate Governance Trust, 1999)

Purswani, Radha. *Carbon Trading: Some Insights and Perspectives*, (Hyderabad: ICAI University Press, 2008).

Rich, Bruce. *Mortgaging the Earth: The World Bank, Environmental Impoverishment and the Crisis of Development*, (Boston: Beacon Press, 1995)

Sadeleer, Nicolas de. *Environmental Principles: From Political Slogans to Legal Rules*, (Oxford: Oxford University Press, 2002).

Saxe, D. *Environmental Offences: Corporate Responsibility and Executive Liability*. (Aurora, ON: Canada Haw Book, 1990).

Science and Environmental Health Network (SEHN) *An Environmental Right for Future Generations: Model State Constitutional Provisions and Model Statute*, (North Dakota: SEHN, 2008).

Shue, Henry. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd Ed. (Princeton: Princeton University Press, 1996).

Simeone, Christina. *The Necessity and Possibilities of Constitutional Environmental Rights* (Master of Environmental Studies Thesis: University of Pennsylvania, 2006).

Spedding, Linda S. *Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning* (Amsterdam: CIMA Publishing, 2009).

Stephens, T. *International Courts and Environmental Protection*. (Cambridge: Cambridge University Press, 2009).

Sullivan, Rory and Craig Mackenzie. *Responsible Investment* (Sheffield: Greenleaf Publishing, 2006).

Turner, Stephen J. *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (The Hague: Kluwer Law International BV, 2009).

Wheelen, Thomas L., and David J. Hunger, *Strategic Management and Business Policy*, (Upper Saddle River: Pearson – Prentice Hall, 2006).

Zadek, S., P. Pruzan and R. Evans (eds.). *Building Corporate Accountability: Emerging Practices in Social and Ethical Accounting, Auditing and Reporting* (London: Earthscan, 1997).

Zandvliet, Luc and Mary Anderson, *Getting it Right: Making Corporate-Community Relations Work*, (Sheffield: Greenleaf Publishing, 2009).

(b) Articles

Adams, Michael, Barry Thornton, and Mohammad Sepehri, "The impact of the pursuit of sustainability on the financial performance of the firm," *Journal of Sustainability and Green Business* (Floridam, USA) (2010): 1-14.

Adams, Carol A. "The Ethical, Social and Environmental Reporting-Performance Portrayal Gap," *17 Accounting, Auditing & Accountability Journal* 5, (Bingley, UK) (2004): 731-757.

Adebanji Adekoya & Emmanuel Ekpenyong. "Corporate Governance and Environmental Performance: Three Point Strategy for Improving Environmental Performance among Corporation in Africa," IAEA Conference Proceedings, 29th Annual Conference of the International Association for Impact Assessment, 6-22 May 2009, Accra International Conference Centre, Accra.

Alston, Philip. "Human Rights in 1993: How Far has the United Nations Come and Where Should it Go From Here?" in Nowak, M., *World Conference on Human Rights* (Vienna: Ludwig Boltzmann Institute of Human Rights, 1994): 13-22.

Angwenyi, Anne N. "An Overview of Environmental Management and Co-ordination Act," in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (ILEG, CASELAP, EAEP: Nairobi, 2008) at p. 143-182.

Anton, W.R., G. Deltas, and M. Khanna. "Incentives for Environmental Self-Regulation and Implications for Environmental Performance," *48 Journal of Environmental Economics and Management* 1 (Amsterdam) (2004): 632-654

Arlen, Jennifer H., and Reinier H. Kraakman, "Controlling Corporate Misconduct: A Comparative Analysis of Alternative Corporate Incentive Regimes," *72 New York University Law Review*, (New York) (1997): 687-779.

Banerjee, Subhabrata B., and Easwar S. Iyer, and Rajiv K. Kashyap, "Corporate Environmentalism: Antecedents and Influence of Industry Type," *67 Journal of Marketing* 2 (Chicago) (2003): 106-122.

Bannon, Alicia L. "Designing a Constitution-Drafting Process: Lessons from Kenya," *116 Yale Law Journal* (New Haven) (2007): 1824-1872.

Bebbington, J. "A Review Essay on Environmental Accounting" *10 Accounting, Auditing and Accountability Journal* 3 (Bingley, UK) (1997), pp. 365-376.

Benn, Suzanne and Dexter Dunphy. "Towards New Forms of Governance for Issues of Sustainability: Renewing Relationships between Corporates, Government and Community" 9 *Electronic Journal of Radical Organization Theory* 1, (Waikato) (2005) pp.1-29.

Black, Nicky. "Business Action on Human Rights: Doing No Harm, Good Works, and Good Business in the Developing World," in *Corporate Citizenship in Developing Countries: New Partnership Perspectives*, E.R. Pedersen & M. Huniche (eds) (Copenhagen: Copenhagen Business School Press, 2006): 57-88.

Boyle, Alan. "The Role of International Human Rights Law in the Protection of the Environment", in Alan E. Boyle and Michael R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, (Oxford: Clarendon Press, 1996): 43-65.

Boyle, Alan. "Human Rights or Environmental Rights? A Reassessment" XVIII *Fordham Environmental Law Review*, (New York) (2007): 471-511.

Boyle, Alan. "Human Rights and the Environment: A Reassessment" Paper presented at the First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability, Kuala Lumpur, 2011.

Bradford, W. "Beyond Good and Evil: Toward a Solution of the Conflict between Corporate Profits and Human Rights," (2007) at <http://ssrn.com/abstract=9924> (accessed on October 1, 2011).

Brandl, E. and H. Bungert. "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad," 16 *Harvard Environmental Law Review* 1 (Cambridge, USA) (1992): 1-100.

Bruch, Carl, Wole Coker & Chris Van Arsdale. "Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa," *Environmental Governance in Africa Working Paper Series* (Washington DC: World Resources Institute, Institutions & Governance Programme, 2001).

Bruckerhoff, Joshua J. "Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights," 86 *Texas Law Review* 3 (Austin, Texas) (2008): 615-630.

Cadbury, Adrian. "Foreword," in Stijn Claessens, *Corporate Governance and Development*, (Washington DC: Global Corporate Governance Forum, 2003) v-vii

- Case, David. "The EPAs Environmental Stewardship Initiative: Attempting to Revitalize a Floundering Regulatory Reform Agenda," 50 *Emory Law Journal* 1 (Atlanta) (2001): 1-100.
- Case, David W. "Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective," *University of Colorado Law Review* 76 (Boulder) (2005): 379-401.
- Case, David. "Changing Corporate Behaviour through Environmental Management Systems," 31 *William and Mary Environmental Law Review*, (Williamsburg, Virginia) (2006): 75-104.
- Carrillo, Elena F Pérez. "Corporate Governance: Shareholders' Interests' and Other Stakeholders' Interests," 4 *Corporate Ownership & Control Journal* 4 (Sumy, Ukraine) (2007): 96-102.
- Carter, Craig R. and Joseph R. Carter. "Interorganizational Determinants of Environmental Purchasing: Initial Evidence from the Consumer Products Industry," 29 *Decision Sciences* 3 (Gainesville, Florida) (1998): 659-684.
- Catá Backer, Larry. "From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations," 39 *Georgetown Journal of International Law* (Washington D.C.) (2008): 591-632.
- Catá Backer, Larry. "From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance," 24 *Pacific McGeorge Global Business & Development Law Journal* (Sacramento, USA) (2012).
- Čater, Tomaž, Janez Prašnikar, Barbara Čater. "Environmental Strategies and Their Motives and Results ion Slovenian Business Practice," 11 *Economic And Business Review* 1 (Ljubljana, Slovenia) (2009): 55-74
- Čermič, Jernej Letnar. "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises," 4 *Hanse Law Review* 1 (Bremen) (2008): 71-100.
- Chappinelli, J.A. "The Right to a Clean and Safe Environment: A Case for a Constitutional Amendment Recognizing Public Rights in Common Resources," 40 *Buffalo Law Review* (New York) (1992): 597.
- Coglianesi, Cary and Jennifer Nash, "Environmental Management Systems and the New Policy Agenda," in Coglianesi C, & Nash J (eds) *Regulating From The Inside: Can Environmental Management Systems Achieve Policy Goals?* (Resources for the Future, Washington D.C, 2001): 1-26.

Coglianesi, Cary. "Legitimacy and Corporate Governance," Working Paper of the Corporate Social Responsibility Initiative, Harvard Kennedy School, Working Paper No. A (Cambridge, USA) (2005).

Cole, David. "The Precautionary Principle: Its Origins and Role in Environmental Law," (2005) <http://edo.org.au/edosa/research/david%20Cole%20onprecautionary%20principle.doc> (last accessed on 27 October 2012)

Cornford, A. "Enron and Internationally Agreed Principles for Corporate Governance and the Financial Sector," G-24 Discussion Paper Series, No. 30, UNCTAD (Geneva) (2004).

Corbett, Angus & P Spender. "Corporate Constitutionalism," *31 Sydney Law Review* 147 (Sydney) (2009): 146-148.

Cormier, Denis and Irene M. Gordon. "An Examination of Social and Environmental Reporting Strategies," *14 Accounting, Auditing & Accountability Journal*, 5 (Bingley, UK) (2001): 587-617.

Cullet, Philippe. "Definition of an Environmental Right in a Human Rights Context," *Netherlands Quarterly of Human Rights*, (Utrecht) (1995): 25-40.

Dhir, Aron A. "Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability," *43 American Business Law Journal* 2 (2006): 365-412.

Donald F. Larson, *et al.* "Carbon Markets, Institutions, Policies, and Research," *Policy Research Working Paper 4761*, The World Bank, New York, 2008.

Donaldson, Thomas and Lee E. Preston. "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications." *20 The Academy of Management Review* (New York) (1995): 65-91

Dubois, F. "Social Justice and the Judicial Enforcement of Environmental Rights and Duties," in A.E. Boyle and M.R. Anderson, eds. *Human Rights Approaches to Environmental Protection*. (Oxford: Clarendon Press): 153-175.

Dupuy, Pierre-Marie. "Soft Law and the International Law of the Environment," *12 Michigan Journal of International Law*, (Ann Arbor) (1991) 420-435.

Duruigbo, Emeka. "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges," *6 Northwestern Journal of International Human Rights* 2, (Chicago) (2008): 222-261.

Eckersley, R. "Greening Liberal Democracy: The Rights Discourse Revisited," in B. Doherty and M. deGeus, eds. *Democracy and Green Political Thought: Sustainability, Rights, and Citizenship*. (London: Routledge, 1996): 212-236.

Ekinsand, P. & T. Barker "Carbon Taxes and Carbon Emissions Trading," 15 *Journal of Economic Surveys* 3 (New York) (2001): 325-327.

Fama, Eugene F. "Agency Problems and the Theory of the Firm," 88 *The Journal of Political Economy* 2, (Chicago) (1980): 288-307.

Fama, Eugene F. and Michael C. Jensen, "Agency Problems and Residual Claims." 26 *Journal of Law and Economics* 2 (Chicago) (1983): 327-349.

Feeney, Patricia. "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda," 6 *SUR International Journal on Human Rights* 11 (São Paulo) (2009): 161-175.

Figge, Frank, Tobias Hahn. Stefan Schaltegger and Marcus Wagner, "The Sustainability Balanced Scorecard: Linking Sustainability Management to Business Strategy," 11 *Business Strategy and the Environment* (New York) (2002): 269-284.

Food & Water Watch and the Council of Canadians, "Lake Naivasha Withering under the Assault of International Flower Vendors," (Washington DC: Food & Watch/Ottawa: The Council of Canadians, 2008).

Freimann, Juergen and Michael Walther. "The Impacts of Corporate Environmental Management Systems: A Comparison between EMAS and ISO 14001," Paper presented at the EASY-ECO Evaluation of Sustainability Euro Conference, May 23 – 25, 2002, Vienna, Austria.

Friedman, A. and S. Miles. "Socially Responsible Investment and Corporate Social And Environmental Reporting in the UK: An Exploratory Study," 33 *The British Accounting Review* 4 (Sheffield) (2001): 523-548.

Gallhofer, S. and J. Haslam, "The Direction of Green Accounting Policy: Critical Reflections," 10 *Accounting, Auditing, and Accountability Journal* 2 (Bingley, UK) (1997): 148-174.

Garriga, Elisabet & D Melé. "Corporate Social Responsibility Theories: Mapping the Territory," 53 *Journal of Business Ethics* 1-2 (New York) (2004): 51-71.

Giamporcaro, Stéphanie, Lise Pretorius, and Martine Visser, "Responsible Investment: A Vehicle for Environmentally Sustainable Economic Growth in South Africa?" Environment for Development Discussion Paper Series (2010)

Giamporcaro, Stéphanie. "How Can Innovative Financial Tools Be Applied to Facilitate an Environmentally Responsible Growth in South Africa? Drawing Lessons from Local and International Experiences in the Application of Responsible Investment Approaches," Paper presented at the Oikos-PRI Young Scholar Academy 2009, "Responsible Investment: Integration, Engagement, and Transparency," February 8–13, 2009, Gais, Switzerland.

Glazebrook, Susan. "Human Rights and the Environment," 40 *Victoria University of Wellington Law Review* (Wellington, New Zealand) (2009): 293-350.

Gordon, Kathryn. "Enabling Conditions for Environmental Sustainability: Private and Public Roles" Draft background paper for discussion at session V. of the OECD Global Forum on Sustainable Development: Conference on Financing Environmental Dimension of Sustainable Development OECD, Paris, 24-26 April 2002.

Graaf, Frank J. de, and Cor A. J. Herkströter. "How Corporate Social Performance Is Institutionalised within the Governance Structure," 74 *Journal of Business Ethics*, 2 (New York) (2007): 177-189.

Gunningham, Neil. "Reconfiguring Environmental Regulation," in Pearl Eliadis, Margaret M Hill, Michael Howlett (eds), *Designing Government*, (Montreal: McGill-Queen's University Press, 2005): 333-364.

Gupta, Mahesh C. "Environmental Management and Its Impact on the Operations Function," 15 *International Journal of Operations & Production Management*, 8 (Bingley, UK) (1995): 34-51.

Hargreaves, Scott. "Conceptualising Legitimacy for New Venture Research," A paper for the Small Enterprise Association of Australia and New Zealand 16th Annual Conference, *Ballarat*, 28 Sept-1 Oct, 2003.

Henkin, Louis. "The Universal Declaration at 50 and the Challenge of Global Markets," 25 *Brooklyn Journal of International Law* 1, (New York) (1999): 25.

Hess, David. "Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency," 17 *Business Ethics Quarterly* (Charlottesville, Virginia) (2007): 453-467.

Hunter, David & Lori Udall. "The World Bank's Inspection Panel," CIEL Issue Brief No. 1 (April 1994) (reprinted in *Environment*, Nov. 1994) at <http://www.ciel.org/Publications/issue1.html> (accessed on July 19, 2012).

International Network for Economic, Social and Cultural Rights (ESCR-NET). "UN Human Rights Norms for Briefing Kit" (2005) at http://www.escr-net.org/usr_doc/Briefing_Kit.pdf (accessed on January 12, 2012).

Jeffords, Christopher. "Constitutional Environmental Human Rights: A Descriptive Analysis of 42 National Constitutions" Working Paper No. 6, The Human Rights Institute, University of Connecticut, Economic Rights Working Paper Series (2011).

Jerbi, Scott. "Business and Human Rights at the UN: What Might Happen Next?" 31 *Human Rights Quarterly* 2 (Baltimore) (2009): 299-320.

John, Nerys. "The Campaign against British Bank Involvement in South Africa," 99 *African Affairs*, (Oxford) (2000): 415-433.

Jones, Mariette X. "The Enforceability of Environmental Rights as Human Rights: A Tale of Two Countries," (2009) at [http://eprints.mdx.ac.uk/3606//The Enforceability of Environmental Rights as Human Rights South Africa and the Netherlands.pdf](http://eprints.mdx.ac.uk/3606//The%20Enforceability%20of%20Environmental%20Rights%20as%20Human%20Rights%20South%20Africa%20and%20the%20Netherlands.pdf) (last accessed on April 30, 2012).

Kagan, Robert A. Dorothy Thornton, Neil Gunningham, "Explaining Corporate Environmental Performance: How Does Regulation Matter?" 37 *Law & Society Review* 1, (New York) (2003): 51-90.

Kamau, Evanson Chege. "Pollution Control in Developing Countries with a Case Study on Kenya: A Need for Consistent and Stable Regimes," *Revista Internacional de Direito e Cidadania*, 9 (São Paulo) (2011): 29-42.

Kameri-Mbote, P. "Law, Gender and Environmental Resources: Women's Access to Environmental Justice in East Africa," in J. Ebbesson and P. Okowa, eds. *Environmental Law and Justice in Context*. (Cambridge: Cambridge University Press, 2009): 390-408.

Kameri-Mbote, Patricia. "Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention," International Environmental Law Research Centre (IELRC) Working Paper No. 2005-1 at <http://www.ielrc.org/content/w0501.pdf> (last accessed on July 3, 2012).

Kameri-Mbote, Patricia. "The Use of Criminal Law in Enforcing Environmental Law," in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (ILEG, CASELAP, EAEP: Nairobi, 2008) 110-125 at p. 120.

Kameri-Mbote, Patricia and Collins Odote. "Courts as Champions of Sustainable Development: Lessons from East Africa," *Journal of Sustainable Development Law & Policy* (Washington DC) (2009): 31-38.

Karkainen, Bradley C. "Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?" 89 *Georgetown Law Journal* (Washington D.C.) (2001): 257-370.

Keeble, Justin, Sophie Topiol and Simon Berkeley, "Using Indicators to Measure Sustainability Performance as a Corporate and Project Level," 44 *Journal of Business Ethics* (New York) (2003): 149-158.

Khan, Irene. "Should Human Rights Be Your Business?" Speech delivered to Japan Association of Corporate Executives, Keizai Doyukai, Tokyo, 2 June 2005, <http://asiapacific.amnesty.org/apro/APROweb.nsf/pages/IreneKhanKeizaiDoyukai> (accessed on January 10, 2012).

Kiss, Alexandre. "Concept and Possible Implications of the Right to Environment," in K.E. Mahoney and P. Mahoney, eds. *Human Rights in the Twenty-first Century: A Global Challenge*. (Dordrecht: Martinus Nijhoff, 1993) 551-559.

Kiss, Alexandre. "Concept and Possible Implications of the Right to Environment," in K.E. Mahoney and P. Mahoney, eds. *Human Rights in the Twenty-first Century: A Global Challenge*. (Dordrecht: Martinus Nijhoff, 1993) 551-559.

Kleindorfer, Paul. "Implications of Globalization and Sustainability for Emerging Business Models," in Prašnikar, Janez (ed.), and Andreja Cirman, (ed.): *New Emerging Economies and Their Culture*, (New York: Nova Science, 2007): 21-37.

Kleiner, Art. "What Does It Mean to Be Green?" *Harvard Business Review*, 69 (1991): 4-11.

Kotzé, Louis J. and Anél du Plessis. "Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa," 3 *Journal of Court Innovation* (2010): 57-76.

Kraakman, Reinier H. "Corporate Liability Strategies and the Costs of Legal Controls," 93 *Yale Law Journal*, (New Haven) (1984): 857-898.

Landman, Todd. "The Scope of Human Rights: From Background Concepts to Indicators," Paper prepared for the AHRI-COST Action meeting 11-13 March 2005, Oslo at http://essex.academia.edu/ToddLandman/Papers/860631/The_Scope_of_Human_Rights_From_Background_Concepts_to_Indicators (accessed on December 30, 2011).

Loewenstein, Mark J., "Veil Piercing To Non-Owners: A Practical And Theoretical Inquiry," Legal Studies Research Paper Series Working Paper Number 10-23 (2010) University Of Colorado Law School.

Madsen, Henning and John P. Ulhøi. "Have Trends in Corporate Environmental Management Influenced Companies' Competitiveness?" *Green Management International* 44 (2003): 75-88.

Maxwell, James *et al.* "Green Schemes: Corporate Environmental Strategies and Their Implementation," 39 *California Management Review* 3 (1997): 118-134.

May, James R. and Erin Daly. "New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide," *IUCN Academy of Environmental Law e-Journal Issue 2011 (1)*.

May, James R. "Constituting Fundamental Environmental Rights Worldwide," 23 *Pace Environmental Law Review* (New York) (2006): 113-182.

May, James R. and Erin Daly. "Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutionally Entrenched Environmental Rights," *Oregon Review of International Law* (Eugene) (2009): 365-439.

McCann, Dennis P. "Controversy: Do Corporations Have Any Responsibility Beyond Making a Profit? A Response to Norman P. Barry," 3 *Journal of Markets & Morality*, No. 1 (Ottawa) (2000), pp. 108-114.

Meyer, JW & B Rowan. "Institutionalized Organization: Formal Structure as Myth and Ceremony", in PJ DiMaggio & WW Powell (eds) (1991) *The New Institutionalism in Organizational Analysis*, (University of Chicago Press: Chicago, 1991): 1-38.

Miles, Kate. "International Investment Law and Climate Change: Issues in the Transition to A Low Carbon World," Working Paper No. 27/08, Society for International Economic Law, Inaugural Conference, Geneva, July 15-17, 2008.

Min, Hokey and William P. Galle. "Green Purchasing Practices of US Firms," 21 *International Journal of Operations & Production Management*, 9 (Brussels) (2001): 1222-1238.

Moder, Karl-Heinz. "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights," Background paper to the FES side event at the 60th session of the UN-Commission on Human Rights on 25 March 2005, Palais des Nations, Geneva at http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf (accessed on February 5, 2012).

Morgera, Elisa. "From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?" 13 *Review of European Community and International Environmental Law* (Oxford) (2004): 214-222.

Morgera, Elisa. "Final Expert Report: Corporate Responsibility to Respect Human Rights in the Environmental Sphere" (2010) a study commissioned by the EU to "identify cross-learning opportunities between existing environmental protection initiatives in the EU and initiatives to operationalise the State duty to protect under the UN Framework for Business and Human Rights.

Morrow, David and Dennis Rondinelli. "Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification," 20 *European Management Journal* 2(2002): 159–171.

Muchlinski, Peter. "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation," 22 *Business Ethics Quarterly* 1 (Charlottesville, Virginia) (2012): 145–177.

Mwai, Elizabeth. "Flower company accused of polluting Lake Naivasha," *The Standard* newspaper, 20th February 200 Online Edition, at <http://www.standardmedia.co.ke/InsidePage.php?id=2000003800&cid=465&story=Flower%20company%20accused%20of%20polluting%20Lake%20Naivasha> (last accessed on April 27, 20).

Mwaura, Kiarie. "Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil" *Harvard Law School's Human Rights Program Working Paper Series*, 2008) [http://www.law.harvard.edu/programs/hrp/Mwaura Working Paper.pdf](http://www.law.harvard.edu/programs/hrp/Mwaura_Working_Paper.pdf) (accessed on November 20, 2011).

Mwaura, Kiarie. "Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violations" 7 *Law Society of Kenya Journal* 1 (Nairobi) (2011): 1-21.

Nickel, James W. "The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification," 8 *Yale Journal of International Law* (New Haven) (1983): 281–295.

Nickel, James. "Human Rights," *The Stanford Encyclopedia of Philosophy (Fall 2010 Edition)* Edward N. Zalta (ed.) at <http://plato.stanford.edu/archives/fall2010/entries/rights-human/> (accessed on December 25, 2011).

Nicolson, Rachel and Emily Howie. "The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective" Paper for ICJ Expert Legal Panel on Corporate Complicity in International Crimes (2007).

Ochich, George O. Otieno. "The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons," *Kenya Law Review* Vol. II (Nairobi) (2008-2010): 1-35

Odhiambo, Japheth. "The Nature of Claims in the Governance of the Corporation: Interrogating the Legal Organization of Stakeholders' Legitimate Claims," 7 *University of Nairobi Law Journal* 1, (Commercial Law Edition) (Nairobi) (2012): 57-69.

Odote, Collins. "Country Report: Kenya - Constitutional Provisions on the Environment," 1 *IUCN Academy of Environmental Law* (e-Journal) (2012): 136-145

Odote, Collins, Benson Ochieng and Odhiambo Makoloo. "The Implications of Property Rights for Wetlands Management in Kenya" (2008) at http://iasc2008.glos.ac.uk/conference%20papers/papers/O/Odote_2260.pdf (Last accessed on September 30, 20) at pp. 8-9.

Ogola, Jason, Winnie Mitullah and Monica Omulo. "Impact of Gold mining on the Environment and Human Health: A Case Study in the Migori Gold Belt, Kenya," *Environmental Geochemistry and Health*, (Dordrecht) (2002) 24 at 141-158.

Oh, Peter B. "Veil-Piercing," *Legal Studies Research Paper Series*, University of Colorado Working Paper No. 2010-06 February 2010

Ojwang', J.B. "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review*, (Nairobi) (2007): 9-29.

Ojwang', J.B. "The Constitutional Basis for Environmental Management," in Calestous Juma and J.B. Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change*, (Nairobi: Initiatives Publishers/London: Zed Books, 1996): 39-60.

Okidi, Charles O. "Concept, Function and Structure of Environmental Law," in C. O. Okidi, P. Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (ILEG, CASELAP, EAEP: Nairobi, 2008) 3-60.

Okomo-Okello, Francis. "The Role of the Private Sector (Banks) in Promoting Compliance with Environmental Law (The Kenyan Experience)" 1 *Kenya Law Review* (Nairobi) (2007): 30-80.

Ong, David M. "The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives" 2 *European Journal of International Law* 4 (Firenze, Italy) (2001): 685-726.

Orts, Eric W., "Reflexive Environmental Law", 89 *Northwestern Law Review* (Chicago) (1995): 1227-1339.

Pak, Natalya S. and James P. Nussbaumer. "Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses" Prepared for the European Centre for Constitutional and Human Rights, Berlin.

Pearson, C. "Environmental Standards, Industrial Relocation and Pollution Havens," in C. Pearson (ed), *Multinational Corporations, Environment, and the Third World* (Durham: Duke University Press, 1987): 113-128.

Perez, Oren, Yair Amichai-Hamburger & Tammy Shterental. "The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment and Organizational Citizenship Behavior," Bar-Ilan University Public Law and Legal Theory Working Paper May, 2009. (On file with the author).

Perry-Kessaris, Amanda. "Corporate liability for environmental harm," in Fitzmaurice, M, and Ong, D (eds) *Research Handbook on International Environmental Law*, (Cheltenham: Edward Elgar, 2001).

Pintér, László and Darren Swanson and Jane E. Barr. "Strategic Environmental Assessment: A Concept in Progress," Annotated Training Module prepared for the World Bank Institute (2006) available at http://www.iisd.org/pdf/2006/measure_statagic_env.pdf (accessed on July 26, 2012).

Podgor, Ellen S. "Criminalization of Corporate Law the Impact of Criminal Sanctions on Corporate Misconduct," 2 *Journal of Business & Technology Law* 1 (Baltimore) (2007): 119.

Pogutz, Stefano, Valerio Micale and Monika I. Winn. "Corporate Environmental Sustainability Beyond Organizational Boundaries: Market Growth, Ecosystems Complexity and Supply Chain Structure as Co-Determinants of Environmental Impact," 1 *Journal of Environmental Sustainability* (New York) (2011): 39-60.

Polonsky, Michael J. "A Stakeholder Theory Approach to Designing Environmental Marketing Strategy," 10 *Journal of Business & Industrial Marketing*, 3 (Bingley, UK) (1995): 29-46.

Popovic, Neil. "Pursuing Environmental Justice with International Human Rights and State Constitutions," 15 *Stanford Journal of Environmental Law*, (Stanford) (1996): 338-354.

Rees, Caroline and David Vermijs. "Mapping Grievance Mechanisms in the Business and Human Rights Arena," (2008) *Corporate Social Responsibility Initiative Report 28*. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

Richardson, Benjamin J. *Socially Responsible Investment Law: Regulating the Unseen Polluters* (Oxford University Press: New York, 2008) at p.509-566.

Rondinelli, Dennis and G. Vastag. "The Value of ISO 14001 Environmental Management Systems," 18 *European Management Journal* 5 (2000): 499-510.

Rondinelli, Dennis and G.A. Vastag. "International environmental management standards and corporate policies: An integrative framework" 39 *California Management Review* 1 (Berkeley) (1996): 106-122.

Roos, Stefanie Ricarda. "The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with Special Reference to the China (Tibet) Case," in J.A. Frowein and R. Wolfrum (eds) *Max Planck Yearbook of the United Nations Law*, Volume 5 (Alphen aan den Rijn: Kluwer Law International, 2005) at 473-521 (with the author).

Redmond, Paul. "Transnational Enterprise and Human Rights: Option for Standard Settings and Compliance," 37 *International Lawyer* (Chicago) (2003) 69-102.

Ruggie, John. "Business and Human Rights: The Evolving International Agenda," A Working Paper of the Corporate Social Responsibility Initiative, Harvard Kennedy School of Government, Working Paper No. 38 of 2007.

Ruggie, John. "Protect, Respect and Remedy: a Framework for Business and Human Rights," A/HRC/8/5, at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on September 24, 20).

Salzman, James. "Decentralized Administrative Law in the Organization for Economic Cooperation and Development," 68 *Law and Contemporary Problems* 3 & 4 (Durham) (2005): 189-224.

Sanda, Ahmadu, Aminu S. Mikailu and Tukur Garba. "Corporate Governance Mechanisms and Firm Financial Performance in Nigeria, AERC Research Paper 149, (African Economic Research Consortium: Nairobi, March 2005)

Schlickeisen, Rodger "Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment," 8 *Tulane Environmental Law Journal* (New Orleans) (1994): 181-.

Schoder, M. "The Performance of Socially Responsible Investments: Investment Funds and Indices," 18 *Financial Markets and Portfolio Management* 2 (Gallen, Switzerland) (2004): 122-142.

Shavell, Steven. "The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize Their Employees," 17 *International Review of Law and Economics*, (1997): 203-213.

Shelton, Dinah. "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?" 35 *Denver Journal of International Law and Policy* 1 (Denver) (2005) at 130

Shelton, Dinah. "Human Rights, Health & Environmental Protection: Linkages in Law & Practice" http://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf (accessed on January 10, 2012)..

Siebecker, Michael R. "Trust & Transparency: Promoting Efficient Corporate Disclosure through Fiduciary-Based Disclosure," 87 *Washington University Law Review* (Washington D.C.) (2009): 115-123.

Sjåfjell, Beate. "Environmental Piercing of the Corporate Veil the Norwegian Supreme Court Decision in the *Hempel Case*" at <http://ssrn.com/abstract=1616820>

Sjåfjell, Beate. "Towards a Sustainable Development: Internalising Externalities in Norwegian Company Law," University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2010-05 Papers from the *Sustainable Companies* Research Project (2010).

Sneirson, Judd F., "Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance," 94 *Iowa Law Review* (Iowa) (2009), 987-1020.

Soppe, Aloy. "Sustainable Corporate Finance," 53 *Journal of Business Ethics*, (New York) (2004): 213-224.

Steurer, Reinhard, Markus E. Langer, Astrid Konrad, André Martinuzzi. "Corporations, Stakeholders and Sustainable Development I: A Theoretical Exploration of Business-Society Relations," 61 *Journal of Business Ethics* 3 (New York) (2005): 263-281

Stevenson, C.P. "A New Perspective on Environmental Rights after the Charter," 21 *Osgoode Hall Law Journal* 3 (Toronto) (1983) 390 at 391.

Swanson, D. J., "Toward an Integrative Theory of Business and Society: A Research Strategy for Corporate Social Performance," 24 *Academy of Management Review* 3, (New York) (1999): 506-521.

Takacs, David. "The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property," 16 *New York University Environmental Law Journal* (New York) (2008): 711-765.

Taylor, Mark B., Luc Zandvliet and Mitra Frouhar. "Due Diligence for Human Rights: A Risk-Based Approach." Corporate Social Responsibility Initiative, John F. Kennedy School of Government, Harvard University Working Paper No. 53.

Taylor, Prudence E. "From Environmental to Ecological Human Right: A New Dynamic in International Law?" 10 *Georgetown International Environmental Law Review* (Washington D.C) (1990) 309.

Teitelbaum, Alejandro. "United Nations and Transnational Corporations: a deadly association" (2007) [http://thirdworldtraveler.com/United Nations/UN TNCs DeadlyAssoc.html](http://thirdworldtraveler.com/United_Nations/UN_TNCs_DeadlyAssoc.html) (accessed on December 2, 2011).

Twinomugisha, Ben K. "Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda" *3/3 Law, Environment and Development Journal* (2007): 244-258 at p. 249 available at <http://www.lead-journal.org/content/07244.pdf> (accessed on July 21, 2012).

Valentine, Scott Victor, "The Green Onion: A Corporate Environmental Strategy Framework," *Corporate Social Responsibility and Environmental Management Journal* (New York) (2009) 1-15.

Waema, Timothy and Muriuki Mureithi. "E-waste Management in Kenya," Kenya ICT Action Network, Nairobi: KICTANET, 2008.

Wanjau, Mercy. "E-Waste and Recycling: Whose Responsibility Is It?" GSR 20 Discussion Paper under the auspices of International Telecommunications Union, Geneva (2011).

Weaver, Gary R., Linda Klebe Treviño, and Philip L. Cochran, "Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures and Corporate Ethics Practices," *42 Academy of Management Journal* (1999): 539-52.

William Bradford, 'Beyond Good and Evil: Toward a Solution of the Conflict between Corporate Profits and Human Rights,' (2007) at <http://ssrn.com/abstract=991241> (accessed on October 1, 2011).

Williams, Cynthia A. "The Securities and Exchange Commission and Corporate Social Transparency," *112 Harvard Law Review* (New Haven) (1999): 1197.

Wilmshurt, TD & GR Frost. "Corporate Environmental Reporting: A Test of Legitimacy Theory," *13 Accounting, Auditing & Accountability Journal*, No. 1 (Bingley, UK) (2000), pp. 10-26.

Worster, Donald. "The Vulnerable Earth: Towards a Planetary History," in Donald Worster (ed). *The Ends of the Earth*, (New York: Cambridge University Press, 1988).

Yakhou, Mehenna and Vernon P. Dorweiler, "Environmental Accounting: An Essential Component of Business Strategy," *13 Business Strategy and the Environment* (New York) (2004): 65-77.

(c) Reports and Other Documents of the UN and Other International Organizations

International Standardization Organization (ISO). *ISO 14001: Environmental Management Systems - Specification with Guidance for Use* (ISO: Geneva, 1996).

Organization for Economic Cooperation and Development (OECD). *An Overview of Corporate Environmental Management Practices*, (OECD: Paris, 2003)

United Nations. *Rio Declaration on Environment and Development: Application and Implementation Report of the Secretary-General*, E/CN.17/1997/8 (UN: New York, 1997).

United Nations Organization, Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations* Available at: <http://www.unctad.org/sections/dite/ia/docs/Compendium/en/13%20volume%201.pdf> (accessed on December 1, 2011).

United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: Transnational Corporations, Extractive Industries and Development* (Geneva: UNCTAD, 2007) at http://www.unctad.org/en/docs/wir2007_en.pdf (accessed on November 21, 2011).

UN Commission on Human Rights, "Responsibilities of Transnational Corporations and Related Business Enterprises With Regard To Human Rights" (2004) U.N. Doc. E/CN.4/DEC/2004/116 at http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc (accessed on December 20, 2012).

UN Human Rights Council, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," U.N. Doc. A/HRC/4/035 (2007) at <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf> (accessed on December 20, 2011).

UN Division for Sustainable Development, *Environmental Management Accounting Procedures and Principles*, (UN: New York, 2001).

UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (UNEP: Geneva, 2004)

UNEP, *The Use of Economic Instruments in Environmental Policy: Opportunities and Challenges*, (UNEP: Nairobi, 2004) at p. 14.

UNEP. *Selection, Design and Implementation of Economic Instruments in the Kenyan Solid Waste Management Sector* (Nairobi: UNEP, 2005) at pp. 24-39.

UN Special Representative of the Secretary General (SRSG). "Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops," UN Doc. A/HRC/4/35/Add.2 15 February 2007.

WCED. *Our Common Future: The Report of the World Commission on Environment and Development*, (New York: OUP, 1987)

(d) Reports of Government Bodies

Kenya National Commission on Human Rights (KNCHR). *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi*, (Nairobi: KNCHR, 2006).

Kenya National Commission on Human Rights (KNCHR), *Annual Report for the 2010/2011 Financial Year*, (Nairobi, KNCHR, 2011).

National Environmental Management Authority (NEMA). *State of the Environment Report 2006/2007*, (Nairobi: NEMA, 2007).

National Environmental Management Authority (NEMA). *National Guidelines on Strategic Environmental Assessment in Kenya*, (Nairobi: NEMA, 2011).

South African Department of Environmental Affairs and Tourism. *Environmental Auditing, Integrated Environmental Management Information Series*, (South African Department of Environmental Affairs and Tourism: Pretoria, 2004).

APPENDIX

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Source: Office of the High Commissioner for Human Rights at
<http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>

AND

UN HUMAN RIGHTS COUNCIL RESOLUTION 17/4 ADOPTING THE GUIDELINES

Source: United Nations Global Compact at
http://www.unglobalcompact.org/docs/issues_doc/human_rights/A.HRC.17.RES.17.4.pdf



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Agenda item 3

Promotion and protection of all human rights,
civil, political, economic, social and cultural rights,
including the right to development

Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

Summary

This is the final report of the Special Representative. It summarizes his work from 2005 to 2011, and presents the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” for consideration by the Human Rights Council.

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Introduction to the Guiding Principles

1. The issue of business and human rights became permanently implanted on the global policy agenda in the 1990s, reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity. These developments heightened social awareness of businesses' impact on human rights and also attracted the attention of the United Nations.

2. One early United Nations-based initiative was called the Norms on Transnational Corporations and Other Business Enterprises; it was drafted by an expert subsidiary body of what was then the Commission on Human Rights. Essentially, this sought to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves under treaties they have ratified: "to promote, secure the fulfilment of, respect, ensure respect of and protect human rights".

3. This proposal triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments. The Commission declined to act on the proposal. Instead, in 2005 it established a mandate for a Special Representative of the Secretary-General "on the issue of human rights and transnational corporations and other business enterprises" to undertake a new process, and requested the Secretary-General to appoint the mandate holder. This is the final report of the Special Representative.

4. The work of the Special Representative has evolved in three phases. Reflecting the mandate's origins in controversy, its initial duration was only two years and it was intended mainly to "identify and clarify" existing standards and practices. This defined the first phase. In 2005, there was little that counted as shared knowledge across different stakeholder groups in the business and human rights domain. Thus the Special Representative began an extensive programme of systematic research that has continued to the present. Several thousand pages of documentation are available on his web portal (<http://www.business-humanrights.org/SpecialRepPortal/Home>): mapping patterns of alleged human rights abuses by business enterprises; evolving standards of international human rights law and international criminal law; emerging practices by States and companies; commentaries of United Nations treaty bodies on State obligations concerning business-related human rights abuses; the impact of investment agreements and corporate law and securities regulation on both States' and enterprises' human rights policies; and related subjects. This research has been actively disseminated, including to the Council itself. It has provided a broader and more solid factual basis for the ongoing business and human rights discourse, and is reflected in the Guiding Principles annexed to this report.

5. In 2007, the Council renewed the mandate of the Special Representative for an additional year, inviting him to submit recommendations. This marked the mandate's second phase. The Special Representative observed that there were many initiatives, public and private, which touched on business and human rights. But none had reached sufficient scale to truly move markets; they existed as separate fragments that did not add up to a coherent or complementary system. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Therefore, in June 2008 the Special Representative made only one recommendation: that the Council support the "Protect, Respect and Remedy" Framework he had developed following three years of research and consultations. The Council did so, unanimously "welcoming" the Framework in its resolution 8/7 and providing, thereby, the authoritative focal point that had been missing.

6. The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

7. Beyond the Human Rights Council, the Framework has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain. Other United Nations special procedures have invoked it extensively.

8. Apart from the Framework's intrinsic utility, the large number and inclusive character of stakeholder consultations convened by and for the mandate no doubt have contributed to its widespread positive reception. Indeed, by January 2011 the mandate had held 47 international consultations, on all continents, and the Special Representative and his team had made site visits to business operations and their local stakeholders in more than 20 countries.

9. In its resolution 8/7, welcoming the "Protect, Respect and Remedy" Framework, the Council also extended the Special Representative's mandate until June 2011, asking him to "operationalize" the Framework – at is, to provide concrete and practical recommendations for its implementation. This constitutes the mandate's third phase. During the interactive dialogue at the Council's June 2010 session, delegations agreed that the recommendations should take the form of "Guiding Principles"; these are annexed to this report.

10. The Council asked the Special Representative, in developing the Guiding Principles, to proceed in the same research-based and consultative manner that had characterized his mandate all along. Thus, the Guiding Principles are informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon.

11. Some of the Guiding Principles have been road-tested as well. For example, those elaborating effectiveness criteria for non-judicial grievance mechanisms involving business enterprises and communities in which they operate were piloted in five different sectors, each in a different country. The workability of the Guiding Principles' human rights due-diligence provisions was tested internally by 10 companies, and was the subject of detailed discussions with corporate law professionals from more than 20 countries with expertise in over 40 jurisdictions. The Guiding Principles addressing how Governments should help companies avoid getting drawn into the kinds of human rights abuses that all too often occur in conflict-affected areas emerged from off-the-record, scenario-based workshops with officials from a cross-section of States that had practical experience in dealing with these challenges. In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice.

12. Moreover, the text of the Guiding Principles itself has been subject to extensive consultations. In October 2010, an annotated outline was discussed in separate day-long sessions with Human Rights Council delegations, business enterprises and associations, and civil society groups. The same document was also presented at the annual meeting of the International Coordinating Committee of National Human Rights Institutions. Taking into account the diverse views expressed, the Special Representative then produced a full draft of the Guiding Principles and Commentary, which was sent to all Member States on 22 November 2010 and posted online for public comment until 31 January 2011. The online consultation attracted 3,576 unique visitors from 120 countries and territories. Some 100 written submissions were sent directly to the Special Representative, including by Governments. In addition, the draft Guiding Principles were discussed at an expert multi-stakeholder meeting, and then at a session with Council delegations, both held in January 2011. The final text now before the Council is the product of this extensive and inclusive process.

13. What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.

14. The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. Each Principle is accompanied by a commentary, further clarifying its meaning and implications.

15. At the same time, the Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.

16. The Special Representative is honored to submit these Guiding Principles to the Human Rights Council. In doing so, he wishes to acknowledge the extraordinary contributions by hundreds of individuals, groups and institutions around the world, representing different segments of society and sectors of industry, who gave freely of their time, openly shared their experiences, debated options vigorously, and who came to constitute a global movement of sorts in support of a successful mandate: establishing universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm.

Annex

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

General principles

These Guiding Principles are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

I. The State duty to protect human rights

A. Foundational principles

1. **States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.**

Commentary

States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes

the duty to protect against human rights abuse by third parties, including business enterprises.

The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.

This chapter focuses on preventative measures while Chapter III outlines remedial measures.

2. **States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.**

Commentary

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

B. Operational principles

General State regulatory and policy functions

3. In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Commentary

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human

rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies' size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.

The State-business nexus

4. **States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.**

Commentary

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in Chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.

5. **States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.**

Commentary

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

6. **States should promote respect for human rights by business enterprises with which they conduct commercial transactions.**

Commentary

States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law.

Supporting business respect for human rights in conflict-affected areas

7. **Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:**

- (a) **Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;**

- (b) **Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;**

- (c) **Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;**

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Commentary

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself – where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.

It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert Government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

Ensuring policy coherence

- 8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.**

Commentary

There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and

human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and sub-national levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations.

9. **States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.**

Commentary

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

10. **States, when acting as members of multilateral institutions that deal with business-related issues, should:**
- (a) **Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;**
 - (b) **Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;**
 - (c) **Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.**

Commentary

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the

performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

II. The corporate responsibility to respect human rights

A. Foundational principles

11. **Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.**

Commentary

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.

Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.

Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.

12. **The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.**

Commentary

Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises. The responsibility of business enterprises to respect human

rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.

Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

13. The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Commentary

Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. Guiding Principle 19 elaborates further on the implications for how business enterprises should address these situations. For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

Commentary

The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character. The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually. However, the responsibility to respect human rights applies fully and equally to all business enterprises.

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
- (a) A policy commitment to meet their responsibility to respect human rights;
 - (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
 - (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Commentary

Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place. Principles 16 to 24 elaborate further on these.

B. Operational principles

Policy commitment

16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
- (a) Is approved at the most senior level of the business enterprise;
 - (b) Is informed by relevant internal and/or external expertise;
 - (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
 - (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
 - (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Commentary

The term "statement" is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations.

The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's operations. Expertise can be drawn from various sources, ranging from credible online or written resources to consultation with recognized experts.

The statement of commitment should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces; investors; and, in the case of operations with significant human rights risks, to the potentially affected stakeholders.

Internal communication of the statement and of related policies and procedures should make clear what the lines and systems of accountability will be, and should be supported by any necessary training for personnel in relevant business functions.

Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.

Through these and any other appropriate means, the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights.

Human rights due diligence

17. **In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:**

(a) **Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;**

(b) **Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;**

(c) **Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.**

Commentary

This Principle defines the parameters for human rights due diligence, while Principles 18 through 21 elaborate its essential components.

Human rights risks are understood to be the business enterprise's potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22).

Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.

Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

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Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being “complicit” in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.

As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise’s alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

- 18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:**

- (a) Draw on internal and/or independent external human rights expertise;**
- (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.**

Commentary

The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.

While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.

Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.

The assessment of human rights impacts informs subsequent steps in the human rights due diligence process.

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

- (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;**
- (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.**

(b) Appropriate action will vary according to:

- (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;**
- (ii) The extent of its leverage in addressing the adverse impact.**

Commentary

The horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions. This is required to ensure that the assessment findings are properly understood, given due weight, and acted upon.

In assessing human rights impacts, business enterprises will have looked for both actual and potential adverse impacts. Potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts—those that have already occurred – should be a subject for remediation (Principle 22).

Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.

Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond.

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.

Where the relationship is “crucial” to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise’s business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

20. **In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:**
- (a) **Be based on appropriate qualitative and quantitative indicators;**
 - (b) **Draw on feedback from both internal and external sources, including affected stakeholders.**

Commentary

Tracking is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement.

Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.

Tracking should be integrated into relevant internal reporting processes. Business enterprises might employ tools they already use in relation to other issues. This could include performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant. Operational-level grievance mechanisms can also provide important feedback on the effectiveness of the business enterprise’s human rights due diligence from those directly affected (see Principle 29).

21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

- (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
- (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Commentary

The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.

Communication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include on-line updates and integrated financial and non-financial reports.

Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.

Remediation

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Commentary

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.

Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31.

Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a

business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.

Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.

Further guidance on mechanisms through which remediation may be sought, including where allegations of adverse human rights impacts are contested, is included in Chapter III on access to remedy.

Issues of context

23. In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

Commentary

Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.

Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Commentary

While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect

remediability. Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.

III. Access to remedy

A. Foundational principle

25. **As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.**

Commentary

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, National Human Rights Institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development, many ombudsperson offices, and Government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early-stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights

mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.

B. Operational principles

State-based judicial mechanisms

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Commentary

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, 'market-based' mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

State-based non-judicial grievance mechanisms

27. **States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.**

Commentary

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants.

Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.

National human rights institutions have a particularly important role to play in this regard.

As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.

Non-State-based grievance mechanisms

28. **States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.**

Commentary

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human

rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

29. **To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.**

Commentary

Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.

Operational-level grievance mechanisms perform two key functions regarding the responsibility of business enterprises to respect human rights.

- First, they support the identification of adverse human rights impacts as a part of an enterprise's on-going human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. By analyzing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly
- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.

Such mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted. If those concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses.

Operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (Principle 31). These criteria can be met through many different forms of grievance mechanism according to the demands of scale, resource, sector, culture and other parameters.

Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.

30. **Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.**

Commentary

Human rights-related standards are increasingly reflected in commitments undertaken by industry bodies, multi-stakeholder and other collaborative initiatives, through codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations, and similar undertakings.

Such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. The legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms. The mechanisms could be at the level of individual members, of the collaborative initiative, or both. These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts.

Effectiveness criteria for non-judicial grievance mechanisms

31. **In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:**
- (a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
 - (b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
 - (c) **Predictable:** providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
 - (d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
 - (e) **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
 - (f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
 - (g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Commentary

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term “grievance mechanism” is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

(a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;

(b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;

(c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Timeframes for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;

(d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;

(e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals’ identities should be provided where necessary;

(f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;

(g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;

(h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.



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Seventeenth session

Agenda item 3

Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Resolution adopted by the Human Rights Council*

17/4 Human rights and transnational corporations and other business enterprises

The Human Rights Council,

Recalling Human Rights Council resolution 8/7 of 18 June 2008 and Commission on Human Rights resolution 2005/69 of 20 April 2005 on the issue of human rights and transnational corporations and other business enterprises,

Recalling also Human Rights Council resolutions 5/1 and 5/2 of 18 June 2007, and stressing that the mandate holder shall discharge his/her duties in accordance with those resolutions and the annexes thereto,

Stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State,

Emphasizing that transnational corporations and other business enterprises have a responsibility to respect human rights,

Recognizing that proper regulation, including through national legislation, of transnational corporations and other business enterprises and their responsible operation can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channelling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms,

Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises, and that further efforts to bridge governance gaps at the national, regional and international levels are necessary,

* The resolutions and decisions adopted by the Human Rights Council will be contained in the report of the Council on its seventeenth session (A/HRC/17/2), chap. I.

Recognizing the importance of building the capacity of all actors to better manage challenges in the area of business and human rights,

1. *Welcomes* the work and contributions of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, and endorses the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, as annexed to the report of the Special Representative;¹

2. *Also welcomes* the broad range of activities undertaken by the Special Representative in the fulfilment of his mandate, including in particular the comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions and the catalytic role he has played in generating greater shared understanding of business and human rights challenges among all stakeholders;

3. *Commends* the Special Representative for developing and raising awareness about the Framework based on three overarching principles of the duty of the State to protect against human rights abuses by, or involving, transnational corporations and other business enterprises, the corporate responsibility to respect all human rights, and the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms;

4. *Recognizes* the role of the Guiding Principles for the implementation of the Framework, on which further progress can be made, as well as guidance that will contribute to enhancing standards and practices with regard to business and human rights, and thereby contribute to a socially sustainable globalization, without foreclosing any other long-term development, including further enhancement of standards;

5. *Emphasizes* the importance of multi-stakeholder dialogue and analysis to maintain and build on the results achieved to date and to inform further deliberations of the Human Rights Council on business and human rights;

6. *Decides* to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years, to be appointed by the Human Rights Council at its eighteenth session, and requests the Working Group:

(a) To promote the effective and comprehensive dissemination and implementation of the Guiding Principles;

(b) To identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon and, in that context, to seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders;

(c) To provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights;

(d) To conduct country visits and to respond promptly to invitations from States;

¹ A/HRC/17/31.

(e) To continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas;

(f) To integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children;

(g) To work in close cooperation and coordination with other relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organizations;

(h) To develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies, funds and programmes, in particular the Office of the United Nations High Commissioner for Human Rights, the Global Compact, the International Labour Organization, the World Bank and its International Finance Corporation, the United Nations Development Programme and the International Organization for Migration, as well as transnational corporations and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organizations and other regional and subregional international organizations;

(i) To guide the work of the Forum on Business and Human Rights established pursuant to paragraph 12 below;

(j) To report annually to the Human Rights Council and the General Assembly;

7. *Encourages* all Governments, relevant United Nations agencies, funds and programmes, treaty bodies, civil society actors, including non-governmental organizations, as well as the private sector to cooperate fully with the Working Group in the fulfilment of its mandate by, inter alia, responding favourably to visit requests by the Working Group;

8. *Invites* international and regional organizations to seek the views of the Working Group when formulating or developing relevant policies and instruments;

9. *Requests* the Secretary-General and the United Nations High Commissioner for Human Rights to provide all the assistance necessary to the Working Group for the effective fulfilment of its mandate;

10. *Welcomes* the important role of national human rights institutions established in accordance with the Paris Principles in relation to business and human rights, and encourages national human rights institutions to develop further their capacity to fulfil that role effectively, including with the support of the Office of the High Commissioner and in addressing all relevant actors;

11. *Requests* the Secretary-General to prepare a report on how the United Nations system as a whole, including programmes and funds and specialized agencies, can contribute to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles, addressing in particular how capacity-building of all relevant actors to this end can best be addressed within the United Nations system, to be presented to the Human Rights Council at its twenty-first session;

12. *Decides* to establish a Forum on Business and Human Rights under the guidance of the Working Group to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices;

13. *Also decides* that the Forum shall be open to the participation of States, United Nations mechanisms, bodies and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and other relevant bodies, transnational corporations and other business enterprises, business associations, labour unions, academics and experts in the field of business and human rights, representatives of indigenous peoples and non-governmental organizations in consultative status with the Economic and Social Council; the Forum shall also be open to other non-governmental organizations whose aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations, including affected individuals and groups, based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, through an open and transparent accreditation procedure in accordance with the Rules of Procedure of the Human Rights Council;

14. *Further decides* that the Forum shall meet annually for two working days;

15. *Requests* the President of the Human Rights Council to appoint for each session, on the basis of regional rotation, and in consultation with regional groups, a chairperson of the Forum, nominated by members and observers of the Council; the chairperson serving in his/her personal capacity shall be responsible for the preparation of a summary of the discussion of the Forum, to be made available to the Working Group and all other participants of the Forum;

16. *Invites* the Working Group to include in its report reflections on the proceedings of the Forum and recommendations for future thematic subjects for consideration by the Human Rights Council;

17. *Requests* the Secretary-General and the High Commissioner to provide all the necessary support to facilitate, in a transparent manner, the convening of the Forum and the participation of relevant stakeholders from all regions in its meetings, giving particular attention to ensuring participation of affected individuals and communities;

18. *Decides* to continue consideration of this question in conformity with the annual programme of work of the Human Rights Council.

33rd meeting

16 June 2011

[Adopted without a vote.]
